



Office of the Inspector-General of Intelligence and Security

Inquiry into possible New Zealand intelligence and security agencies'
engagement with the CIA detention and interrogation programme 2001-2009

PUBLIC REPORT

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I INTRODUCTION

“The use of torture and other prohibited forms of ill-treatment as a tool for obtaining confessions is a dangerous paradigm that undermines broader peace-building efforts. Torture does not work – it is an unreliable and ineffective tool for gathering accurate information. Notwithstanding the destructive nature of such practices on long-term stability, torture is illegal, immoral and wrong.”¹

Purpose of Inquiry

1. This is a Report of my Inquiry into whether New Zealand’s intelligence and security agencies and personnel knew of or were otherwise connected with, or risked connection to, the Central Intelligence Agency (CIA) detention and interrogation of detainees between 17 September 2001 and 22 January 2009 (the CIA programme).² My Inquiry also considered the adequacy of the agencies’ current policies and guidance materials, to ensure compliance with New Zealand’s domestic human rights law and its international legal obligations when cooperating with other nations.

Reporting

2. I have prepared a detailed classified Inquiry Report. I have consulted at length on that report with the New Zealand Security Intelligence Service (NZSIS or Service) and the Government Communications Security Bureau (GCSB or Bureau)(together, the intelligence and security agencies or agencies) and other affected parties. I am not able to disclose publicly all of the information that I obtained in this Inquiry.³
3. This public Report is a summary of that classified Report. It includes a summary of all factual matters material to my Inquiry and all my findings and recommendations. It is consistent with the full, classified Report which has been provided to the Minister responsible for the agencies, the Directors-General of the intelligence agencies, the former Directors of both agencies for the period covered by my Inquiry and other key Government agencies with responsibilities relevant to the matters covered in this Report.
4. In the interest of informing the public I describe in this report, to the extent possible, the role of the New Zealand intelligence and security agencies in supporting New Zealand military involvement in Afghanistan and how that gave rise to a risk of involvement in the CIA programme. I go on to consider whether and how the agencies had regard to that risk, in light

¹ Office of the United Nations (UN) High Commissioner for Human Rights (UNHCHR) and UN Assistance Mission in Afghanistan (UNAMA) *Treatment of Conflict-Related Detainees in Afghan Custody: Implementation of Afghanistan’s National Plan on the Elimination of Torture* (UNAMA and UNHCHR, Kabul, 2017) at 12.

² The Terms of Reference for the Inquiry are at Appendix A.

³ I am barred by law from disclosing information that, if publicly disclosed, would be likely to prejudice the entrusting of information to the New Zealand Government on a basis of confidence; prejudice the continued performance of the functions of an intelligence and security agency; or prejudice the international relations of the New Zealand Government: Intelligence and Security Act 2017 (ISA), s 188.

of their legal obligations under New Zealand law and New Zealand's international human rights obligations.

5. The principal emphasis of my conclusions and recommendations is on how the risks implicit in international intelligence-sharing and cooperation arrangements – particularly in the context of providing intelligence support to military operations – can best be anticipated and, where possible, mitigated. The Report's section on Best Practice is addressed to this.

Background to the Inquiry

6. On 9 December 2014, the United States Senate Select Committee on Intelligence published its redacted Executive Summary of its Report into the CIA's detention and interrogation of detainees in the period between 17 September 2001 and 22 January 2009).⁴
7. The Senate Report provided new detail about the CIA's treatment of suspected terrorists and their detention. It described a system of secret CIA detention centres established in regions across the world and the use of extraordinary rendition.⁵ The Report provided considerable and disturbing evidence about the torture and other cruel, inhuman, degrading treatment or punishment (CIDTP) of CIA detainees. It described the CIA's brutal interrogation techniques⁶ (called Enhanced Interrogation Techniques or EIT), its under-reporting of the number of people subjected to harsh interrogation techniques, its misinformation about the effectiveness or "success" of its programme and the transfer of detainees (by means of extraordinary rendition) upon capture to secret prisons run by the CIA in various cooperating countries around the world.

