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

SUBMISSIONS OF COUNSEL FOR JON STEPHENSON IN REPLY FOLLOWING PUBLIC HEARING 3

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MAY IT PLEASE THE INQUIRY

INTRODUCTION

1. These submissions in reply address the following matters covered during Public Hearing 3:

   (a) The scope of the International Security Assistance Force (**ISAF**) mandate under relevant Security Council Resolutions (**SCRs**).

   (b) The application of detention and *non-refoulement* obligations to partner forces in respect of detentions on partnered operations with Afghan forces.

   (c) State complicity in the internationally wrongful acts of other states.

SCOPE OF ISAF MANDATE

2. In their presentation for Public Hearing No 3, the Crown Agencies submitted that ISAF's mandate was limited to assisting Afghan forces to provide security in Afghanistan.[1] In doing so, they emphasised a number of passages from relevant SCRs relating to ISAF in which the Security Council:[2]

   (a) recognised that responsibility for providing security and law and order resided with the Afghans themselves;

   (b) affirmed its commitment to the sovereignty of Afghanistan;

   (c) stressed the importance of security sector reform;

   (d) encouraged ISAF and partners to train, mentor and empower the Afghan national security forces; increase the functionality, professionalism and accountability of the security sector; and provide assistance to this end, including financial support; and

   (e) encouraged ISAF to work towards the goal of self-sufficient, accountable and ethnically balanced Afghan security forces providing security and law and order throughout the country.

3. It is submitted the references provided by the Crown Agencies provide an incomplete picture of the ISAF mandate. They do not emphasise that:

[1] At [14](a).
[2] At [14](a)-(e).

(a) the Security Council also recognised and then repeatedly reaffirmed that the situation in Afghanistan amounted to a threat to international peace and security;

(b) states were authorised to use "all necessary measures" to assist the Afghan Interim Authority (**AIA**) and eventually the Afghan government to provide security which included the use of armed force and detention where necessary for imperative reasons of security.

(c) the SCRs did not place additional limits on the authority of ISAF participating states to use force or detain, for example, a requirement that any use of force be defensive only; and

(d) ISAF and the AIA executed a Military Technical Agreement in January 2002 which gave ISAF considerable freedom, and recorded that the ISAF Commander in Afghanistan "had the authority, without interference or permission, to do all that the Commander judge[d] necessary and proper, including the use of military force, to protect the ISAF and its mission".[3]

4. It follows that there was an inherent tension within the SCRs. On the one hand, as the Crown Agencies submitted, they did emphasise that ISAF's mandate was to assist Afghan authorities to provide security and affirmed the importance of promoting and enhancing Afghan sovereignty. On the other hand, they also represented a significant relinquishment of that sovereignty, to the extent they authorised the presence of ISAF states and authorised them to use offensive force to provide security "without interference or permission" from the government of Afghanistan.

5. In substance, the effect of the mandate was to authorise ISAF states to take part in the non-international armed conflict in Afghanistan on the side of the Government.[4] As a result, common article 3 and, it is submitted, Additional Protocol II (**AP II**) to the Geneva Conventions[5] applied to ISAF states in addition to the customary international law applicable in non-international armed conflicts.

[3] In article IV(2). In article IV(5) ISAF did undertake to make every reasonable effort to co-ordinate with and take into account the needs of the AIA.

[4] Pursuant to common article 3 to the Geneva Conventions and article 1(1) of the Additional Protocol II.

[5] In his presentation Professor Akande suggested in a footnote that multinational forces in Afghanistan could not have been bound by AP II because article 1(1) of the Protocol implies that the Protocol only applies to the host state and relevant organised armed groups: Akande Opinion at [8], footnote 2. Mr Stephenson respectfully disagrees with that proposition, for the reasons stated in Anyssa Bellal, Gilles Giacca and Stuart Casey-Maslen "International Law and Armed Non-State Actors in Afghanistan" (2011) 93(881) IRRC 47 at 60-61.

DETENTION OBLIGATIONS AND PARTNERING OPERATIONS

Questioning during Public Hearing 3

6. During Public Hearing 3, Inquiry members questioned counsel for the Crown Agencies on why, if the Agencies accepted that detention and *non-refoulement* obligations applied when New Zealand forces detained people in Afghanistan before handing them over to local authorities, the same obligations should not have applied when New Zealand participated as a partner force in a deliberate detention operations.

7. Mr Rishworth QC reserved the Crown Agencies' position on this issue for follow-up by way of written reply.

8. Mr Stephenson makes two submissions in response to this issue. First, there is no reason in principle or policy why detention and *non-refoulement* obligations could not have applied to New Zealand when operating as a partner force in a deliberate detention operation. New Zealand could have incurred state or executive[6] responsibility for the detention and the *refoulement* of the detainee into the exclusive control of Afghanistan. Second, even if New Zealand forces were not responsible for a deliberate detention on such an operation, they would still have had to comply with other legal obligations which applied at all times, including the duty to ensure respect for the Geneva Conventions by Afghanistan and the duty to prevent torture and mistreatment.

9. These two submissions are developed below.

Application of detention-related obligations

10. Certain obligations under IHL and human rights law only apply where a state has either detained or exercised sufficient control over an individual. These include the obligation not to detain a person arbitrarily,[7] the

[6] The concept of executive responsibility is used here to refer to responsibility under the New Zealand Bill of Rights Act 1990 (**NZBORA**) pursuant to s 3 of that Act, as distinct from state responsibility under public international law.

[7] Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law* (CUP, Cambridge, 2009) (**ICRC Study**) at Rule 99 summarising the scope of the rule under customary international humanitarian law (**IHL**); International Covenant on Civil and Political Rights 1435 UNTS 357 (signed 16 December 1966, entered into force 23 March 1976) (**ICCPR**), art 9(1); and NZBORA, s 22. Since there is no authority to detain a person in a non-international armed conflict under treaty or customary IHL, for a detention to have been lawful, would have needed to be authorised under a relevant SCR and/or domestic law of the host state: Synopsis of Submissions for Jon Stephenson for Public Hearing 2 at [13] and Keith Opinion at p5.

obligation to treat persons who have been detained in accordance with IHL and human rights law,[8] and the *non-refoulement* obligation.[9]

11. There is no reason in principle why these obligations could not have been engaged by the conduct of New Zealand forces on partnered operations. The same questions would arise as when New Zealand took detainees directly, specifically:

    (a) Did treaty or customary rule, or statutory provision, apply in the circumstances?[10]

    (b) Were there acts attributable to New Zealand which amounted to a detention?

    (c) If there was a detention, did it comply with the prohibition on arbitrary detention?

    (d) For as long as New Zealand was responsible for the detention, were the relevant legal obligations complied with?

    (e) When New Zealand's responsibility for the detention ended and the detainee was left in the exclusive control of Afghanistan, were there substantial grounds for believing that detainee would be in danger of torture or mistreatment?

