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COVER SHEET

To accompany documents to the Minister of Defence

Subject:	**DETAINEE ARRANGEMENTS - AFGHANISTAN**		
NZDF File No.	NZDF Tracking # *(For OCDF Use Only)* 484/10		Minister's Tracking#: *(For Minister's office)*
Priority:	**ROUTINE**	Request Ministerial response by:	
Contacts:	1. PSR(IC)3 2.	Tel: PSR(IC)3 Tel:	A/H: PSR(IC)3 A/H:

Sheet not to exceed one page. Please complete shaded areas.

Purpose:	To advise the Minister of the Crown Law advice received on the detainee arrangements for Afghanistan.
Recommendations:	It is recommended that the Minister **note** this brief.
MOD/NZDF Consultation	Required/ Not required (provide reasons):
Minister's comments:	
Minister's Action:	Signed / Noted / Agreed / Approved / Declined Referred to:
Signature:	**Date:**

J. MATEPARAE
Lieutenant General
Chief of Defence Force

Date 9 Nov 10

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NZDF 3304/DLS/INTREL/AFGHAN
NZDF 3304/DLS/INTREL/NATO

9 November 2010

Minister of Defence

DETAINEE ARRANGEMENTS – AFGHANISTAN

Reference:
A. C10004560 – WLN dated 2/9/10

1. As you are aware suggestions that the support given by the NZSAS to the Afghan Crisis Response Unit (CRU) render New Zealand and/or members of the NZDF guilty of complicity in torture caused me to seek legal advice on the issue from the Director General of Defence Legal Services (DGDLS). His advice concluded that the partnering arrangement between NZSAS and the CRU does not amount to complicity in torture. Because of the importance of the issue and its potential impact on NZDF operations in Afghanistan and elsewhere I directed that DGDLS seek confirmation of his opinion from the Solicitor-General, Dr David Collins QC. I have now received that advice (attached).

2. The Crown Law opinion is detailed and thorough. It confirms the advice given by DGDLS and concludes that:

a. NZDF partnering arrangements with the CRU do not create sufficiently close connection to the alleged practice of torture by Afghan authorities to establish complicity: paragraphs 2.1.1 and 34.

b. It is "strongly unlikely" that members of the NZDF who provide assistance in the taking into custody of detainees are thereby risking criminal liability: paragraph 24.

c. 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 are not within the scope of that obligation: paragraph 37.

3. The opinion also discusses what we have called the "moral and arguably legal obligations" relating to ascertaining the human rights situation of persons detained by NZDF partnered Afghan Forces. The Solicitor-General advises that instigating

monitoring and other protective measures in respect of such people raises several practical legal risks. Although these risks were identified in DGDLS's advice the Crown Law opinion is, if anything, stronger in this regard. In particular the Solicitor-General expresses concern that the extension of monitoring procedure to persons not captured by the NZDF may "undermine the difference in applicable obligations" and may place the New Zealand personnel involved in a situation where they may "become aware of torture or ill-treatment but then have little or no capacity to act. Such situations could, in turn, lead to allegations of complicity or deliberate disregard": paragraph 69.3.

4. The Solicitor-General advises that "New Zealand should not pursue individual monitoring of prisoners taken in partnered operations, but should continue to require formal and operational assurances and to gather information and should restrict or withdraw cooperation in the event that a risk of torture arises." I propose to direct NZDF force elements in Afghanistan accordingly. The Solicitor-General's advice will also form part of direction to other future deployments.

5. The opinion also advises on a number of duties to actively promote human rights obligations, including the prohibition against torture. I have directed DGDLS to provide a copy of the opinion to MFAT and I consider that it would be worthwhile for staff from NZDF and MFAT to have a round-table meeting on this matter to ensure that all concerns are addressed. I do not propose to distribute the opinion more widely. Crown Law have confirmed to DGDLS that they do not consider that this is a matter in respect of which the Crown's legal professional privilege should be waived and that, in any event, such waiver could only be done by the Attorney-General personally.

6. I would be happy to make DGDLS available to you to discuss this matter more fully should you desire.

7. It is recommended that you **note** this brief.

J. MATEPARAE
Lieutenant General
Chief of Defence Force

Te Tari Ture o te Karauna
Crown Law
Solicitor-General

COPY

2 November 2010

PSR(IC)3
Director-General, Defence Legal Services
New Zealand Defence Force
Private Bag
WELLINGTON

Dear PSR(IC)3

Obligations in respect of persons detained during multinational operations
Our Ref: DFO037/283

1. Further to your instruction of 15 September 2010, draft advice provided on 18 October and associated discussions and emails, I have reviewed your opinion "Detainee Arrangements – Afghanistan" dated 10 September 2010, NZDF reference C10004560-WLN.

Summary

2. I agree with the conclusions reached in the opinion that:

   2.1 While findings that some prisoners held by Afghan authorities have been subject to torture are of grave concern, the current circumstances of New Zealand "partnering" operations in Afghanistan do not give rise to liability either through individual or state complicity in torture or through breach of the duty of non-refoulement of people at risk of torture:

      2.1.1 New Zealand partnering operations involve the provision of close support and technical assistance to Afghan forces. Complicity requires a knowing, and sufficiently close, connection between the assistance provided by New Zealand personnel and any acts or practices of torture by Afghan authorities. On the information available to New Zealand, including as a result of inquiries by operational personnel and by the Minister of Defence, there is not currently such a connection; and

      2.1.2 The duty of non-refoulement, and potentially applicable related obligations such as the duty of protection of prisoners taken in armed conflict, only apply to prisoners held by New Zealand personnel. New Zealand partnering operations have, to date, involved only the provision of assistance to Afghan forces that have taken prisoners. While New Zealand personnel have a narrow power to take prisoners, that power has not been exercised.

2.2 If New Zealand personnel were to take prisoners in Afghanistan, such prisoners could be transferred to Afghan authorities only if they do not face a real risk of torture in Afghan custody and, further, such prisoners are subject to monitoring once transferred. I understand that the current bilateral agreement between the New Zealand Defence Force and the Afghan Ministry of Foreign Affairs provides both that transfer of prisoners must comply with New Zealand's international obligations and that such prisoners may be subsequently monitored by New Zealand, by the International Committee of the Red Cross (ICRC) and by the Afghan Independent Human Rights Commission (AIHRC).

2.3 If New Zealand, or New Zealand personnel, were to become aware – or, on the more contentious principle of "constructive knowledge", ought to have become aware – that prisoners taken by Afghan forces in operations partnered by New Zealand personnel were then at a real risk of torture and New Zealand did not then cease or restrict its cooperation, it is possible that New Zealand and/or its personnel would become liable on grounds of complicity.

3. Beyond these conclusions, however, and noting that the opinion refers to "a moral (and arguably legal) duty to take reasonable steps to ascertain that the human rights of persons detained in partnered activities are respected" (at [57]), I have further considered what obligations attach to such detainees and what those obligations entail:

3.1 As is reflected in the opinion, New Zealand's non-refoulement and related obligations are not engaged in respect of prisoners taken by New Zealand-partnered Afghan forces. It follows that these obligations do not give rise to a duty, or a right, for New Zealand to monitor such prisoners.