Relevance to New Zealand intelligence and security agencies

8. The Senate Report raised questions for my office as to whether New Zealand's intelligence and security agencies knew of, or were otherwise connected to, the activities detailed in the Senate Report, or to information obtained as a result of those activities. It also raised the broader question of what steps are taken by New Zealand when cooperating with other governments to safeguard against complicity in torture or implication in other wrongful acts.
9. Once I was aware that intelligence support was provided by the Bureau and the Service to the coalition military forces in Afghanistan and, more broadly, to the counter-terrorism efforts of New Zealand's foreign intelligence partners, I was satisfied that there was a sufficient public interest justifying the commencement of an own-motion Inquiry⁷ in order to answer the questions set out at paragraph 8 above. I adopted the same timeframe for my Inquiry as the US

⁴ United States Senate Select Committee on Intelligence *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program* (December 2014) (Senate Report); Executive Summary available at <https://fas.org/irp/congress/2014_rpt/ssci-rdi>. For completeness I note also the publication in December 2014 of a report containing the Minority Views of several members of the Senate Select Committee on Intelligence and the release in December 2014 of the June 2013 "CIA Comments on the Senate Select Committee on Intelligence Report on the Rendition, Detention and Interrogation Program".

⁵ See definition of "extraordinary rendition" in the glossary in Appendix E.

⁶ Senate Report, above n 4, at p 2.

⁷ This Inquiry was commenced under the Inspector-General of Intelligence and Security Act 1996 (IGIS Act), s 11(1)(a) and (ca). The corresponding provision in the ISA is s 158.

Senate Inquiry; that is 17 September 2001 to 22 January 2009. The specific terms of reference for my Inquiry are at Appendix A.

10. The question of whether New Zealand's intelligence agencies were connected to the CIA programme and whether there were, and are, adequate safeguards against complicity in acts of torture or CIDTP (including early alerts as to the possibility of legal or reputational risk) goes to the heart of whether New Zealanders can have confidence that the GCSB and the NZSIS act lawfully and properly.

Afghanistan and New Zealand involvement

11. The 11 September 2001 attacks in the United States (9/11) had an unprecedented impact on the global security environment, including in New Zealand. In the aftermath of 9/11, the GCSB and the NZSIS cooperated with other New Zealand government agencies and foreign governments in the common goal⁸ of disrupting and reducing the risk of terrorist attacks from Al Qa'ida. There was intense pressure on military forces and intelligence and security agencies across the world as they scrambled to understand and respond to the high risk of more terrorist attacks being perpetrated against civilian populations.
12. New Zealand's military involvement in Afghanistan began in December 2001 as part of Operation Enduring Freedom (OEF); a coalition of international forces led by the United States in response to 9/11. This international effort was based on the principle of collective self-defence. OEF's combat mission was focused on counterterrorism.
13. In parallel to OEF, the International Security Assistance Force (ISAF) was mandated by United Nations Security Council Resolution 1386 as an international coalition to help the Afghan government maintain security in Kabul and surrounding areas. The North Atlantic Treaty Organisation (NATO) took the lead of ISAF on 11 August 2003.⁹
14. Both OEF and ISAF continued until 28 December 2014 when the three year transition period process for transferring responsibility for security to the Afghan security forces was completed.
15. From 23 September 2003, the New Zealand Defence Force (NZDF) took command of the Provincial Reconstruction Team (PRT) located in the town of Bamian, in Bamyan Province.
16. The New Zealand intelligence and security agencies provided assistance to military operations in Afghanistan undertaken by the NZDF and the coalition forces and, more broadly, participated in information-sharing with overseas intelligence agencies (including the CIA) to facilitate the gathering of information about known or suspected terrorists. As part of the New Zealand Government's response, the GCSB provided intelligence support to the NZDF and coalition

⁸ Pursuant to *Threats to international peace and security caused by terrorist acts* SC Res 1368 (2001) and *Threats to international peace and security caused by terrorist acts* SC Res 1373 (2001).