12. The key legal rules of particular relevance to partnered operations are the customary rules governing attribution of conduct for the purposes of state responsibility, and the concepts of detention and *non-refoulement*.

State responsibility by attribution of the conduct of Afghan forces to New Zealand

13. In general, states can only be responsible for acts or omissions which are independently attributable to them under the customary law of state responsibility.[11]

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[8] Treaty and customary IHL and international and domestic human rights law variously set out rights of persons who have been arrested or detained, which include the to be informed at the time of the arrest of the reasons for it (ICCPR, article 9(2); and NZBORA, s 23(1)(a)); the right to consult a lawyer without delay and to be informed of that right (NZBORA, s 23(1)(b)); the right to apply to a court without delay for *habeas corpus* (ICCPR, art 9(4); and NZBORA, s 23(1)(c)); and the right to be free from torture and ill-treatment (ICRC Study, rules 87 and 90; AP II, art 5(3); ICCPR, art 7; NZBORA, ss 9 and 23(5)). It is noted that while s 23(1) of the NZBORA affirms that the rights in that subsection apply to "everyone who is arrested or who is detained under any enactment" and therefore may have a more limited application, neither s 23(5) of the NZBORA nor article 9 of the ICCPR is so limited.

[9] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment NZTS 1989 NO 14 (signed 10 December 1984, entered into force 26 June 1987) (**CAT**), art 3(1); ICCPR, art 7; and NZBORA, ss 9 and 23(5).

[10] This is the question of whether the relevant obligations apply extraterritorially in the circumstances, which has been addressed in previous submissions.

[11] International Law Commission Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries (**ARSIWA**), article 2.

14. One of the more basic rules of attribution is that the acts and omissions of a state's own organs will be attributable to the state.[12] Applying this rule, all acts and omissions of New Zealand on partnered operations would have been attributable to New Zealand.

15. The more difficult question is whether and how the conduct of Afghan forces on such operations could have been attributable to New Zealand. There are two rules of attribution which could have applied to this conduct, depending on the circumstances of the operation.

16. The first is the rule that where a state places one or more of its organs "at the disposal of" another state, the acts and omissions of those organs will be attributable to the other state.[13] It is acknowledged this rule addresses the "limited and precise" circumstances where the loaned force "may temporarily act for [the other state's] benefit and under its authority" and, as such, is unlikely to apply in circumstances where Afghan commanders retain full command.[14] However, as the Crown Agencies frankly acknowledged in their reply submissions following Public Hearing 2, the possibility cannot be ruled out that what appeared to be partnering operations were really means of achieving ISAF or national objectives.[15]

17. The second potentially relevant rule is the rule providing for joint state responsibility. Nollkaemper and Jacobs argue that joint or shared responsibility has an important function in international law, since:[16]

> The involvement of a multiplicity of actors in cases of concerted action may lead to blame shifting (or "buck passing") between the various actors involved.

18. The rule is reflected in article 47(1) of the International Law Commission (**ILC**)'s Draft Articles on the Responsibility of States for Internationally Wrongful Acts (**ARSIWA**) which provides:

> Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

19. The commentary to article 47(1) notes:[17]

> Several States may be responsible for the same internationally wrongful act in a range of circumstances. For example, two or more States might combine in carrying out together an internationally wrongful act in circumstances where they may be regarded as acting jointly in respect of the entire operation. In that case the injured State can hold each responsible State to account for the wrongful conduct as a whole.

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[12] ARSIWA, article 4.
[13] ARSIWA, article 6.
[14] ARSIWA commentaries on article 6 at (1). Doc 06/05 at p13 – "Partnered operations do not establish a transfer of authority between ISAF and the ANSF".
[15] Crown Agencies' memorandum dated 13 June 2019 at [16]. It is acknowledged that in making that submission the Crown Agencies were speaking purely hypothetically.
[16] Andre Nollkaemper and Dov Jacobs "Shared Responsibility in International Law: A Conceptual Framework" (2013) 34(2) Mich JIL 359 at 391-392.
[17] ILC commentary on article 47 at (2).

20. The commentary notes that in general, the principle of independent state responsibility means that different states' responsibilities should be assessed separately and that states should only be responsible for acts or omissions which are attributable to them. However, it places a caveat on that by noting:[18]

> In the application of that principle, however, the situation can arise where a single course of conduct is at the same time attributable to several States and is internationally wrongful for each of them. It is to such cases that article 47 is addressed.

21. Both the text and commentary of article 47(1) indicate that it is targeted at concerted *conduct.* This contrasts with the concept of joint and several liability in domestic tort law which focuses on co-responsibility for the same *damage*.

22. While, as scholars have noted, international jurisprudence on joint state responsibility is underdeveloped,[19] the issue arose in the context of the *Oil Platforms* case. In that case Iran had alleged that the United States of America had breached provisions of a bilateral treaty by attacking and destroying oil platforms in the Persian Gulf. The United States counter-claimed that Iran had also violated the treaty by laying mines and harassing commercial shippers passing through the Gulf, including as part of the conduct of the Iran-Iraq War. The majority of the International Court of Justice (**ICJ**) concluded that the United States' counter-claim was not made out on the facts, and therefore did not consider the issue of whether relevant conduct could be attributed to Iran as opposed to Iraq.

23. In his separate opinion, Judge Simma concluded he would have upheld the counter-claim on the basis of the principle of joint and several liability, which his Excellency recognised as a general principle of international law. In his analysis Judge Simma distinguished article 47 of the ARSIWA as inapplicable because there was no suggestion Iran and Iraq had co-operated to harass commercial shippers in the Persian Gulf. Judge Simma noted:[20]

> In the context of the specific variant of the United States counter-claim, Article 47 would apply only if both Iran and Iraq were responsible for a given action – *for instance, if Iran had carried out an attack against a ship engaged in treaty-protected commerce, jointly planning and co-ordinating the operation with Iraq*. However, in the present case, the reality is such that the two States *never acted in concert with respect to a specific incident*, and thus it always was either Iran or Iraq which was responsible for a given incident. As a result, Article 47, which requires both States to be responsible for the same internationally wrongful act, cannot be applied to the specific counter-claim
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> (emphasis added)

24. The important point for present purposes is Judge Simma's clarification that article 47(1) is concerned primarily with concerted conduct, and can be satisfied by states planning and co-ordinating together to carry out an

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[18] ILC commentary on article 47 at (4).

[19] John Noyes and Brian Smith "State Responsibility and the Principle of Joint and Several Liability" (1988) 13(2) Yale JIL 225 at 225, endorsed 25 years later by Nollkaemper and Jacobs, above n 16, at 363.

[20] *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America) (Judgment)* (6 November 2003) separate opinion of Judge Simma at [76].

operation. However, his Excellency's conclusion that joint and several liability is a general principle of law is also relevant to the extent it signals judicial comfort with the recognition of wider principles of joint state responsibility in international law.