3.2 New Zealand is subject to a continuing obligation to ensure that assistance provided to Afghan authorities does not amount to complicity. On that basis, New Zealand is required to ensure that it is adequately informed of the overall conduct of Afghan authorities and that, if it becomes aware of a practice of torturing prisoners, to restrict or withdraw its assistance. This obligation does not, however, extend to the monitoring of individual prisoners.

3.3 Similarly, and while the issue is not straightforward, New Zealand may also be subject to duties to take steps to promote compliance with human rights standards and, particularly, with the prohibition against torture under one or more of the following:

3.3.1 The duty under international humanitarian law, so far as that law may be applicable here, to "ensure respect" for minimum standards of treatment of prisoners;

3.3.2 The potential duty, which would be drawn from the prohibition against torture under customary international law and the *Genocide* decision of the International Court of Justice, to take all reasonably available steps to act to prevent torture; and

3.3.3 The duty under the Convention against Torture to take certain steps in respect of apparent acts of torture, such as seeking investigation and other measures, so far as that duty may apply here. The United Nations Committee against Torture has indicated that these ancillary obligations may

apply where a state party to the Convention becomes aware of another state committing such acts in the course of joint operations.

However, each of these duties again requires New Zealand to take measures within its capacity, such as information-gathering and withdrawal of cooperation, and again does not require or authorise monitoring of individual prisoners.

4. I have also considered, in light of the *Amnesty* and *Al-Jedda* decisions discussed below, whether these obligations are affected by the New Zealand Bill of Rights Act 1990 and by the terms of the Security Council resolutions under which New Zealand forces are deployed:

4.1 There is at least a reasonable prospect that the Bill of Rights Act would be held to apply to the actions, including the partnering operations, of New Zealand personnel in Afghanistan. The Act does not add substantively to the obligations in respect of acts of torture identified above. However, the Act would be likely to assist any challenge to New Zealand operations before the New Zealand courts by providing a relatively straightforward basis for such a claim; and

4.2 Although the point is not beyond argument, noting the reasoning in *Al-Jedda* and the precedent decisions applied there, it is not likely that the terms of the relevant Security Council resolutions would provide a defence to or otherwise alter the application of the obligations identified above.

5. Last, and in order to meet these respective obligations in practice and avoid undue legal risk, I conclude:

5.1 New Zealand should maintain its current position that, if New Zealand personnel take prisoners in Afghanistan, those prisoners will not be transferred to Afghan authorities if at risk of torture and will in any case be subject to ongoing monitoring following transfer.

5.2 New Zealand should not, however, seek to monitor prisoners taken by Afghan forces in partnered operations, because:

5.2.1 While monitoring arises under New Zealand's obligations towards prisoners taken by New Zealand personnel, there are not – for the reasons outlined at paras 3.1 – 3.3.3 above – parallel obligations in respect of prisoners taken by Afghan forces in New Zealand-partnered operations; and

5.2.2 Absent a clear legal basis, monitoring by New Zealand personnel may well give rise to undue legal risk, both because there may be uncertainty as to the rights and obligations of the responsible New Zealand personnel and because, in the event of court proceedings or other challenge, there is a risk of conflating the distinct obligations that apply to the two categories of prisoners.

5.3 Instead, in order to reflect the actual and/or potential obligations that apply in partnered operations, New Zealand should proceed, largely in line with current practice, through:

5.3.1 Maintaining agreements with Afghan authorities that human rights protections are to be observed;

5.3.2 Continuing to obtain credible assurances from Afghan officials and personnel that these protections are met in practice;

5.3.3 Concerted information-gathering by New Zealand personnel on Afghan practices; and

5.3.4 In the event that these measures indicate that prisoners taken in partnered operations are at a real risk of torture, restriction or withdrawal of New Zealand cooperation as necessary, until that risk can be addressed.

ANALYSIS

Factual background

Evans *and related developments*

6. The starting point for your 10 September opinion, and for this review, is the recent decision of a full bench of the England and Wales High Court in *R (on the application of Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin). The proceeding arose from the United Kingdom's stated policy that persons detained by UK armed forces would not be transferred to another state's jurisdiction where there is a real risk of torture or ill-treatment.

7. Because the proceeding concerned the consistency of UK conduct with stated policy, the Court did not need to consider the prior questions of whether the prohibition of torture under art 3 of the European Convention on Human Rights (ECHR), as reflected in the policy, was itself applicable or whether the United Kingdom forces were acting on behalf of the United Nations (at [238]).

8. The Court held that, in light of that policy, together with recurrent reports of persistent abuse of prisoners in a range of Afghan institutions and failures of monitoring procedures, the transfer of detainees by UK forces operating in Afghanistan to the Afghanistan National Directorate of Security (NDS) prison in Kabul exposed those detainees to a real risk of torture, contrary to the policy. The Court concluded that a moratorium on such transfers, which had been introduced in December 2008, should be maintained without exception ([303] & [315]f).

9. The Court considered that transfers to two other NDS prisons, in Kandahar and Lashkar Gah (in the south of Afghanistan), were of concern and that monitoring procedures then in place were inadequate. The Court concluded, however, that transfers to these prisons would be permissible provided that monitoring procedures were significantly strengthened and that a moratorium would be considered in the event of any suspension of monitoring or further credible allegation of abuse ([320] & [322]).

Other reports of torture in Afghan institutions

10. As was noted in *Evans* (see [50]-[75]), there have been recurrent reports of torture in Afghan prisons, though there are indications of improvement. By way of additional recent, or recently disclosed, examples:

10.1 A Canadian government report, disclosed earlier this month to a Military Police Complaints Commission hearing, reported complaints of torture by approximately

one in five of detainees transferred by Canadian personnel to Afghan authorities between late 2007 and early 2008.[1]

10.2 The most recent United States State Department report on human rights conditions in Afghanistan, released in March 2010, observed:[2]

> "The constitution prohibits such practices; however, there were reports of abuses by government officials, local prison authorities, police chiefs, and tribal leaders. NGOs reported that security forces continued to use excessive force ..."
>
> An April Afghanistan Independent Human Rights Commission (AIHRC) report stated that torture was commonplace among the majority of law enforcement institutions, especially the police ..."

10.3 The Afghan Independent Human Rights Commission reported in June 2010 that:[3]

> "In recent years, instances of torture and abuse of prisoners and detainees have declined from previous years. Nevertheless, torture and degrading treatment in detention centers and prisons is one of the most serious concerns regarding places of custody. Torture and cruel treatment, especially of individuals in the custody of the National Directorate of Security (NDS), is much more than what has been identified and reported by AIHRC."

Canadian court proceedings

11. In parallel to *Evans, Amnesty International Canada v Canada (Chief of the Defence Staff)* sought declarations that the transfer of detainees taken by Canadian forces into Afghan custody was subject to, and so potentially in breach of, the Canadian Charter of Rights and Freedoms 1982, including the right against torture and cruel treatment.[4] This proceeding followed a substantial report by Amnesty International that recorded consistent reports of the transfer of detainees.[5]

12. The claim was based upon allegations that Canadian forces had continued to transfer detainees into Afghan custody despite the existence of a real risk of torture. Both at first instance (at [300] & [328]) and on appeal (at [20]), the claim failed on the basis that the Canadian Charter could not apply in the sovereign territory of Afghanistan, even in respect of torture. As is noted below at para 59.2, however, there is some basis on which to question whether, in light of the recent *Khadr* decision of the Supreme Court of Canada, *Amnesty* was correctly decided.