⁹ Previously, ISAF command rotated between different nations every six months. These countries included the UK, Turkey, Germany and The Netherlands (in joint command).

forces in Afghanistan.¹⁰ Also during this period, the NZSIS agreed to the secondment of an NZSIS staff member to a partner agency on the basis that the staff member would then be deployed to Afghanistan as part of that partner agency's deployment.

Findings

17. It is important to state at the outset that I am satisfied that the agencies, the then Directors, and individual agency staff members had no direct involvement in the CIA's unlawful activities; nor were they complicit in any unlawful conduct.
18. My specific findings include:
 - 18.1. The NZSIS and the GCSB had no involvement with the CIA rendition¹¹ of detainees.
 - 18.2. The GCSB had no direct involvement with CIA detention of individuals. I found no evidence that the GCSB's intelligence activities in-theatre and from Wellington assisted or contributed to military chain-of-command decisions that led to the capture and then detention of individuals by the CIA, but the nature of signals intelligence (SIGINT) activity means GCSB involvement of that kind cannot be completely ruled out. In any event such involvement would have been a step distant from any kind of direct involvement. I found no evidence that the NZSIS was directly involved in the CIA programme in respect of detention.
 - 18.3. I found no evidence that GCSB or NZSIS personnel directly participated in or were present at CIA interrogations. However, there is evidence that NZSIS and GCSB received information from CIA detainee interrogations. In 2003, the Service provided questions for the CIA to put to a detainee, and received intelligence reports in response. The agency was not aware at the time that the detainee interrogations involved torture, although it was known that the detainee was being held by the CIA in an undisclosed location. One request from a GCSB staff member to attend an FBI detainee interrogation was declined by the then Director.
 - 18.4. Both the NZSIS and the GCSB maintained intelligence sharing and cooperation arrangements with their partner agencies, respectively the CIA and the National Security Agency (NSA),¹² during this period.
 - 18.5. GCSB did not adequately support its staff deployed in or otherwise engaged in intelligence activity in respect of Afghanistan, nor provide them with any policies or procedures relating to GCSB's human rights obligations, and the role of civilians, in a military

¹⁰ The deployment of GCSB personnel to Afghanistan in support of New Zealand military deployments (and the GCSB's later intelligence support to Operation Watea) was classified information until announced by the Director-General of the GCSB in his opening statement to the Intelligence and Security Committee on 20 February 2019.

¹¹ The Senate Report looks at the totality of the CIA programme which involved, at various points, rendition, detention and interrogation. This Inquiry too looks at each of those activities and possible New Zealand agency knowledge of or involvement in them.

¹² And with the knowledge that the NSA provided SIGINT, including that which originated with the GCSB, to the CIA.

environment working to support military operational objectives; NZSIS policies on human rights obligations relating to foreign intelligence cooperation were also insufficient.

- 18.6. GCSB and NZSIS did not provide adequate “eyes on” supervision of staff deployed to Afghanistan or seconded to a role in, or relating to, operations in Afghanistan.
 - 18.7. The then Directors of GCSB and NZSIS and the agency staff had a low level of awareness of the public allegations about the CIA programme, even after the middle of 2004 when, on my assessment, there was sufficient information in the public domain to put them clearly on notice and lead them to make their own inquiries and assessments.
 - 18.8. The then Directors of GCSB and NZSIS did not at the time adequately identify the potential legal and reputational risks for their organisations and the Government from engaging with the CIA, as an intelligence partner, when the CIA was responsible for alleged (and subsequently established) serious mistreatment of detainees. Thus the Prime Minister and Ministers were not informed and enabled to make decisions about how to deal with the risks in the context of New Zealand’s overall relationship with its foreign partners.
 - 18.9. The NZSIS provided some intelligence to the CIA during the relevant period, although the full extent of this was unclear (including to the Service itself). The Bureau did not have a direct relationship with the CIA, however it has not been possible to identify whether any intelligence reported by GCSB staff was used by the CIA on any occasion. In terms of New Zealand holdings, both agencies received and retain intelligence reports arising from the interrogation of individuals under the CIA programme, with the Service in particular receiving a significant number. This material remains in the agencies’ systems.
 - 18.10. Neither agency raised any concerns about the CIA programme with that agency or the United States Administration more generally, either formally or informally.
19. The current Directors-General of the GCSB and NZSIS have clearly acknowledged their leadership role in ensuring their agencies comply with New Zealand law and human rights obligations recognised by New Zealand law, and they have provided the statement immediately following for the purposes of this report. I have made detailed recommendations to the agencies based on the findings made above. My recommendations are set out at the end of this report.