25. It is submitted that article 47(1) could have been engaged by deliberate detention operations involving New Zealand and Afghan forces. It has long been recognised that in an armed conflict involving multiple states, it can be difficult to determine which allied state is responsible for a detention, and that in such cases, joint responsibility should be recognised. In this regard, in its commentary on article 12 of the Third Geneva Convention which allocates responsibility for treatment of prisoners of war (**POW**) in international armed conflicts (**IACs**), the International Committee of the Red Cross (**ICRC**) noted:[21]

> Whether the case involves a coalition of States, an international armed force or any other organization within which military personnel of several States fight side by side, one general principle prevails: *wherever it is impossible or difficult, for any reason, to determine which is the State which has captured prisoners of war and consequently is responsible for them, this responsibility is borne jointly by all the States concerned. In such a case, the broadest obligations in the humanitarian field of one or several of the States concerned must of course be applied by all of them.*
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> (emphasis added)

26. In the context of partnered detention operations, the effect of applying article 47(1) would be to attribute the conduct of each state on the operation to both states.

27. Importantly, the rule would not permit the attribution of the conduct of either New Zealand or Afghan forces to the other state after the operation was completed. Once a targeted individual was detained and transferred into custody, Afghanistan would bear sole responsibility for the ongoing detention.

28. At this point it may be helpful to refer to consider how New Zealand conceived of partnered operations and the relationship between NZSAS and Afghan forces. The Chief of Defence Force (**CDF**) Directive authorising the first rotation of NZSAS Task Force 81 (**TF 81**) noted:[22]

> The basis for the relationship is that TF 81 is partnering with the CRU *as equals*, clearly understanding that COIN and CBT in AFG are primarily Afghan problems requiring Afghan solutions, supported by the capability and capacity of ISAF.
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> (emphasis added)

29. A TF 81 briefing document also noted:[23]

> **Partnering**: A habitual relationship between ANSF and ISAF Units that must pervade all aspects of life for an ANSF Unit through *mutual co-operation and a responsibility for planning preparation, execution and post operational assessments towards the achievement of joint operational effects.*

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[21] ICRC commentary on article 12 to the Third Geneva Convention (1960).
[22] Doc 05/09 at [22].
[23] Doc 06/05 at p37.

(emphasis added)

30. This briefing also acknowledged that NZSAS personnel "assist[ed] in planning and conduct of operations". It is submitted that in some cases, NZSAS personnel did more than simply assist. A declassified legal checklist describes a number of different operation types, first among them "ISAF-led" operations.[24] The NZSAS briefing mentioned above noted that TF 81 and Afghan CRU forces worked "*shonna bi shonna* [sic]" [25] – shoulder to shoulder. If such a degree of close co-operation on an operation were not regarded as sufficient to amount to a single course of conduct attributable to both states for the purpose of article 47(1) of the ARSIWA, when else could the principle of joint responsibility be engaged?

Joint state responsibility and non-refoulement

31. It follows that the joint state responsibility rule provides a legal basis for attributing the conduct of Afghan forces on deliberate detention operations to New Zealand. It is submitted that the rule also provides a conceptual basis for the application of the *non-refoulement* principle to New Zealand.

32. The principle of *non-refoulement* does not have one singular expression in law. It is most commonly associated with refugee law where it has been described as the "cornerstone of refugee protection".[26] Article 33(1) of the 1951 Geneva Convention (**Refugee Convention**) provides:

> No Contracting State shall *expel* or *return ("refouler")* a refugee *in any manner whatsoever* to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion."
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> (emphasis added)

33. Subsection (1) is subject to subsection 33(2) which provides:

> The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

34. The concept of a "refoulement" under article 33(1) is wide. As the United Nations Human Rights Committee (**UNHRC**) has noted:[27]

> The prohibition of refoulement to a danger of persecution under international refugee law is applicable to any form of forcible removal, including deportation, expulsion, extradition, informal transfer or "renditions", and non-admission at the border in the circumstances described below. This is evident from the wording of Article 33(1) of the 1951 Convention, which refers to expulsion or return (refoulement) "in any manner whatsoever"

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[24] Doc 06/04.
[25] The correct transliteration of this term is *shona ba shona*.
[26] United Nations Human Rights Committee *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (26 January 2007) (**UNHRC Advisory Opinion**) at [5].
[27] UNHRC Advisory Opinion at [7].

35. A similar principle of *non-refoulement* is affirmed in human rights treaties and instruments. Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (**CAT**) expressly provides:

> 1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights

36. Article 7 of the ICCPR and s 9 of the NZBORA affirm the rights to be free from torture and other forms of cruel, inhuman and degrading treatment in more general terms. However, these rights have been held to imply a *non-refoulement* obligation.[28]

37. Unlike the principle in article 33(1) of the Refugee Convention, the principle of *non-refoulement* to torture and other mistreatment in human rights law is not subject to any exceptions. The principle also applies extraterritorially where a state exercises effective control over an individual and transfers them into the exclusive control of another state. In this regard New Zealand has acknowledged it had to comply with the *non-refoulement* principle when it detained people in Afghanistan directly.[29]

38. It follows the key issue for present purposes is whether New Zealand's participation on deliberate detention operations can amount to the exercise of control and then *refoulement* of a detainee to Afghanistan. It is submitted that it can. There is no conceptual difficulty in recognising New Zealand forces as exercising sufficient control over the detainee. They can be jointly responsible for the detention. Under the principle of individual or independent state responsibility, a state incurs responsibility for all acts and omissions which are attributable to it. As submitted above, in deliberate detention operations, that includes the conduct of Afghan forces on those operations. Once that is recognised, there is also no conceptual difficulty in recognising that the termination of the detention on completion of the operation amounts to a *refoulement*. The detainee has been uplifted and then left in the exclusive control of Afghanistan.

39. It would be consistent with the concept of "return" in article 3 of the CAT and the principle implied in article 7 of the ICCPR and s 9 of the NZBORA to recognise the entire course of conduct on a partnered operation as a *refoulement*. In law and in fact, New Zealand will have assumed control over the detainee and delivered him or her into Afghan custody.

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[28] UNHRC General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) (10 March 1992) at [9]; and *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 282 (***Zaoui***) at [79]. The European Court of Human Rights has also applied article 3 of the European Convention on Human Rights in this way: see generally *Soering v United Kingdom* (1989) 11 EHRR 439.

[29] Doc 03/02 at [67].

Responsibility other than by joint state responsibility

40. Even without reference to the concept of joint state responsibility, it would have been possible for the actions of partner states *alone* to have given rise to a detention or *refoulement* on a given detention operation. That is because the concept of "detention" in human rights law means a deprivation of liberty, which may be effected by means other than physical restraint. A person may be deprived of their liberty wherever they are made to believe, on reasonable grounds, that they are not free to leave a place.[30]

41. It may be helpful to consider two examples. First, suppose Afghan and New Zealand forces plan and carry out a deliberate detention operation. New Zealand forces take the lead role and secure the target's house or compound, preventing the individual from escaping. Afghan CRU or NDS personnel then move in, restrain the person and effect an arrest. Alternatively, suppose Afghan forces take the lead or both forces secure the compound together. After effecting the arrest, Afghan CRU or NDS forces hand over the detainee to New Zealand forces to transport to a nearby detention facility. The vehicle is driven by a New Zealand officer and the detainee is accompanied by New Zealand officers. On arrival the detainee is processed by New Zealanders before being left in the custody of Afghan forces. In each of these cases, the detainee would have been deprived of his or her liberty at various points *solely by conduct attributable to New Zealand, without the need to rely on conduct ostensibly attributable to Afghanistan alone*, albeit potentially for a brief time in the first example.