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1 Canadian Press "1 in 5 Afghan prisoners interviewed reported abuse", 4 October 2010, available online at http://www.ctv.ca/CTVNews/World/20101004/afghan-prisoners-101004/.

2 State Department *2009 Country Reports on Human Rights Practices: Afghanistan* (March 2010), available online at http://www.state.gov/g/drl/rls/hrrpt/2009/sca/136084.htm

3 AIHRC *The Situation of Detention Centers and Prisons in Afghanistan* (2010) 14.

4 [2008] 4 FCR 546; [2009] 4 FCR 149 (FCA).

5 Amnesty International *Afghanistan: Detainees transferred to Torture: ISAF Complicity?* (Amnesty, 2007).

Parliamentary and other inquiries in Canada and the United Kingdom

13. In addition to *Evans* and *Amnesty*:

13.1 The Canadian parliament has made various efforts to inquire into allegations of failure by Canadian personnel to safeguard detainees. In July of this year and following considerable controversy, a parliamentary committee commenced examination of largely historical documents;

13.2 Alongside the Canadian parliamentary inquiry, the Military Police Complaints Commission has – after considerable delay, including unsuccessful injunction proceedings by the Canadian government – pursued an investigation into particular allegations of torture in 2006;

13.3 A complaint by two Canadian academics in 2007 to the Prosecutor of the International Criminal Court appears to have been incorporated into a "preliminary examination" by the Court Prosecutor of potential crimes committed in Afghanistan – although, as with similar efforts in respect of Afghanistan, this may prove inconsequential;[6] and

13.4 The United Kingdom parliamentary Joint Committee on Human Rights conducted an inquiry into allegations of complicity in torture, but in the related but separate context of United Kingdom cooperation with other governments' intelligence and other institutions.[7]

Legal context for New Zealand operations

Legal framework

14. As noted in the 10 September opinion, New Zealand personnel operate under successive United Nations Security Council "peace enforcement" resolutions, commencing with UNSCR 1386(2001), which broadly provide a mandate to assist the Afghan government in maintaining security. New Zealand has, in turn, operated within the International Security Assistance Force (ISAF) and under an agreement between the NZDF and Afghan government (opinion at [14]-[16]). As a matter of Afghan law, New Zealand personnel have immunity, but no legal authority.

15. Within that framework, transfer of detainees is governed by:

15.1 The ISAF Standard Operating Procedures for Detention of Non-ISAF Personnel (SOP), which provide that:

15.1.1 ISAF cannot seek to constrain the freedom of action of the Afghan authorities;

15.1.2 ISAF forces may, however, negotiate bilateral agreements with Afghanistan to govern detainee transfers "according to national requirements"; and

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6 See M Byers & W Schabas "War Crimes and the Transfer of Detainees from Canadian custody in Afghanistan", letter to L Moreno-Ocampo, 3 December 2009, 1.

7 Twenty-Third Report, Session 2008-2009, HL Paper 152/HC 230.

15.1.3 Detainees should not be transferred where there is a risk that they will be subjected to torture or other ill-treatment.

15.2 An agreement between the NZDF and the Afghan Ministry of Foreign Affairs on the transfer of detainees (termed "ATD"), which is classified but is described in the opinion (at [26] as providing that:

15.2.1 Any transferred detainee will be treated in accordance with both New Zealand's and Afghanistan's international obligations;

15.2.2 NZDF will notify the International Committee of the Red Cross (ICRC) and the Afghan Independent Human Rights Commission (AIHRC) of any transfer;

15.2.3 Representatives of NZDF, ICRC and AIHRC will have full access to detainees and the Afghan government is to advise when detainees are transferred or otherwise subject to significant change.

15.3 I note that there are also general provisions dealing with the prohibition of torture in the 2001 Bonn Agreement on Provisional Arrangements in Afghanistan and the 2006 Afghanistan Compact. Further, and, as the opinion notes (at n 16), improvement of Afghan practices in respect of detainees form part of ISAF's work and (at [40]) part of the work of the NZSAS.

16. The SOP is reflected in NZDF policy and in the forthcoming second edition of the New Zealand *Draft Manual of Armed Forces Law* (opinion at [25]). Standard instruction to NZDF personnel includes a direction to "protect [detainees] from rape, abuse, torture or degrading treatment".

Relevance of Evans and other developments to New Zealand operations

17. Reports of risk of torture both in the *Evans* decision and in several other inquiries and proceedings, notably in Canada, have direct or indirect implications for New Zealand personnel who are in Afghanistan as part of the International Security Assistance Force (ISAF):

17.1 In considering the relevance of *Evans*, the legal position of New Zealand and UK personnel are broadly similar. However, there is a significant practical distinction, as the UK personnel in issue in *Evans* are engaged in military counterinsurgency operations, including the taking of detainees into UK military custody. By contrast, the issue in respect of New Zealand personnel arises from the provision of support, termed "partnering", by NZSAS to a specialist Afghan paramilitary police unit, the Crisis Response Unit (CRU).

17.2 Unlike the United Kingdom forces in issue in *Evans*, New Zealand personnel have not taken prisoners, but have assisted CRU personnel in doing so. In the partnering role, NZSAS personnel provide close support and other military and technical assistance but have no legal power of arrest under Afghan national law. Any detention would be for security reasons. Further, and unlike some other ISAF states, New Zealand has no established detention capacity. New Zealand personnel could, however, become directly involved in detention, for example if a person sought by the CRU were to attempt to escape a CRU cordon.

18. The factual context in respect of torture, so far as it is known to New Zealand, is not straightforward. Your opinion identifies several potential concerns over the viability of the current detainee arrangements:

18.1 The Afghan CRU, which is supported by NZSAS personnel, is not a prosecution authority and does not undertake long-term detention. Detainees taken into custody by the CRU will, unless released, be transferred to facilities controlled by agencies of the Afghan Ministry of the Interior or to NDS prisons, as considered in *Evans* (opinion at [20]). Some CRU prisoners have been transferred from CRU custody to the NDS prison at Kabul, which was held to be unacceptable in *Evans*;

18.2 PSR(IC)4, PSR(R)1

18.3 Consistent with its unvarying practice of confidentiality, the ICRC will only disclose instances of abuse to the state responsible and not to a third state, such as New Zealand ([51]);

18.4 The ICRC will also not act on notification by New Zealand personnel (or other supporting force) of a detention undertaken by Afghan personnel but with New Zealand assistance ([52]); and

18.5 The ICRC will not express a view on New Zealand practice PSR(R)1, PSR(IC)4

19. However, your opinion also notes:

19.1 While the NDS prison in Kabul was found to pose an unacceptable risk in *Evans*, it has also been described as "the detainee arrangement of choice" by ISAF and as having the best record keeping and access for the ICRC ([54]); and

19.2 Substantial improvements have occurred in detention practices, including by the NDS, and these were noted in a recent visit to Afghanistan by the New Zealand Minister of Defence ([55]). ISAF forces, including New Zealand personnel, have contributed to training of Afghan personnel.