**STATEMENT OF REBECCA KITTERIDGE, DIRECTOR-GENERAL OF SECURITY NZSIS, AND
ANDREW HAMPTON, DIRECTOR-GENERAL GCSB: 28 FEBRUARY 2019**

As the current Directors-General of the Government Communications Security Bureau (GCSB) and the New Zealand Security Intelligence Service (NZSIS), we wish to emphasise the commitment of the agencies to complying with New Zealand law and human rights obligations recognised by New Zealand law. This is fundamental to the agencies. Ensuring compliance is a critical responsibility of the Directors-General in their capacity as agency heads as well as public service leaders. In addition, we recognise that the agencies' adherence to these obligations (and demonstration of this) is critical to the authorising environment in which the agencies operate.

The leadership of the Directors-General plays a central role in setting organisational culture and expectations. This drives the behaviour of staff and supports them to meet these obligations while contributing to the protection of New Zealand's national security and well-being. The importance that we place on human rights is highlighted by not only the policies and processes of the agencies, but also by our organisational values and the State Services Standards of Integrity and Conduct. Examples of the organisational values that directly relate to human rights are Integrity and Courage for the GCSB, and Self-aware and Courageous for the NZSIS. These require staff to act in a manner consistent with obligations, even if doing so requires having a difficult conversation with an international partner.

Co-operation with a range of international partners is essential for the agencies to contribute to the protection of New Zealand's national security and well-being. The framework for this is set by the Intelligence and Security Act and the corresponding Ministerial Policy Statements (MPSs) which the agencies welcomed in 2017. The framework, set by Parliament and the responsible Minister, allows information sharing with foreign partners under particular conditions that observe human rights.

The level of co-operation with international partners reflects the closeness of the relationship, with human rights assessments setting the parameters for information sharing. The agencies share information with partners based on need and the ability to obtain the required level of assurance regarding the use of that information. On occasion, the agencies only share intelligence with foreign agencies where specific caveats have been applied to ensure that human rights obligations are met.

The Directors-General have overall accountability for agencies' relationships and level of co-operation with international partners. The Directors-General are responsible for conveying to these international partners the New Zealand Government's position on, and obligations of the agencies with respect to, human rights. It is incumbent on the Directors-General to ensure that those representing the agencies accurately represent this position and relevant obligations.

These factors serve to highlight the seriousness with which the Directors-General take human rights obligations of the agencies. Meeting these obligations has been and will continue to be a key focus of ours.

II WHY DO THE ISSUES IN THIS INQUIRY REMAIN IMPORTANT?

Torture is unlawful

20. Torture is prohibited in New Zealand law, in the law of other countries and at international law. At international law, the prohibition is absolute and non-derogable. The New Zealand Government's commitment to the prohibition has been expressed as "a long-standing and strong opposition to the use of torture, cruel, inhuman or degrading treatment or punishment (including the death penalty) in all cases and under all circumstances, including in response to threats to national security".¹³
21. The prohibition of torture has direct and practical implications for the conduct of national intelligence and security activities especially in relation to intelligence cooperation with overseas agencies.
22. Since 9/11, States that had a connection with the CIA programme of detention and extraordinary rendition have been subject to intense scrutiny about the degree to which they may have been implicated in the CIA's abuse of detainees and their renditions. Across international and domestic jurisdictions, there have been police inquiries into the actions of intelligence agency personnel; inquiries by intelligence oversight bodies including the UK Intelligence and Security Committee (UK ISC), a committee of the UK Parliament;¹⁴ and domestic and international court cases. Steps have been taken to hold not only States, but also individuals, legally accountable for complicity in torture and CIDTP.
23. The experience of other jurisdictions, including New Zealand's closest intelligence partners, demonstrates how real the risks are of being challenged, and held accountable for torture (and CIDTP) or complicity in such activities unless there are clear national standards and operational guidance in place.
24. Intelligence cooperation, including the sharing of intelligence, is of very significant value to New Zealand's national security.¹⁵ But, as experience shows, it comes with risks (which go beyond legal risks to include matters such as reputational risk to the Government) that must be identified and acknowledged, rigorously assessed, and, where possible, managed.