42. The *non-refoulement* principle could also have applied in these cases. In each situation, again applying the principle of individual or independent state responsibility, New Zealand would have assumed control over the detainee before relinquishing that control to Afghan forces. The very purpose of a deliberate detention operation is to control an individual and deliver them into Afghan custody.

43. It may be contended that temporary deprivations of liberty should not amount to detentions or give rise to *non-refoulement* obligations. That is not accepted. Even brief deprivations of liberty may amount to detentions where they are "substantial" having regard to the nature, purpose, duration and effect.[31] In deliberate detention operations, even brief deprivations of liberty may have serious consequences, especially where there are substantial grounds for believing the detainee is in danger of being subject to torture or mistreatment by Afghan forces.

44. It may also be contended that the concept of a "detaining authority" is embedded in international humanitarian law and practice and applying the relevant principles in this way would cut across that body of law and create too low a threshold for recognition of a "detaining authority". Such a

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[30] See generally Andrew Butler and Petra Butler (eds) *The New Zealand Bill of Rights Act: A Commentary* (2 ed, LexisNexis NZ, Wellington, 2014) at [19.6.2] - [19.6.15] and the Human Rights Committee General Comment No. 35 – Article 9: Liberty and Security of the Person (23 October 2014).

[31] *Police v Smith* [1994] 2 NZLR 306 (CA) at 316. The European Court of Human Rights takes a similar approach in distinguishing between "restrictions" and "deprivations" of liberty: see eg. *Austin v UK* (2012) 55 EHRR 14 (GC).

contention would be misplaced. The concept of a "detaining authority" is limited to the IHL applicable in IACs, set out in the first to fourth Geneva Conventions and Additional Protocol I (**AP I**). It has no application in non-international armed conflicts where there are no comparable rules or conceptions similar to that of a detaining authority or POW. Moreover, the 1960 ICRC commentary to article 12 of the Third Geneva Convention also suggests that even by 1960, the concept of a detaining authority was proving increasingly difficult to apply in practice especially to multinational operations.[32]

45. Given the absence of relevant rules under the IHL applicable in non-international armed conflicts, there is no conceptual difficulty in human rights law and the principle of *non-refoulement* filling the gap. No issues of inconsistency between the bodies of law arise. In any event, as submitted during Public Hearing 3, the "tools" available for resolving true conflicts between IHL and human rights law principles are limited.[33]

Policy objections

46. The declassified documents suggest that New Zealand officials were concerned about the potential consequences if partner forces were found to owe legal obligations arising from detentions on partnering operations. Two of the main concerns which appear to have been that:

(a) New Zealand forces would not have been able to comply with the legal obligations arising from detentions.

(b) Recognising New Zealand forces as responsible for detentions would have signalled a lack of respect for Afghan sovereignty and the enforcement of Afghan law.

47. Neither of these objections stands up to scrutiny.

Compliance

48. If New Zealand were legally responsible for detentions on partnered operations, three obligations would have followed: the obligation not to detain a person arbitrarily, the obligation to treat a person in detention in accordance with relevant IHL and human rights law, and the *non-refoulement* obligation. Each of these obligations could have been complied with.

49. Regarding the prohibition on arbitrary detention, New Zealand forces had authority to detain under SCR 1386 (2001). While the point is not free from doubt,[34] it is likely that SCR 1386 (2001) and relevant ISAF policies relating

[32] Paragraph [25] above.
[33] Synopsis of Submissions of Counsel for Jon Stephenson for Public Hearing 3 at [40]-[45].
[34] Compare Bruce Oswald "Some controversies of detention in multinational operations and the contributions of the Copenhagen Principles" (2013) 895(95) IRRC 707 at 713 suggesting that SCRs may be too vague to authorise detention in a non-arbitrary manner, with *Serdar Mohammed v Secretary of State for Defence* [2017] UKSC 2 in which a majority of the United Kingdom Supreme Court held the

to detention authorised detention in a manner which was sufficiently clear and rational so as not to be arbitrary. Provided the guidance was complied with, it is unlikely the detention would be arbitrary.

50. Regarding the obligation to treat detainees in accordance with relevant IHL and human rights law, these obligations would only have applied for as long as New Zealand was legally responsible for the detention. As submitted above, this responsibility would have ceased, at the latest, on the completion of the operation. In most cases, then, the only relevant obligations that would have applied would have the obligation to inform the detainee of the reasons for his or her arrest and the obligation to ensure he or she was not tortured or mistreated during the operation. Those would not have been onerous obligations.

51. Regarding the principle of *non-refoulement*, New Zealand could have complied with this obligation by determining, before commencing an operation, whether there were substantial grounds for believing that detainees taken on the operation would be in danger of being tortured or mistreated once in the exclusive control of the Afghan authorities. If such a risk existed, New Zealand could have sought appropriate assurances from the Afghan government to address the risk. If it were not possible to obtain the necessary assurances, New Zealand would have been obliged not to have participated in the operation.

52. If New Zealand were able to obtain appropriate assurances, the given operation proceeded and the detainee captured and detained in an Afghan facility, the issue would arise as to whether New Zealand would have had a legal obligation to monitor the welfare of that person. It is submitted there would have been no mandatory obligation to do so in the circumstances. Article 12 of the Third Geneva Convention does provide:

> Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody.
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> Nevertheless *if that Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war.* Such requests must be complied with.
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> (emphasis added)

53. However, this rule only applies to the transfer of POWs in IACs. There are no equivalent rules under common article 3 or Additional Protocol II (**AP II**), or in customary international law.

54. While not under any mandatory obligation to monitor or take back detainees, however, New Zealand would have had an obligation pursuant to common article 1 of the Geneva Conventions to ensure that Afghanistan respected the Geneva Conventions, which would have imposed positive

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detention of the plaintiffs under SCR 1386 (2001) and ISAF and UK policy was lawful and non-arbitrary.

obligations to use due diligence to ensure that Afghanistan was not continuing to commit breaches of the Conventions and to bring it back into a position of compliance. This duty could have required New Zealand to take reasonable steps to monitor the welfare of those detained on partnered operations. As the ICRC noted in its 2016 commentary on common article 1:[35]

> In the case of the transfer of detainees to a co-belligerent, non-belligerent or neutral State, the High Contracting Parties should, even absent specific provisions dealing with post-transfer responsibilities (see e.g. Article 12(3) of the Third Convention), monitor the fate of those transferred and, if necessary, exercise their influence in order to ensure observance of the Conventions by the receiving State.