Review of opinion in respect of obligations towards prisoners

Individual complicity in torture

20. As the opinion observes, torture is prohibited both as an individual crime and as a wrongful state act. The prohibition is provided for in a range of different contexts by the Geneva Conventions, the First and Second Additional Protocols to the Geneva Conventions, the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture (CAT) and the Statute of the International Criminal Court and, as a matter of New Zealand law, in implementing legislation that includes the Geneva Conventions Act 1958, the Crimes of Torture Act 1989 and the New Zealand Bill of Rights Act 1990 (BORA). The prohibition is also contained in the Afghan Constitution and in Afghan legislation (opinion at [32ff]).

21. So far as individual complicity in torture is concerned, the opinion concludes:

21.1 The leading decision of the International Criminal Tribunal for the former Yugoslavia in *Furundzija*[8] requires both knowledge of torture and provision of assistance that substantially affects the perpetration of that crime;

21.2 The Statute of the International Criminal Court requires in art 7(1) provision of assistance "for the purpose of facilitating the commission" of the crime;

21.3 The position in domestic law under s 66(1) of the Crimes Act 1961 is not materially different; and

on each of these standards, NZDF personnel do not encourage the commission of torture and do not have any power to intervene to prevent torture, and so cannot be liable for complicity.

Comment

22. In terms of international law standards for complicity, art 4(1) of the CAT provides both for the crime of torture itself and for the crime of any act "which constitutes complicity or participation". Article 4(1) is implemented in New Zealand law by s 3(1) of the Crimes of Torture Act, which provides offences of aiding, abetting, inciting, counselling or procuring torture.

23. The Committee against Torture, the expert body established under the CAT, has held complicity includes "incitement, instigation, superior orders or instructions, consent, acquiescence and concealment".[9] This aspect of art 4(1) gives rise to two potentially relevant principles:

23.1 The first is that it has been suggested that art 4(1) may be interpreted to extend to failure of responsible public authorities to take steps to prevent a specific risk of torture of which they are aware.[10] Further, while both the Yugoslavia and Rwanda tribunals have canvassed such liability by omission at the level of principle, both have applied the very high threshold that the omission must have been "decisive".[11] In addition, that this contention is based upon Committee decisions dealing with state obligations of protection, rather than the more stringent threshold for individual criminal liability, which seems unlikely to be satisfied in such a case.

23.2 The second is, as reflected in the 10 September opinion, the question of provision of assistance. The leading *Furundzija* decision, as noted above, held that if an accused:[12]

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8 *Prosecutor v Furundzija* (Case IT-95-17/1, 1998).

9 M Nowak & E McArthur *The United Nations Convention against Torture: A Commentary* (Oxford, 2008)247-248.

10 P Sands *Memorandum to the Joint Committee on Human Rights: Allegations of UK Complicity in Torture* HL Paper 152/HC 230, Ev 62, citing *Dzemajl v Yugoslavia* CAT/C/29/D/161/2000, 2 December 2002.

11 See M Duttwiler "Liability for Omission in International Criminal Law" (2006) 6 Int Crim L Rev 1; and see doubts on this point in G Boas, J Bischoff & N Reid *Forms of Responsibility in International Criminal Law* (Cambridge, 2007) 313.

12 Above n 8, [252].

> "... gives some sort of assistance and support with the knowledge however that torture is being practised, then the individual may be found guilty of aiding and abetting in the perpetration of torture. Arguably, if the person attending the torture process neither shares in the purpose behind torture nor in any way assists in its perpetration, then he or she should not be regarded as criminally liable ..."

24. Applying this latter standard, I agree that in the present context, it is strongly unlikely that New Zealand personnel who provide assistance in the taking into custody of detainees are thereby risking criminal liability.

25. If, however, New Zealand or New Zealand personnel became aware, or ought, through normal diligence, to have become aware of an intention on the part of Afghan authorities to torture some or all of those detained, liability could ensue. I have discussed ways in which New Zealand can continue to address that risk below.

26. In considering the position in domestic law:

26.1 The standard for party liability under s 66 of the Crimes Act requires, on the one hand, the act of assistance, omission or instigation and, on the other, both knowledge of the offending and an intention to provide help or encouragement.[13]

26.2 This position is not altered by the recent decision of the New Zealand Supreme Court in *Attorney-General v Tamil X* [2010] NZSC 107, holding – with some reference to international standards – that criminal complicity would ensue where an accused had voluntarily contributed in a significant way to the primary actor's ability to pursue the purpose of committing a crime, aware that his or her assistance will in fact further that purpose.[14]

27. As under the international standard, I agree that New Zealand personnel would not have the requisite knowledge and intention to assist crimes of torture by Afghan authorities to establish individual complicity.

Complicity under state responsibility at international law

28. As your opinion notes, the starting point for complicity as a matter of state responsibility is art 16 of the International Law Commission's Articles on State Responsibility:

> "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
>
> (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
>
> (b) The act would be internationally wrongful if committed by that State."

29. As your opinion further notes (at [40]-[41]):

29.1 The requirement of knowledge in art 16(a) may be satisfied by statements or other formal actions of the other state, but also potentially by constructive knowledge, as

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13 See J Robertson (ed) *Adams on Criminal Law* (Thomson Reuters, Looseleaf) "Commentary to s 66: Parties to Offences".

14 At [67]-[70].

would be expected from reasonable inquiry. The opinion comments that it is not a given that that is the case here; and

29.2 Article 16 is also understood to require that the state concerned "intended to facilitate the occurrence of the wrongful conduct".[15] The opinion comments that the nature of New Zealand support is in fact contrary to that intention.

Comment

30. The leading commentary by James Crawford emphasises that art 16 is "not concerned with ordinary situations of interstate cooperation or collaboration", and then goes to refer specifically to the provision of assistance to states that commit human rights violations:[16]

> "... a State may incur responsibility if it ... provides material aid to a State that uses the aid to commit human rights violations. In this respect, the United Nations General Assembly has called on member states in a number of cases to refrain from **supplying arms and military assistance to countries found to be committing serious human rights violations**. Where the allegation is that the assistance of a state has facilitated human rights violations by another state, the particular circumstances of each case must be carefully examined to determine whether the aiding state by its aid was **aware of and intended to facilitate the commission of the internationally wrongful conduct**."

31. The subsequent, and fuller, commentary edited by Crawford and others observes that art 16(a):[17]

> "... underlines the importance of intention on the part of the State which provides aid or assistance. The assisting State must have clear knowledge and intention to collaborate in the commission of an internationally wrongful act of another state."

32. To the same end, the International Court of Justice applied art 16 as a rule of customary international law in its 2007 *Genocide Convention* judgment. While torture is not, unlike genocide, a crime of specific intent, it is nonetheless relevant here that the Court required that the complicit state must have specific knowledge of the wrongful act with a high degree of particularity: it did not, in general, suffice that wrongful acts were assisted through a general process of support and assistance.[18]

33. However, it is at least arguable that constructive knowledge could suffice, as found by the United Kingdom Joint Committee:[19]

> "If the government engaged in an arrangement with a country that was known to torture in a widespread way and turned a blind eye to what was going on ... that might well cross the line into complicity."