¹³ MPS *Cooperation of New Zealand intelligence and security agencies (GCSB and NZSIS) with overseas public authorities* (September 2017)(MPS Overseas Cooperation) at [22].

¹⁴ The UK ISC has produced two recent reports: *Detainee Mistreatment and Rendition: 2001-2010* (HC 1113, 28 June 2018) and *Detainee Mistreatment and Rendition: Current Issues* (HC 1114, 28 June 2018).

¹⁵ Sir Michael Cullen and Dame Patsy Reddy, *Intelligence and Security in a Free Society* (G.24a, February 2016) (Cullen & Reddy) at [4.27].

25. The political and legal circumstances leading to the development and implementation of the CIA programme provide a salutary “case study” in warning signs¹⁶ that indicate a risk that compliance with international law may have become compromised. It demonstrates that observance of these standards by our closest overseas intelligence partners cannot be taken for granted. While litigation arising from the CIA programme has occurred in other countries, to date no US elected representative or government official¹⁷ has been held accountable for the human rights violations committed by the CIA programme. Lack of legal accountability for human rights breaches is a recognised risk factor¹⁸ in assessing the human rights record of a country.
26. Clearly stated principles and policy reflecting the gravity of the prohibition against torture will help to ensure that in times of international pressure to cooperate against significant threats to security, there is clarity particularly for those involved in operational decisions about the lines New Zealand will not cross.

¹⁶ In the United States context, some of the warning signs I identified from an analysis of the development of the so called “Torture Memos” and relevant commentary were: the publicly-expressed views of those holding executive power about the legality and/or effectiveness of torture; indications of intra-government secrecy and selective consultation rather than appropriate consultation with officials accepted as having the requisite subject-matter expertise; the risk of the executive assuming expansive powers; and the lack of congruency between governmental assurances and publicly available counter-factual evidence. Subsequently, the lack of accountability of those against whom credible and, in some cases, confirmed allegations of torture have been made, indicates an ongoing need for caution. See Justice Department’s Office of Professional Responsibility *Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s use of “Enhanced Interrogation Techniques” on Suspected Terrorists*, 29 July 2009; Interview of Lawrence Wilkerson, Chief of Staff to Colin Powell Secretary of State (Steve Inskip, National Public Radio on Morning Edition, 3 November 2005) transcript provided by National Public Radio; Jane Meyer “The Memo. How an internal effort to ban the abuse and torture of detainees was thwarted”, *The New Yorker*, 27 February 2006 at page 13; US Department of Justice Office of Legal Counsel *Memorandum for Alberto R. Gonzales*, 1 August 2002 at Parts III and IV; The Special Rapporteur, United Nations Human Rights Office of the High Commissioner, Geneva, (press release, 11 December 2014).

¹⁷ For example, in the current US context, see Matthew Rosenberg, *The New York Times*, online ed, New York, 2 February 2017. I note for completeness that a government (CIA) contractor was convicted of felony assault, after severely beating a detainee on a US base in Afghanistan in 2003. The detainee died the next day. See *The New York Times* “C.I.A. Contractor Guilty of Beating Afghan” (18 August 2006). The activities of the CIA were also subjected to a 2004 review by the CIA’s own Inspector-General (whose report was later released in a heavily redacted form).

¹⁸ See the section on Best Practice later in this report.