55. The scope of the duty to ensure respect is considered in more detail below. The short point for present purposes is that New Zealand officials would not have found themselves having to *demand* to the Afghan government that they return prisoners taken on partnered obligations in a manner which rendered Afghan forces *legally obliged* to accede to such request. The obligations on New Zealand would have been limited to using best endeavours to ensure respect for the Conventions only.

56. Concluding on this objection, New Zealand could have complied with its legal obligations. It is acknowledged that the consequences of compliance could potentially have raised political difficulties, especially if New Zealand had been forced to the conclusion that deliberate detention operations needed to cease unless and until appropriate assurances could be obtained. As Judge Advocate General Riordan submitted during Public Hearing 2 in relation to the ROE, however, where political or military and legal imperatives are in conflict, the legal imperatives must prevail. No political imperative can excuse an arbitrary detention or *refoulement* to torture.

No infringement of Afghan sovereignty

57. The other main policy objection appearing in the Crown Agencies presentations and documents is that most partnered operations were primarily operations to enforce Afghan criminal law, therefore, recognising joint legal responsibility would amount to an inappropriate interference with the enforcement of that law by Afghanistan.

58. In response, the first point is that, as submitted above, the extent of legal obligations on New Zealand arising from partnered operations would likely have been be limited to complying with the prohibition of arbitrary detention, carrying out the detention humanely and complying with the *non-refoulement* principle. It is not suggested that partner forces would remain responsible for the detention even after an operation, while the detainee awaited trial. It is also important to note that mere application of the *non-refoulement* principle does not amount to an interference with the sovereignty of the receiving state. As the Supreme Court of New Zealand observed in *Zaoui v Attorney-General (No 2)*, referring to ss 8 and 9 of the NZBORA:[36]

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[35] ICRC commentary on article 1 of the First Geneva Convention (2016) at [168].
[36] *Zaoui*, above n 28, at [79].

> 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 articles 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.*
>
> (emphasis added)

59. The second key point is that, to the extent New Zealand did assist Afghanistan on law enforcement operations, that was at the request and with the consent of Afghanistan. New Zealand had express authority to assist Afghan authorities to provide security under the relevant SCRs. This included authority to use force and to detain where necessary for imperative reasons of security.

60. Under this authority, New Zealand forces could have acted lawfully in a manner which was inconsistent with the enforcement of Afghan criminal law, at least in the short term. For example, New Zealand forces had lawful authority under SCR 1386 (2001) and the IHL applicable in non-international armed conflict to kill insurgents who were subject to an Afghan arrest warrants while avoiding responsibility under Afghan domestic law pursuant to the relevant ISAF and New Zealand agreements with the government of Afghanistan.

Conclusion

61. It follows there is no reason in principle or policy why the actions of New Zealand forces on deliberate detention operations could not have engaged state and executive responsibility. Whether such responsibility actually arose in relation to Operation Burnham, Nova or Yamaha will depend on the facts as the Inquiry finds them to be.

62. It is acknowledged that the proposed interpretation of the relevant rules of state responsibility, IHL and human rights law diverges somewhat from how the Crown interpreted those obligations at the time. However, it should be recalled that on 18 August 2010, shortly before Operation Burnham occurred, former Minister of Foreign Affairs Hon Murray McCully noted on the margin of a briefing paper next to advice that no such obligations applied: "*I do not agree with this. This is a developing area of law and is not 'clear*'".[37]

63. The reality is that even at the time, a large number of Crown officials and advisers, including senior legal advisers, considered that New Zealand's conduct on partnered operations resulting in detentions could have given rise to some sort of obligation. This was variously described as a "*moral obligation*",[38] a "*moral/political obligation*",[39] a "*moral, and arguably legal,*

[37] Doc 06/08 at [4].
[38] Doc 06/05 at p20.
[39] Doc 06/08 at [30].

obligation"[40] and a "*moral and legal duty*".[41] In his opinion, the Solicitor-General noted that "*clarification*" of relevant legal obligations over time could "*raise doubts about the lawfulness of New Zealand's current or continuing practices*".[42]

64. Mr Stephenson submits the relevant obligations were legal obligations not to detain a person arbitrarily, to treat people in detention in accordance with relevant IHL and human rights law and to comply with the principle of *non-refoulement*. These obligations arose under general international law, IHL, the CAT, the ICCPR and the NZBORA.

Other obligations not dependent on a detention

65. As noted above,[43] whether or not New Zealand incurred legal responsibility for detentions on partnered operations, New Zealand forces and officials were also required to comply with a number of other duties under international law which applied at all times. These included:

(a) The undertaking to respect and ensure respect for the Geneva Conventions in common article 1 of the Geneva Conventions.

(b) The duty to co-operate to bring to an end serious breaches of peremptory norms affirmed in article 41(2) of the ARSIWA.

(c) The duty to take positive steps to prevent torture in article 2 of the CAT.

66. During Public Hearing 3, the Chairman of the Inquiry indicated it would be helpful if counsel could provide additional submissions on the scope of common article 1 of the Geneva Conventions. These submissions are provided below. The duty to co-operate under article 41(2) of ARSIWA and the duty to prevent torture under article 2 of the CAT were addressed in submissions for Public Hearing 2.

The duty to ensure respect for the Geneva Conventions

General observations

67. Common article 1 appears in each of the four main Geneva Conventions. It provides:

> The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

68. Common article 1 is not a "mere stylistic clause" or a statement that the obligations in the Conventions are owed *erga omnes* with the procedural consequences for enforcing breaches that entails, but is a specific legal obligation with imperative force.[44] It applies to all states parties to the Conventions and in all circumstances, not just to the parties to an armed

[40] Doc 05/36 at [18].
[41] Doc 03/01 at [9].
[42] Doc 03/02 at [66.2].
[43] Paragraph [9].
[44] ICRC commentary on article 1 of the First Geneva Convention (2016) at [121].

conflict during the duration of the armed conflict. It imposes twin duties on all states parties "to respect" the Geneva Conventions themselves and "to ... ensure respect" for the Geneva Conventions by others, in all circumstances.

69. The main issue for the purpose of the Inquiry is the scope of the duty "to ... ensure respect" for the Conventions by other states, and in particular, how that duty might have applied to New Zealand with respect to breaches of common article 3 to the Conventions by Afghanistan.