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15 J Crawford *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (Cambridge, 2002) 103 & 149.

16 Crawford, above n 15, 150-151.

17 C Dominicé "Attribution of Conduct to Multiple States and the Implication of a State in the Act of another State" in J Crawford, A Pellet & S Olleson (eds) *The Law of International Responsibility* (Oxford, 2010) 281, 286.

18 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, [2007] ICJ Rep 91, [420] & [422].

19 Above n 7, [41], adopting the submission of Philippe Sands QC, reproduced at Ev 60, that "a blind eye" would suffice on "some interpretations" of art 16.

34. It follows that I agree that the present circumstances do not give rise to state complicity on the part of New Zealand, but that there is a continuing need to ensure that New Zealand both is and can be shown to be taking due steps to be adequately informed.

Non-refoulement to torture

35. In respect of the prohibition of non-refoulement to torture, the opinion observes that there is some difficulty in applying the prohibition while subject to the sovereignty of the host state, but concludes:

35.1 If New Zealand personnel were to take a detainee into custody:

35.1.1 If the detainee would face a real risk of torture if transferred to Afghan custody, the detainee must not be transferred, leaving release as the only practical option; and

35.1.2 In any other case, New Zealand has a continuing obligation to monitor the welfare of that detainee, at least until the point of any court appearance ([27] & [36]).

35.2 However, where New Zealand personnel are involved only to the extent of the provision of support, there is neither an obligation nor a right to intervene ([28] & [37]). On that basis, the obligation is not engaged.

Comment

36. There is broad agreement that while the concept of non-refoulement originated in respect of inter-state movements, it now (consistently with the view expressed in the opinion) applies to any detainee under the "effective control, *de facto* or *de jure*" of a state's personnel, wherever they happen to be and even if those personnel are at the time under the operational command of another state.[20]

37. It follows that I agree that:

37.1 Prisoners taken directly into custody by New Zealand personnel are within New Zealand's obligation of non-refoulement; but

37.2 Prisoners taken by Afghan forces in New Zealand-partnered operations are not within the scope of that obligation.

Particular obligations towards prisoners taken by Afghan forces in New Zealand-partnered operations

38. While the obligations applicable to the transfer of prisoners taken by ISAF forces have been relatively well canvassed, including in *Evans*, above, and in a Danish initiative to set agreed standards for the treatment of detainees taken in multinational operations,[21] the obligations of

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20 See, for example, Committee against Torture *Concluding Observations: Denmark* CAT/C/DNK/CO/5 (2007) [13]; and see also, for example, E-C Gillard "There's no place like home: states' obligations in relation to transfers of persons" (2008) 90/871 Int Rev Red Cross 703, 712-714.

21 See Danish Ministry of Foreign Affairs and Trade *The Copenhagen Process on the Handling of Detainees in International Military Operations* (December 2007) and an ongoing series of subsequent meetings, in which New Zealand has participated but which have yet to reach any conclusion.

partnered forces are less straightforward. In particular, New Zealand's obligations of non-refoulement and, to the extent that they are applicable, related obligations to protect prisoners under the law of armed conflict are limited in their application to prisoners taken by New Zealand forces.

39. The opinion notes, however, that there is "a moral (and arguably legal) duty to take reasonable steps to ascertain that the human rights of persons detained in partnered activities are respected" ([57]). While, as noted, this is a complex and developing area of international law, there are four actual or potential grounds for that duty:

39.1 Most practically, New Zealand is subject to a continuing obligation to ensure that its partnering operations, as with other assistance provided to Afghan authorities, do not give rise to complicity;

39.2 The law of armed conflict, to the extent that it applies, may impose a duty on New Zealand to take due steps to "ensure respect" on the part of Afghan authorities for minimum standards of treatment of prisoners, including the prohibition of torture;

39.3 The Convention against Torture has been held by the United Nations Committee against Torture to impose duties of investigation and pursuit of remedial measures where a state party becomes aware of torture committed by another state party in the course of joint operations; and

39.4 The Convention and/or the customary international law prohibition against torture may give rise to an obligation to take available measures to prevent torture.

Ensuring non-complicity

40. The content of the duty of non-complicity has been outlined above. The effect of the duty is essentially to ensure that New Zealand does not provide assistance where it is known, or ought to be known, that that assistance provides sufficiently direct support for acts of torture by Afghan authorities.

41. In respect of prisoners taken by New Zealand forces, the duty of non-complicity – given that direct involvement – may well require the taking of specific steps to safeguard those prisoners. In partnered operations, in which New Zealand involvement is necessarily less direct and less specific, the duty of non-complicity arises at the systemic level of ensuring that New Zealand assistance is not providing knowing support for torture.

42. In practice, the duty of non-complicity requires in respect of partnered operations that:

42.1 New Zealand continues to take steps within its capacity, such as seeking ongoing and credible assurances from Afghan authorities and providing training or other assistance, to deter torture by those authorities;

42.2 New Zealand continues to take all due steps to gather information of the practices of Afghan personnel and institutions; and

42.3 If circumstances change, such that New Zealand or its personnel are potentially complicit in torture, New Zealand cooperation should be restricted or withdrawn until those circumstances are resolved.

Applicability and effect of law of armed conflict

43. Secondly, and while New Zealand personnel are generally involved in what amount to law enforcement actions undertaken under Afghan national law by the CRU, it is – as you have noted – also possible that some or all New Zealand operations may be subject to elements of the law of non-international, and even international, armed conflict.

44. As it appears to be accepted that there is a non-international conflict in Afghanistan, it is possible that, even where CRU operations are formally a matter of law enforcement, such operations may in practice engage members of organized armed groups at a sufficient level of intensity to engage the law of non-international armed conflict.[22] The New Zealand Prime Minister has, for example, described CRU operations as follows:[23]

> "... the Crisis Response Unit ... is again an Afghan force, a very elite Afghan force, and if you look at what's been happening, Kabul is no picnic. I mean Kabul itself is quite a high intensity zone and the New Zealanders have been at the forefront actually of foiling a number of major plots there, a number of major insurgent actions that would have taken place ..."

45. In this context, and noting the description of the overall security situation in Afghanistan as "fluid", "dynamic" or "hybrid",[24] it is clearly prudent to anticipate that New Zealand forces may, in some operations, become subject to law of armed conflict obligations. That approach is also consistent with the principle that, in cases of uncertainty, the greater protections under the law of armed conflict standards should apply.

46. Secondly, some obligations in respect of international armed conflict standards may apply to New Zealand operations by virtue of the Security Council mandate noted above. The United Nations Secretary-General's 1999 bulletin *Observance by United Nations Forces of International Humanitarian Law* provides that international humanitarian law broadly applies to United Nations forces when acting as combatants in the course of enforcement actions or, while in peacekeeping operations, in self-defence. In particular, the bulletin provides, albeit in rather general terms, for the application of some protections under the law of international armed conflicts, although not prisoner of war status:[25]

> "Without prejudice to their legal status, [detained members of armed forces] shall be treated in accordance with the relevant provisions of the Third Geneva Convention of 1949, as may be applicable to them mutatis mutandis."