III CHRONOLOGY OF RELEVANT EVENTS

27. In reaching the findings in this Inquiry, I had to make a judgement as to whether it was reasonable to conclude that reports in the public domain about the CIA's use of rendition and torture on detainees were sufficient in number, had sufficient credibility, and carried enough weight, to put the agencies' Directors on notice to independently inquire and assure themselves about what the CIA was doing and what impact it might have on their agencies. In my view they should have done so; I acknowledge that in their view making their own inquiries would have jeopardised receipt of intelligence relevant to New Zealand's security.¹⁹ I determined it was reasonable to identify such a time, and I took a conservative approach to that assessment. In my view this tipping point was reached by mid-2004, at the latest. A chronology of relevant events is at Appendix B. It includes information about a range of matters relating to the period (2001-2009) and subject matter covered by this Inquiry, including: significant events (some of which were not publicly known at the time); and reports and publications that were in the public domain. While the Chronology sets out key events and the most relevant publications, it is not an exhaustive record.

IV THE ROLE OF GCSB AND NZSIS STAFF IN RESPECT OF AFGHANISTAN

28. This section will examine, in turn, the GCSB's and the NZSIS's support to military operations in Afghanistan during the time period subject to this Inquiry. In contrast to the support provided by the GCSB, the NZSIS had only one officer deployed to Afghanistan during this period.
29. The information in this section is drawn from interviews of GCSB staff and the NZSIS staff member who were involved in providing this support. Staff also provided us with additional documents and we carried out extensive searches of the GCSB's and the NZSIS's information systems. I provide, with as much detail as is consistent with national security constraints, a summary of the work carried out by staff of the agencies and the supporting structures and processes that were in place. However, I am not able to describe where interviewed staff were deployed and their particular roles in providing intelligence support to the coalition forces.
30. In order to assess whether the agencies or their personnel knew of or were otherwise connected with, or risked connection to, the activities discussed in the US Senate Report, we sought a range of information to ensure that we accurately understood the various roles undertaken by staff and where they were positioned in the organisational contexts in which they worked. Often, in the case of GCSB staff, they did not know who would ultimately be using the intelligence they collected, or for what purpose and because of this it was not possible to consider the particular issues of this Inquiry in isolation from a fuller understanding of the context involved.
31. The organisational focus of the Inquiry was on the adequacy of the support provided by the agencies to their staff in relation to legal risk, particularly the risk of contribution to, or

¹⁹ Further discussed in part V of this report.

association with, any human rights breaches. I thought it important to obtain the staff perspective on this. I have commented in this report on matters arising from those interviews that were illustrative of the legal complexities of providing support to military operations. These issues indicated the extent to which staff understood the relevant legal frameworks as they carried out their various roles in a coalition environment and therefore the extent to which they would have been in a position to identify a risk of being caught up in or connected to actions involving grave human rights breaches.

32. The systemic deficiencies identified in the supporting organisational frameworks do not undermine the quality of the professional contribution provided by GCSB and NZSIS staff. However, neither agency²⁰ had adequate policy or procedures in place or provided sufficiently specific New Zealand training on human rights obligations to ensure that their staff understood the relevant legal framework and its possible “in theatre” application to their work while deployed or seconded. Related to this, I was concerned that there was limited scope (aside from the deployees’ written reports) for the GCSB and NZSIS to provide effective oversight of their deployed and seconded staff activities especially for those who did not have a military background.

GCSB CIVILIAN SUPPORT TO MILITARY OPERATIONS IN AFGHANISTAN

Introduction

33. Part of the lawful exercise of GCSB’s statutory functions was and remains to support New Zealand Defence Force operations, and this included New Zealand’s military involvement in Afghanistan. At the relevant time GCSB staff were deployed to support the Afghanistan mission, and the support GCSB provided to that mission included providing both intelligence and information assurance services. Such support properly falls within GCSB’s mandate. During the period subject to this Inquiry, GCSB personnel were sent to various locations in Afghanistan, and seconded to SIGINT partner agencies in support of the coalition forces’ efforts in Afghanistan. Intelligence support for the NZDF and coalition forces was also provided from Wellington. At all times GCSB staff retained their status as civilians.
34. Details about the work carried out by GCSB deployees helped us to identify, for example, the particular risks linked to operations where the objective was to kill or capture enemy combatants. It was possible that intelligence supplied by a GCSB staff member might have resulted in, or contributed to, the capture of targets and their detention by the CIA. Another risk that emerged and was not foreseen at the start of the Inquiry was that if staff were supporting operations run by a foreign military force that had different Rules of Engagement (ROE)²¹ from