The duty to ensure respect by others

70. The text of common article 1 does not expressly state that the duty "to ... ensure respect for the Conventions in all circumstances" includes a duty to ensure respect by other states. The *travaux preparatoires* to the Conventions are also inconclusive on this point.[45] However, the consistent practice of states has been to recognise that common article 1 does indeed impose such a duty.[46] New Zealand has recognised this in the context of its operations in Afghanistan.[47]

71. State practice demonstrates that the duty to ensure respect is not a duty to ensure a particular outcome, but is a duty to use due diligence to ensure that other states respect the Conventions. The obligation is not to take every possible measure available to the state, but to choose from a range of reasonable measures. The obligation necessarily excludes actions which would be unlawful, such as the use of force other than in accordance with the UN Charter system.[48]

72. As commentators have observed, the due diligence duty has both negative and positive aspects.[49] In terms of negative aspects, the duty may require states to refrain from offering aid, assistance or encouragement to another state where there is a risk this could contribute to breaches of the Conventions by the other state. The standard in this regard is lower than for state complicity in internationally wrongful acts or complicity in international crimes.[50] The comments of the International Court of Justice in the *Genocide Case* on the scope of the obligation to prevent genocide

[45] ICRC commentary on article 1 of the First Geneva Convention at [122]-[124] and [155]. See also Knut Dormann and Jose Serralvo "Common Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations" (2014) 895 IRRC 707 at 710-716. For an assessment from a more conservative perspective which reaches essentially the same conclusion, see Carlo Focarelli "Common article 1 of the 1949 Geneva Conventions: A Soap Bubble?" (2010) 21(1) EJIL 125 at 129-133.

[46] ICRC commentary on article 1 of the First Geneva Convention (2016) at [171] and footnotes 97-103; and Dormann and Serralvo, above n 45, at 712-716.

[47] Crown Agencies presentation for Public Hearing 3 at [84]-[87].

[48] Dormann and Serralvo, above n 45, at 726.

[49] Dormann and Serralvo, above n 45 at 719; and ICRC commentary on article 1 of the First Geneva Convention (2016) at [154].

[50] ICRC commentary on article 1 of the First Geneva Convention (2016) at [159]-[160]. Complicity rules are addressed in more detail below.

in article 3 of the Genocide Convention are instructive. There the Court noted:[51]

> [A] State may be found to have violated its obligation to prevent even though it had no certainty, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way; for it to incur responsibility on this basis *it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed.*
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> (emphasis added)

73. The standard set out in the highlighted text is constructive knowledge of a serious risk. Applied to common article 1 and partnered operations, the negative aspect of the duty to ensure respect arguably required that, wherever New Zealand knew or should have known that there was a serious danger that people detained on a partnered operation would be tortured or mistreated, to obtain appropriate assurances that this would not occur or cease to participate. As the ICRC noted in its 2016 commentary on common article 1:[52]

> In the event of multinational operations, common article 1 thus requires High Contracting Parties to opt out of a specific operation if there is an expectation, based on facts or knowledge of past patterns, that it would violate the Conventions, as this would constitute aiding or assisting violations.

74. Common article 1 also imposes positive obligations to take steps to bring ongoing breaches of the Conventions by other states to an end. Again, the obligation is one of due diligence. what is required will depend on the specific circumstances, including:[53]

> ... the gravity of the breach, the means reasonably available to the State, and the degree of influence it exercises over those responsible for the breach.

In this regard, in IACs, the duty overlaps somewhat with article 89 of Additional Protocol I (**AP I**) to the Conventions.

75. Partnering can be a means of complying with this obligation, not just a means of breaching it. Again as the ICRC has noted:[54]

> The fact, for example, that a High Contracting Party participates in the financing, equipping, arming or training of the armed forces of a Party to a conflict, or even plans, carries out and debriefs operations jointly with such forces, places it in a unique position to influence the behaviour of those forces, and thus to ensure respect for the Conventions.

76. At the same time, this will only be the case where the knowledge, actual or constructive, of a serious danger that partnering will contribute to breaches of the Conventions is not present.

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[51] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* (26 February 2007) (**Genocide Case**) at [432].
[52] ICRC commentary on article 1 of the First Geneva Convention (2016) at [161].
[53] ICRC commentary on article 1 of the First Geneva Convention (2016) at [165].
[54] ICRC commentary on article 1 of the First Geneva Convention (2016) at [167]-[168].

77. In their presentation for Public Hearing 3, the Crown Agencies submitted that New Zealand can be considered to have complied with the duty to ensure respect for common article 3 to the Geneva Conventions by Afghanistan because:[55]

> New Zealand forces were engaged in a mentoring relationship with Afghan law enforcement personnel/officials designed to promote greater understanding of and adherence to human rights and international obligations within Afghanistan. ... Furthermore New Zealand was part of a wider effort ... to develop the capacity of the Afghan security forces and the criminal justice system.

78. It is acknowledged that, to the extent New Zealand engaged in training and mentoring of CRU personnel, this could have gone some way toward fulfilling New Zealand's positive obligations under common article 1, however, the Inquiry would need to be satisfied on the evidence that the training and mentoring which actually occurred was sufficiently robust. In addition, to submit that New Zealand "can be considered to have complied" with the obligation because of the provision of unspecified training and mentoring suggests that compliance with common article 1 is a box-ticking exercise. Importantly, the Crown Agencies' submission does not address the fact the duty under common article 1 includes negative obligations on states to refrain from close co-operation in certain circumstances where the state has actual or constructive knowledge that participation may contribute to breaches of the Conventions.

79. It is respectfully submitted that before it can conclude whether New Zealand complied with its negative and positive obligations under common article 1 in connection with the events at issue in the Inquiry, the Inquiry will need to reach conclusions on matters of fact such as what New Zealand officials knew or ought to have known about the commission of torture and mistreatment in Afghanistan and when that knowledge arose or could have arisen. It would then need to consider the appropriateness of New Zealand's decision to participate in each deliberate detention operation within the scope of the Inquiry in the light of that actual or constructive knowledge. The wider forms of training or mentoring assistance provided by New Zealand would only be relevant to extent they bore upon the risk that New Zealand's participation in those specific operations would contribute to breaches of the Convention.

STATE COMPLICITY

Issues

80. In addition to due diligence obligations, New Zealand also had obligations not to be complicit in the internationally wrongful acts of other states. These obligations arose from two main sources. First, New Zealand was bound by the general rules of customary international law prohibiting complicity. The most prominent evidence of these rules is article 16 of the ARSIWA and the associated commentary. Second, New Zealand was bound by the specific rule of customary international law prohibiting the

[55] At [84].

giving of aid or assistance in maintaining serious violations of peremptory norms. This rule is expressed in articles 40 and 41 of the ARSIWA.

81. Depending on the facts as the Inquiry finds them to be, complicity rules could have been engaged in relation to wrongful acts committed by Afghan or United States forces on Operation Burnham or by Afghan forces on or after Operation Yamaha.

82. Both Sir Kenneth Keith and the Crown Agencies addressed the scope of the general complicity rules in their presentations. Two main issues arose which are addressed here by way of reply:

(a) Whether the general complicity rules can be satisfied by omission.

(b) What mental element(s) are required for the general complicity rules.