47. Further, the leading commentator Christopher Greenwood has noted some, though not consistent, instances of United Nations deployments invoking Geneva Convention obligations

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22 See, for example, art 1 of the Second Additional Protocol to the Geneva Conventions, contrasting "sustained and concerted military operations", which engage the law of non-international armed conflict, and "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature", which do not.

23 TVNZ, *Q&A*, 9 May 2010; see also, for example, NZPA "NZ Doing Its Bit in Afghanistan: Kiwi's Defense Chief" (April 2010), referring to the CRU as an "elite group of Afghan commandos".

24 See, for example, C Schaller "Military Operations in Afghanistan and International Humanitarian Law" (Stiftung Wissenschaft und Politik Comments No 7, March 2010), 3.

25 ST/SGB/1999/13, 6 August 1999, [8] and see M Zwanenburg "The Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law: A Pyrrhic Victory?" (2000) 39 Mil L & L War Rev 13, 25-26.

and protections,[26] while there is also some practice of states voluntarily applying such standards to their own forces.[27]

48. The bulletin on its terms does not extend to ISAF forces, but at least provides an indication of relevant principle.[28] However, Canada, at least, has stated that it will treat all detainees in accordance with prisoner of war status under the Third Geneva Convention, on the basis that it is best practice, and that that practice is incorporated into its bilateral agreement with the Afghan government.[29]

49. To the extent that it applies, the law of armed conflict imports two relevant obligations:

49.1 Common art 3 of the Geneva Conventions imposes minimum standards for the treatment of prisoners and others, including prohibition of "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture [and] outrages upon personal dignity, in particular humiliating and degrading treatment". It has also been suggested – though not necessary accepted – that the duty of protection of prisoners in art 5(4) of the Second Additional Protocol gives rise to duties in respect of transfer of prisoners to other forces.[30] However, while these obligations would apply to prisoners taken by New Zealand forces, they do not appear relevant to actions of New Zealand forces in a partnering capacity.

49.2 The second, and more material, obligation is the duty to "ensure respect" for law of armed conflict standards, which is expressly provided for in respect of international armed conflicts[31] and which also appears to apply in non-international conflicts as a rule of customary international law.[32] The International Committee of the Red Cross has described the obligation as requiring states to "exert ... influence, to the degree possible, to stop violations of international humanitarian law."[33] While the scope of the duty is not well settled, it is apparent that it does not extend to a right to use

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26 C Greenwood "International Humanitarian Law and United Nations Military Operations" (1998) 1 YB Int Humanitarian L 3, 26.

27 C Garraway "Applicability and Application of International Humanitarian Law to Enforcement and Peace-Enforcement Operations" in T Gill & D Fleck (eds) The Handbook of the International Law of Military Operations (Oxford, 2010) 129, 133.

28 Above n 27, 131-132 indicates that operations against a non-state actor are governed by the law of non-international armed conflict but that does not appear mandated by the terms of the bulletin.

29 Technical Arrangements between the Government of Canada and the Government of the Islamic Republic of Afghanistan, art 1.2, cited in *Amnesty* (FC), above n 4 [166]. This practice may be shared by other states: see Garraway above n 27, 133, noting that states may choose to apply IHL principles as "higher standards".

30 C Droege "Transfers of Detainees: Legal Framework, Non-Refoulement and Contemporary Challenges" (2008) 90/871 Int Rev Red Cross 669, 676.

31 See, for example, art 1of the Third Geneva Convention, which provides that "[t]he High Contracting Parties undertake to respect **and to ensure respect** for the present Convention in all circumstances" [emphasis added].

32 ICRC *Commentary to the Geneva Conventions*, GCI:1 and J-M Henckaerts & L Doswald-Beck *Customary International Humanitarian Law*, vol I, 41.144.

33 *Military and Paramilitary Activities in and against Nicaragua* 1986 ICJ Rep 14, [220] and also see above n 32.

force, but may include such measures as reporting of violations of international humanitarian law, diplomatic pressure, and withdrawal of cooperation or assistance.[34]

Potential obligation to act to prevent torture or to take other steps

Potential obligation to prevent

50. A further potential basis for liability in respect of acts of torture follows from the broad interpretation given to the "obligation to prevent" genocide under the Genocide Convention in the *Bosnia v Yugoslavia* decision of the International Court of Justice. The Court held that the agreement of the states parties to the Genocide Convention that (art 1):

> "... genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish"

gave rise to an obligation, to the extent that a given state was capable of making efforts to prevent genocide, that it should "do [its] best to ensure that such acts do not occur".[35] The Court stressed that this duty of non-omission was distinct from complicity and, further, that it did not require knowledge but only that the state was aware, or ought to have been aware, of a serious danger of such acts.

51. I note that there are at least two obstacles to the extension of this principle to the prohibition of torture:

51.1 The Court stressed that while other instruments, including the Convention against Torture, included obligations of prevention, it was not enunciating a generally applicable principle either in respect of treaties or at customary international law: "the content of the duty to prevent varies from one instrument to another, according to the wording of the relevant provisions, and depending on the nature of the acts to be prevented."[36]

51.2 In that respect, while the Genocide Convention contains a general undertaking of prevention, as excerpted above, the Convention against Torture contains a more specific agreement "to prevent acts of torture in any territory under its jurisdiction", which, as noted above, substantially limits any such direct obligation in the present case.

52. Nonetheless, given that the Court's approach to the prevention obligation has been described as innovative and "pregnant with potential for the promotion of human rights",[37] it is not beyond question that the decision may support the inference from the Convention or from customary international law of a duty to take available steps to prevent torture.

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34 See O Engdahl "Compliance with International Humanitarian Law in Multinational Peace Operations" (2010) 78 Nord JIL 513, 517; L Moir "The Implementation and Enforcement of the Laws of Non-International Armed Conflict" (1998) 3 J Armed Conf L 163, 174-176; and above n 32.

35 Above n 18, [430]-[432].

36 Above n 18, [429].

37 W Schabas "Genocide Law in a Time of Transition: Recent Developments in the Law of Genocide" (2008) 61 Rutgers L Rev 161, 188.

Investigation and other duties under the Convention against Torture

53. In addition to the prohibition of torture itself and the duty of non-refoulement noted above, the Convention against Torture provides for other ancillary obligations directed towards the suppression of torture, including duties of investigation where torture is alleged.

54. The Committee against Torture, the expert body established under the Convention, indicated in 2008 that, in its view, states parties that become aware of alleged acts of torture committed by others in the course of joint operations are then obligated to report and seek investigation of those allegations.[38]

Effect upon applicable obligations of the New Zealand Bill of Rights Act 1990 and the United Nations mandate

55. The further question, in light of the *Amnesty* decision and similar proceedings, is whether these obligations are affected by the Bill of Rights Act, to the extent that it may apply to operations in Afghanistan, and/or by the Security Council resolutions that relate to those operations.

Potential extraterritorial application of the Bill of Rights Act

56. While the possible application of the Act to New Zealand personnel outside New Zealand territory has not been canvassed at any length to date, there is some reason to conclude that – contrary to the decision in *Amnesty*, above – the Act would be held to have some application.