²⁰ The one NZSIS staff member deployed in Afghanistan was there as a secondee to a partner agency which did have appropriate policies, procedures and training. However, as the secondee remained an employee of the NZSIS during this period (see paragraph 101 below), guidance on relevant NZSIS’s policies and procedures should have also been provided.

²¹ *New Zealand Defence Doctrine Publication Rules of Engagement* NZDDP-06.1 (second edition) defines ROE as “... orders issued by the highest level of military command that specify the circumstances and manner under which force will be used in the execution of the mission.” Letter of GCSB and NZSIS to IGIS, 5 October 2018, para 24, explains, citing NZDDP-06.1, page 3, that “ROE direct members of the Armed Forces as to when they may or may not use force against persons

the NZDF, it was possible that they were supporting operations that the NZDF would not consider lawful under International Humanitarian Law (IHL). However, there was no way to verify any direct connection with possible human rights breaches committed by a coalition partner. What we describe in this Report are situations which had the potential to risk connection to human rights breaches.

Legal basis and organisational arrangements for GCSB deployments to Afghanistan

Government authorisation

35. The GCSB has been unable, to date, to provide the Inquiry with a complete set of Government authorisations covering the deployment of GCSB staff to Afghanistan. This is a surprising and significant gap in the record of official authorisation.

Arrangements with NZDF

36. The GCSB and NZDF entered into a memorandum of understanding (MOU)²² which acknowledged the GCSB's mission and the willingness of the NZDF to provide appropriate assistance to GCSB deployed staff, "without such assistance causing detriment to wider NZDF operations". The NZDF support included logistic and welfare support and in-theatre force protection. GCSB staff were deployed as civilians and remained "under the command and control" of the GCSB. GCSB staff were not to be armed. The GCSB was also responsible for all legal aspects of the GCSB deployments.
37. A Wellington-based position was formalised²³ in May/June 2007 to support these arrangements. A Senior Military Advisor role was established as a joint GCSB/NZDF position (held by one person) with the goal of ensuring good coordination between the GCSB and the military. In relation to deployed GCSB staff, the Senior Military Advisor's function was to assist civilian personnel to go through the necessary NZDF processes to ensure their preparation for deployment and their safety once deployed. The appointment of the Senior Military Advisor also enhanced the suitability of the arrangements in place for deployees as improvements were made based on the feedback received from returning deployees. Later deployees interviewed were grateful for the structured pre-deployment process that was set out for them.

GCSB authorisation

38. Each staff member was provided with a GCSB deployment directive setting out a brief description of their role in Afghanistan, pre-deployment training instructions and a welfare support plan. This document was stated as providing "GCSB authority and Director's guidance in order to successfully deploy [name] in the role of [title]." It listed in detail the range of actions

or property, and detail the authorised level of any such force." NZDF's ROE are endorsed by the Minister of Defence, approved by the Prime Minister, and issued as orders by the Chief of Defence Force (NZDDP-06, preface). It should be noted that governments may authorise different national positions for the use of force or engagement that are entirely consistent with IHL.

²² Memorandum of Understanding between the NZDF and the GCSB Concerning Assistance to the GCSB Mission in Afghanistan signed by "BR Ferguson, Chief of Defence Force" and "WH Tucker, Director, GCSB" (30 January 2006).

²³ Prior to this appointment, GCSB senior staff carried out these functions.

that had to be completed prior to deployment and referred to the intent to provide “comprehensive and appropriate training” and appropriate support.