Complicity and omissions

83. Article 16(a) of the ARSIWA is silent on whether the aiding or assistance requirement can be satisfied by omission. However, article 2 of the ARSIWA provides that in general, both acts and omissions can amount to internationally wrongful acts. As the International Law Commission noted in its commentaries:[56]

> Conduct attributable to the State can consist of actions or omissions. Cases in which the international responsibility of a State has been invoked on the basis of an omission are at least as numerous as those based on positive acts, and no difference in principle exists between the two

84. Individuals may also be complicit in international crimes by omission where there was a legal duty to act in the circumstances.[57]

85. Nevertheless, the *Genocide Case*, the ICJ, commenting on the difference between liability for failing to prevent genocide and complicity in genocide under the terms of the Genocide Convention, observed:[58]

> In the first place, as noted above, complicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrators of the genocide, while a violation of the obligation to prevent results from mere failure to adopt and implement suitable measures to prevent genocide from being committed. In other words, while complicity results from commission, violation of the obligation to prevent results from omission; this is merely the reflection of the notion that the ban on genocide and the other acts listed in Article III, including complicity, places States under a negative obligation, the obligation not to commit the prohibited acts, while the duty to prevent places States under positive obligations, to do their best to ensure that such acts do not occur.

86. Two comments can be made in response to these observations. First, the Court was considering the specific complicity rule in article 3 of the Genocide Convention, not the general complicity rules under customary

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[56] ILC commentary on article 2 at (4).
[57] *Prosecutor v Orić* IT-03-68-A Appeals Chamber (Judgment) (3 July 2008) at [43].
[58] *Genocide Case*, above n 51, at [432]. The statement was obiter because the Court was concerned with the interpretation of "complicity" in article 3 of the Genocide Convention, not article 16(a) of the ARSIWA.

international law.[59] Second, the comments were made in the context of the Court attempting to clearly distinguish between the obligations not to be complicit in genocide and the obligation to take steps to prevent genocide. In emphasising the various ways in which the obligation not to be complicit in genocide was more stringent, [60] however, the ICJ arguably overshot and inadvertently narrowed the scope of complicity liability. As Miles Jackson argues in his recent monograph:[61]

> Following the *Bosnian Genocide* case, [the ICJ's statement of principle] appears to be the prevailing position in international law. As a matter of principle, it is a misstep. As argued in Chapter 2, there is no good reason to exclude certain culpable omissions in the face of a specific duty from the ambit of responsibility for complicity. As a matter of basic usage, some omissions do assist in the commission of wrongdoing. Moreover, some omissions are sufficiently wrongful as to link the omitting party to the ensuing harm. In criminal law, the paradigm case of a cleaner intentionally failing to lock a bank so as to facilitate a robbery seems to exemplify the wrong of complicity. In respect of state complicity, the ILC itself cites Article 3(f) of the Definition of Aggression as an example of a primary complicity rule. States may allow their territory to be used by an aggressor state by omission—failing to object, for instance.

87. For these reasons it is submitted the ICJ's *obiter dicta* do not reflect the conduct requirement for state complicity under customary international law.

The mental element(s)

88. The general complicity rules clearly require that a state have some form of knowledge of the internationally wrongful act committed by the primary perpetrator. However, questions have arisen as to what degree of knowledge is required, and whether there is an additional requirement of intent to further the wrongful act.

Knowledge

89. Article 16(a) of the ARSIWA provides that to be complicit, a state must aid or assist another state "with knowledge of the circumstances of the internationally wrongful act". While there is little case law applying the rule, state practice supports the position that knowledge of the circumstances of the primary act will be found or imputed where the state:[62]

    (a) knew the primary act would be committed;

    (b) knew with something approaching a virtual certainty that the primary act would be committed; or

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[59] It is acknowledged that article 3 is worded generally and the ICJ also adverted to the relationship between article 3 and customary law in its judgment. However, in connection with the duty to prevent genocide, the ICJ also warned that the case should not be applied beyond its particular context: at [429].

[60] For instance, state complicity requires contribution by way of aiding or assisting, with mere encouragement not sufficient, and the mental element for state complicity requires knowledge: Miles Jackson *Complicity in International Law* (Oxford University Press, Oxford, 2015) at 154 and 159.

[61] Jackson, above n 60, at 156-157.

[62] Jackson, above n 60, at 161-162 and Harriet Moynihan "Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism" (Research Paper, Chatham House, November 2016) at [46].

(c) deliberately failed to inquire into whether the primary act would be committed when faced with clear indications that its aid or assistance could be used to commit the primary act (wilful blindness).

90. Declassified documents show that the Crown's own understanding of this element was that wilful blindness or potentially even constructive knowledge would have sufficed. As the Director-General of Defence Legal Services advised after the release of the *Evans* decision:[63]

> There may be occasions when constructive knowledge (ie knowledge that can be expected from reasonable inquiry) is enough. In the present case, for all of the reasons set out in the *Evans* decision, it can assumed [sic] that New Zealand is [now] constructively on notice that the NDS has used torture.

91. Regarding the application of the standard Harriet Moynihan has observed:[64]

> Where evidence stems from credible and readily available sources, such as court judgments, reports from fact-finding commissions, or independent monitors on the ground, it is reasonable to maintain that a state cannot escape responsibility under Article 16 by deliberately avoiding knowledge of such evidence.

92. Similarly Erika De Wit has argued:[65]

> If credible and readily-available reports of fact-finding commissions, independent monitors or international organisations such as the UN draw attention to systematic violations of international or international human rights law by the [primary perpetrator] state, actual knowledge on the part of the assisting State can be assumed. Under these circumstances, the assisting state will have to make prior inquiries into the specific purposes for which its assistance will be used by the recipient state. Anything else would amount to wilful blindness, that is, 'a deliberate effort by the assisting state to avoid knowledge of illegality on the part of the state being assisted, in the face of credible evidence of present or future illegality.'

93. In her article, De Wit placed a caveat on her conclusions with reference to the recent decision of the English Divisional Court in *R (Campaign Against Arms Trade) v Secretary of State for International Trade* (***CAAT***).[66] De Wit argued that this decision demonstrated that even wilful blindness may be difficult to demonstrate in practice. In that case, CAAT had sought judicial review of the United Kingdom government's decision to grant export licences for the sale or transfer of arms to Saudi Arabia. The United Kingdom government had put in place guidelines which were based on EU law and prohibited the granting of licences where there was a clear risk that items could be used in serious violations of IHL. It was common ground that the UK government had applied a forward-looking approach to the granting of licences and had not considered and investigated reports of systemic violations of IHL by Saudi Arabia in the past as part of the conflict in Yemen. CAAT argued this had been irrational.

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[63] Doc 06/10 at [36].
[64] Moynihan, above n 62,at [45].
[65] Erika De Wit "Complicity in Violations of Human Rights and Humanitarian Law by Incumbent Governments Through Direct Military Assistance on Request" (2018) 67 ICLQ 287 at 303.
[66] *R (on the application of Campaign Against Arms Trade) v Secretary of State for International Trade* [2017] EWHC 1754 (Admin).