57. First, the one material comment in New Zealand caselaw to date was made in the decision of the Supreme Court in *Attorney-General v Zaoui No 2*.[39] The Court concluded that the rights against torture and against arbitrary loss of life under ss 8 and 9 of the Bill of Rights Act would operate to prevent New Zealand officials from deporting Mr Zaoui to a risk of torture elsewhere, commenting (at [79] (footnote citation omitted):

> Those provisions do not expressly apply to actions taken outside New Zealand by other governments in breach of the rights stated in the Bill of Rights. That is also the case with arts 6.1 and 7 of the ICCPR. But those and comparable provisions have long been understood as applying to actions of a state party – here New Zealand – if that state proposes to take action, say by way of deportation or extradition, where substantial grounds have been shown for believing that the person as a consequence faces a real risk of being subjected to torture or the arbitrary taking of life. The focus is not on the responsibility of the state to which the person may be sent. Rather, it is on the obligation of the state considering whether to remove the person to respect the substantive rights in issue.

58. While the Court's comment does not directly address the question of direct extraterritorial application, the comment gives some reason to conclude that the New Zealand courts would apply the Bill of Rights Act to the conduct of New Zealand personnel overseas in certain circumstances:

58.1 The Court's focus is upon the distinction between actions of the New Zealand government and other governments, rather than upon the prior question of the location of any New Zealand government action; and

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38 See the Committee's *Concluding Observations in respect of Sweden* CAT/C/SWE/CO/5, [19], responding to the Bunia incident, in which Swedish personnel engaged in a multinational deployment in the Democratic Republic of the Congo became aware of alleged torture by French forces. A similar conclusion was apparently reached by the Swedish military legal advisor: see Engdahl, above n 34, 522.

39 [2006] 1 NZLR 289.

58.2 The United Nations Human Rights Committee has given its view that arts 6 and 7 of the ICCPR, to which the Court refers here, do apply to detentions undertaken by a state party where that party has effective control over that detainee.

59. Further, while the approach taken in comparative caselaw to the extraterritorial application of national human rights law is far from straightforward, there is at least some support for such application in respect of the prohibition of torture:

59.1 In *R (Al-Skeini) v Secretary of State for Defence* [2008] AC 153, the House of Lords held that the duty to inquire into death or maltreatment, as it arose under the Human Rights Act 1998 (UK), could apply extraterritorially, but only where United Kingdom personnel had effective control over a given territory, in that case as an occupation force. While that standard is not met here, an attempt to bar wrongful acts – as distinct from triggering positive obligations – could be founded in customary international law, following the earlier decision of the House of Lords in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2005] 2 AC 1. In that instance, the House of Lords took a similarly narrow view of the direct applicability of human rights standards, but was nonetheless prepared (at [99]) to find the extraterritorial actions of United Kingdom officials unlawful as inconsistent with the fundamental obligation of non-discrimination in United Kingdom law and at customary international law. Such reasoning would appear also to apply to the fundamental right against torture.

59.2 While in *Amnesty* the Canadian Federal Court of Appeal held that the Canadian Charter of Rights and Freedoms 1982 did not apply to allegations of torture in extraterritorial armed conflict, that approach may now have been overtaken by the decision of the Supreme Court of Canada in *Khadr v Canada* [2010] 1 SCR 44, which commented (at [14]):

> As a general rule, Canadians abroad are bound by the law of the country in which they find themselves and cannot avail themselves of their rights under the Charter. International customary law and the principle of comity of nations generally prevent the Charter from applying to the actions of Canadian officials operating outside of Canada: *R. v. Hape* [2007] 2 SCR 292, at para 48, per LeBel J, citing *United States of America v Dynar* [1997] 2 SCR 462, at para 123. The jurisprudence leaves the door open to an exception in the case of Canadian participation in activities of a foreign state or its agents that are contrary to Canada's international obligations or fundamental human rights norms ...

The Court went on to hold that the Charter applied by virtue of that exception where Canadian officials had participated in interviews of the appellant while in the United States detention facilities at Guantanamo Bay, notwithstanding that such detention had been held by the United States courts to breach rights to habeas corpus and humane treatment. While the *Khadr* case was exceptional, both in the degree of Canadian involvement and evident knowledge, and because the applicant was a Canadian national, the reasoning is likely to have a broader consequence.[40]

60. It follows that there is at least some prospect that a New Zealand court would hold the actions of New Zealand personnel in Afghanistan to be subject to the Bill of Rights Act, at least in respect of fundamental rights such as torture.

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40 See further C Keitner "Rights Beyond Borders" (2011) 36 Yale JIL (forthcoming), 39.

61. The application of the Bill of Rights Act does not appear to add to the substantive obligations in respect of torture already identified. Rather, the significance of the point is that the Bill of Rights Act would, if held to be applicable, provide a basis for a straightforward civil proceeding in the New Zealand courts, without the need to rely upon the more legally demanding avenues of alleged criminal wrongdoing or state responsibility.

Potential relevance of mandate under Security Council Resolutions

62. Secondly, and as noted above, New Zealand personnel are present in Afghanistan under the mandate of successive resolutions of the United Nations Security Council. In *R (on the application of Al-Jedda) v Secretary of State for Defence* [2008] 1 AC 332, the House of Lords held (at [39], [111] & [135] & [152]) that the conferral by the Security Council of "authority to take all necessary measures to contribute to the maintenance of security and stability" took precedence so far as necessary over all other international obligations, including human rights standards, by virtue of art 103 of the United Nations Charter.

63. The relevant resolutions here include similarly framed authorisation to the ISAF forces "to take all necessary measures to fulfil its mandate": see, for example, UNSCR 1890(2009), [2]. However, and while the point is not straightforward, it is possible that a New Zealand court would hold *Al-Jedda* does not to apply here, for at least two reasons:

    63.1 *Al-Jedda* may be criticised for taking an unreasonably inflexible view of the scope of art 103 of the Charter, which may also have since been contradicted by the approach of the European Court of Justice in *Kadi*;[41] and

    63.2 More concretely, however, it must be recognised that *Al-Jedda* concerned a challenge to internment under the Security Council resolution, which clearly forms part of the "necessary measures" implicit in the mandated role and was, in any case, held there to be conditioned by a requirement that internment go no further than necessary. Such an approach seems unlikely to apply to the transfer of detainees at risk of torture.[42]

Practical implications of relevant obligations for current New Zealand operations

Proposals for monitoring of detainees

64. Last, the opinion notes both that New Zealand is obligated to monitor prisoners taken by New Zealand forces once transferred to Afghan custody and also comments on the implementation of the moral and/or legal duty to ascertain respect for the human rights of detainees taken into custody in partnered operations.

65. In respect of the monitoring of detainees taken in partnered operations, the opinion observes (at [58]ff and [65]):

    65.1 This duty can most robustly be met through inspections and monitoring of such detainees.

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41 See, among others, C Tomuschat "Case Note: *R (on the application of Al-Jedda) v Secretary of State for Defence*: Human Rights in a Multi-Level System of Governance and the Internment of Suspected Terrorists" (2008) 9 Melb JIL 391.