94. The Divisional Court dismissed the challenge. It emphasised the prospective nature of the risk assessment, the fact that the United Kingdom government had access to constantly updated, classified material which was relevant to current and future risk and that the government had provided training to Saudi forces which gave it an insight into the system which should be taken into account. The Court also emphasised the difficulties of a third state making assessments about whether another state had committed violations of IHL, noting:[67]

> The close relationship between the UK Government and Saudi Arabia places [the government] in a position to garner more direct information about Saudi decision making than outside observers. Nonetheless, there would be inherent difficulties for a non-party to a conflict to reach a reliable view on breaches of International Humanitarian Law by another sovereign state. A non-party would not be likely to have access to all the necessary operational information (in particular, knowledge of information available at the time to the targeting decision-maker forming the basis of the targeting decision

95. Since De Wit's article was published, however, the Divisional Court's decision has been overturned.[68] The English Court of Appeal has held that the UK government's failure to assess the past compliance of Saudi Arabia with IHL was indeed irrational.[69] While the question of assessing past compliance with IHL was complicated, the government had been under a legal obligation to try to do so, on the basis of the information before it, and was competent to do so.

Intention

96. More contentious is whether there is a separate requirement that a complicit state intend to further the primary act. There is no such requirement in the text of article 16(a) of the ARSIWA, which only mentions knowledge of the circumstances of the internationally wrongful act. However, the commentaries to article 16(a) do note the article "deals with the situation where one State provides aid or assistance to another with a view of facilitating the commission of an internationally wrongful act" and that a state is not responsible "unless the relevant state organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct."

97. How should the Inquiry resolve this conflict between the text and commentary of article 16(a)? It is submitted it should apply the rules governing the recognition of rules of customary international law, which in their most general expression, require demonstration that customary rules be supported by both state practice and *opinio juris*. More specifically, state practice must be sufficiently "dense" in the sense of being "virtually uniform, extensive and representative".[70]

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[67] At [181](ii).

[68] *R (on the application of Campaign Against Arms Trade) v Secretary of State for International Trade* [2019] EWCA Civ 1020.

[69] At [138] and [144]-[145].

[70] ICRC Study on Customary IHL at p. xliii, with reference to Sir Humphrey Waldock, "General Course on Public International Law", Collected Courses of the Hague Academy of International Law (1962), Vol. 106 at 44; and the ICJ's decision in the *North Sea Continental Shelf* cases at [74].

98. In their presentation for Public Hearing 3, the Crown Agencies submitted there is "considerable consensus" for a requirement that complicit states intend to further the primary wrongful act.[71]

99. This statement, in addition to being an oxymoron, does not stand up to scrutiny. The Crown Agencies footnote their claim to one solitary reference: paragraph [64] of a paper by Harriet Moynihan. While Moynihan does conclude in that paragraph that "the better view appears to be that intent is a necessary part of article 16, in addition to knowledge", she does not elaborate on why that is her conclusion. In the preceding paragraphs, Moynihan acknowledges there are competing arguments both from principle and as a matter of policy as to why there may be no requirement of intention to further the wrongful act. While Moynihan does refer to state practice in the years leading up to the publication of the ARSIWA as "generally inclined" toward requiring intention, the example given – comments submitted by the United States of America to the ILC recommending that there be an intention requirement written in to article 16(a) – is not illustrative of her argument. Article 16(a) was not changed in accordance with the United States' proposal.

100. The Crown Agencies also supported their claim with reference to the following observations of the ICJ in the *Genocide Case*:[72]

> Before the Court turns to an examination of the facts, one further comment is required. It concerns the link between the specific intent (dolus specialis) which characterizes the crime of genocide and the motives which inspire the actions of an accomplice (meaning a person providing aid or assistance to the direct perpetrators of the crime): the question arises whether complicity presupposes that the accomplice shares the specific intent (dolus specialis) of the principal perpetrator. But whatever the reply to this question, there is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent (dolus specialis) of the principal perpetrator. If that condition is not fulfilled, that is sufficient to exclude categorization as complicity
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> (emphasis added)

101. The submission was that the underlined words support a conclusion that the ICJ understood state complicity as requiring proof of intent in addition to knowledge. However, the ICJ's comments were expressly *obiter* and it is by no means clear that the ICJ was, in fact, intending to suggest intention is required. Jackson has criticised similar arguments to those made by the Crown Agencies as "not a natural interpretation of the [ICJ's] judgment".[73]

102. Jackson also presents a contrasting view to Moynihan on whether state practice supports the existence of a requirement of intent to further the primary wrongful act. He argues it does not (at least, not yet).[74] Contrary to the submissions of the Crown Agencies, Jackson also emphasises there is no clear view among scholars on this issue, nor is there a clear argument for intention as a requirement based on principle or policy.

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[71] Crown Agencies' presentation for Public Hearing 3 at [100].
[72] Crown Agencies' presentation for Public Hearing 3 at [106].
[73] Jackson, above n 60, at 160.
[74] Jackson, above n 60, at 159-162.

103. It is therefore submitted the Crown Agencies have failed to demonstrate sufficiently dense state practice to support an intention requirement. The only mental element for which sufficient practice exists is knowledge.

International criminal law

104. During Public Hearing 3, the Crown Agencies submitted that the approach to complicity in international criminal law (**ICL**) should inform the Inquiry's assessment of the relevant mental element(s) for complicity under the general complicity rules. Scholars have observed that such analogies should be treated with care, given that complicity rules in ICL and general international law developed in different circumstances, are found in different sources and serve different purposes.[75] A finding that an individual is guilty of a crime against humanity or war crime is a substantively different matter from a finding that a state is complicit in one of any potential internationally wrongful acts.

105. To the extent the Inquiry considers it useful to refer to complicity rules in ICL, it is submitted there is no clear state practice in support of *mens rea* requirement of intent. While article 25(3)(c) of the Rome Statute requires that aid or assistance be given "for the purpose of facilitating the commission of [the primary crime]", the Solicitor-General's advice at the time of the events in Operation Burnham was that this standard could potentially be satisfied by constructive knowledge.[76] Further, in its leading decision on aiding and abetting in *Prosecutor v Šainović*,[77] the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (**ICTY**) held that a requirement of knowledge alone sufficed under article 7 of the ICTY Statute.[78]

Article 41(2) ARSIWA

106. Finally, it is noted that whether or not the general complicity rules require intention, the specific complicity rule in article 41 of the ARSIWA does not. Subarticle (2) provides:

> No State shall recognize as lawful a situation created by a serious breach [of an obligation arising under a peremptory norm of general international law], *nor render aid or assistance in maintaining that situation.*
>
> (emphasis added)

Dated 16 August 2019

Sam Humphrey
Counsel for Jon Stephenson

[75] De Wit, above n 65, at 307 footnote 132.
[76] Doc 03/02 at [25] and [33].
[77] *Prosecutor v Šainović* IT-05-87-A Appeals Chamber (Judgment) (23 January 2014).
[78] At [1617]-[1651], [1675]-[1678] and [1772]-[1773].