42 See, similarly, P Nevill "Reconciling the Clash between UK Obligations under the UN Charter and the ECHR in Domestic Law: Towards Systemic Integration?" [2008] Cambridge LJ 447, 449-450.

65.2 In order to be credible, such a procedure would require:

65.2.1 Thorough, frequent and sustainable over time and apply to any facility where such detainees are held;

65.2.2 The involvement of an appropriate expert inspector, who must – to avoid any perceived lack of objectivity – be independent of NZDF. The opinion proposes that MFAT staff would be appropriate. The opinion also expresses concern over possible implication of any NZDF personnel involved in inspections in torture or other grave crimes ([63]); and

65.2.3 A robust means of response if any instance of ill-treatment is identified or if rights of access are withdrawn, most likely by the cessation of New Zealand assistance to the Afghan government.

65.3 In order to put such a procedure in place, New Zealand would need to negotiate a further and more detailed agreement with the Afghan government, which may require years.

65.4 If that is not possible, the other available measures include:

65.4.1 The possibility of an enhanced arrangement with the ICRC; and

65.4.2 Expanded support for reforms to Afghan government practices.

Legal risk, monitoring and other measures

66. The protection of prisoners taken by New Zealand forces and in New Zealand-partnered operations raises several practical legal risks:

66.1 The risk of legal challenge to New Zealand operations in Afghanistan, following on from *Evans*, should not be overstated – particularly given that New Zealand personnel have not, unlike the United Kingdom forces, taken prisoners and the Afghanistan conflict has not attained the same notoriety in New Zealand as in Canada – there is nonetheless some chance of a challenge. Court proceedings, parliamentary or other inquiries and in at least one case a formal complaint to the International Criminal Court have been pursued in other ISAF countries, notably Canada, and a non-governmental organization might regard New Zealand as a robust forum in which to bring such a proceeding or complaint.

66.2 Further, you have indicated that the "partnering" model followed by New Zealand forces in Afghanistan is likely to be adopted by other ISAF forces over time. That broader adoption is likely to lead to clarification of relevant obligations, whether on the part of the ISAF-contributing states or through further court challenges. Such clarification could then raise doubts as to the lawfulness of New Zealand's current or continuing practices; and

66.3 Most practically, and in any case, it is necessary to ensure that New Zealand personnel are acting upon a clear legal basis. In particular, if further reports or allegations of torture by Afghan authorities were to arise, New Zealand personnel will need to know clearly what their obligations are. Such clarity would also be of considerable help in defending any legal challenge or other complaint.

Prisoners taken by New Zealand forces

67. I agree that where New Zealand personnel themselves take detainees into custody for transfer to Afghan authorities, New Zealand's obligations in respect of non-refoulement, avoidance of civil or criminal complicity in ill-treatment and/or positive duties under humanitarian law, as applicable, require New Zealand to ensure that there is not a real risk of torture. To that end, in order for transfers to occur:

67.1 New Zealand must receive appropriate assurances from the responsible Afghan authorities that ill-treatment will not occur;

67.2 New Zealand authorities must be confident, having taken all available means to obtain relevant information, that ill-treatment is not now occurring in institutions to which detainees are transferred or are at risk of transfer. The means used should include review of available reports on human rights conditions, news or other sources and, if possible, ongoing discussion with Afghan authorities and information-sharing with other contributing forces;

67.3 New Zealand continues to exercise rights of access to and monitoring of detainees. Such direct access may – subject to the difficulties noted in para 18 above – be usefully supplemented through ICRC, AIHRC or other relevant independent agencies, though that may not be mandatory; and

67.4 In the event that any of these three measures identifies instances of ill-treatment, it is likely that transfers will then pose an unacceptable risk and would have to cease until the issue is resolved.

Prisoners taken in partnered operations

68. By contrast, where New Zealand personnel are indirectly involved in detention through provision of support to Afghan forces, measures taken should reflect the more limited obligations outlined above – essentially, of ensuring that New Zealand is not complicit in torture and, so far as obligations arise, is acting within its capacities to prevent torture – that then apply.

69. However, the proposal to expand monitoring to include such detainees appears both to go beyond applicable obligations, as identified at para 39-54 above, and to pose several significant problems:

69.1 While New Zealand's obligations towards prisoners taken by New Zealand personnel, including the obligation to monitor such prisoners once transferred, are clear, there is not a similarly clear obligation towards prisoners taken by New Zealand-partnered Afghan forces.

69.2 In particular:

69.2.1 The duty of non-refoulement is concerned with persons under New Zealand's effective control. It does not extend to persons under control of Afghan forces, even if that control is supported or assisted by New Zealand;

69.2.2 More broadly, while there has been extensive efforts to clarify or develop obligations applicable to the transfer of prisoners taken by ISAF and similar

multinational forces, there has been no similar development in respect of prisoners taken by multinational-partnered forces; and

69.2.3 While New Zealand is subject to a range of actual or potential obligations, as outlined at paras 38-54, these do not give rise to a duty, or a right, to monitor.

69.3 Further, there may well be difficulty in securing and upholding rights of access to such detainees, given the direct role of the Afghan authorities, the correspondingly wider ramifications of such access and – it appears – the lack of precedent among ISAF states;

69.3.1 As noted above at para 18.4, the approach of the ICRC to such detainees means that New Zealand monitoring in these cases would not be assisted by the ICRC;

69.3.2 The expansion of monitoring procedures may, particularly in the event of legal challenge, in fact tend to undermine the difference in applicable obligations: it may be suggested that a common practice of monitoring both categories of detainees reflects a common underlying obligation; and

69.3.3 As the opinion also notes, involvement of New Zealand personnel with such detainees may, absent a clear and robust legal basis, place those personnel in situations in which they may, for example, become aware of torture or ill-treatment but then have little or no capacity to act. Such situations could, in turn, lead to allegations of complicity or deliberate disregard.

70. Adoption of a distinct approach that reflects the relevant obligations will also assist in managing undue legal risk, including, for example, the risk that a New Zealand court might conflate the two categories of prisoners and attendant obligations.

71. A useful analogy may be drawn from the Organization for Security and Cooperation in Europe (OSCE) handbook *Preventing Torture*, which distinguishes between "monitoring" and "investigation" mandates and practices. While investigation involves – where mandated – "a more active effort to obtain information that has not yet been provided, assess the validity of claims and determined ... what steps can be taken", the lesser step of "monitoring" comprises:[43]

> "[c]ollecting publicly available information, receiving testimony from individuals, making contact with other organizations, meeting public officials to discuss the government's legislative and administrative efforts to prevent torture and ill-treatment ..."

72. On that basis, I conclude that New Zealand should not pursue individual monitoring of prisoners taken in partnered operations, but should continue to require formal and operational assurances and to gather information and should restrict or withdraw cooperation in the event that a risk of torture arises.

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43 *Preventing Torture: A Handbook for OSCE Field Staff* (OSCE, 1991), 54.

73. I have been assisted in preparing this advice by Cheryl Gwyn, Deputy Solicitor-General (Constitutional), and by Ben Keith, Crown Counsel. Please let me know if I can be of further assistance.

Yours sincerely

David Collins QC
Solicitor-General