39. In relation to their association with military forces, the deployment directives instructed staff not to wear the military uniform of New Zealand or any other country whilst deployed and noted they were to undertake a basic New Zealand Police weapons familiarisation course.²⁴ The directives placed responsibility on the GCSB legal advisor to ensure that all deploying employees were aware of the “New Zealand legal limitations placed upon them regarding carriage and use of weapons as a civilian”.
40. Staff carrying out SIGINT functions in Afghanistan were expected to comply with and oversee, where applicable, the implementation of New Zealand Signals Intelligence Directives (NZSID). These Directives provided mandatory guidance for all SIGINT activities.²⁵
41. GCSB deployees, especially those in more senior roles, were given considerable scope to shape their roles, according to their particular skills, experience and preferences and the changing needs of the NZDF and New Zealand’s coalition partners in Afghanistan and the missions of OEF and ISAF. The then GCSB Director advised in April 2015 that “those deployed had a significant degree of freedom/discretion as to the scope of their role and what exactly they did in-theatre.” The weekly staff reports provided a degree of transparency about how staff were shaping their roles.

Civilian GCSB staff working in Afghanistan within the coalition forces

42. Deployed Bureau staff worked in a war zone. Some worked closely with NZDF and others were more spread out among coalition partners. They all worked as civilians in military environments where they received daily tasking in order to support military objectives. These staff had the technical expertise to carry out the tasks involved but they had to learn how to use their expertise in relation to a military tactical environment.
43. Because of the time period covered by the GCSB deployments, some staff worked to OEF command and its ROE and some to ISAF command and its ROE.

Selection of deployed personnel

44. The earliest GCSB staff deployed were chosen partly because of their previous military experience. Into the second year, a process was established where selection was based on broader merit grounds (including technical competence, health and personality factors) and there was a formal interview of candidates. Applicants were provided with a basic position description. Prior military experience was not determinative but was a positive factor.
45. One interviewee thought that the role required someone who was able to interact with military personnel and stand up for themselves, was physically fit, had mental fortitude (particularly to

²⁴ The opportunity to attend weapons familiarisation training, given by the NZ Police, was not provided until 2007.

²⁵ GCSB is known in the intelligence world as a SIGINT agency. That is, it collects and disseminates “signals” intelligence. In contrast, the NZSIS is known as a HUMINT agency. Its focus is on the collection and dissemination of intelligence from human sources.

see and read reports about attacks) and the patience to persevere. Another said that the GCSB was looking for people who were prepared and able to look after themselves. These characteristics make sense and we found no evidence that GCSB deployees lacked them; we found to the contrary. In addition, they had relevant technical skills and experience and were able, at times, to introduce useful innovations which were appreciated by the coalition forces.

Comment

46. I consider that the GCSB exercised good judgement in its selection of individuals during the period relevant to this Inquiry. The expertise and temperaments of the deployees stood the GCSB in good stead. We saw no reports of missteps by the deployees who, to a large extent, had to find their own feet in roles which were not defined in any detailed way and, for some, in an unfamiliar military environment. Deployed staff showed initiative in developing good relationships with their international colleagues and using their expertise to make valuable contributions to the work at hand. The Inquiry reviewed documents supporting this assessment.
47. Having said this, a number of those interviewed also expressed the view that the GCSB relied heavily on their common sense while providing little written instruction, particularly in relation to the ambit of their jobs and the legal and policy basis for their roles.

Work environment for GCSB staff deployed to Afghanistan

48. Some deployed GCSB staff, with no military background, were placed in roles where they were embedded with an overseas coalition partner without any other New Zealanders working alongside them who were experienced in working in a combined joint forces environment. Their workplaces had video feeds, showing close to real time, “kill or capture” military operations against High Value Targets (HVT). While one early staff report back to GCSB Wellington warned that this could be a highly stressful experience especially if it involved civilian deaths, the general consensus among deployed interviewees was that the NZDF training they had undergone had provided some insight into what to expect in a combat zone. None of the staff interviewed who worked in an environment where there were video feeds of live military operations stated that this was of concern to them.
49. A number of interviewees recalled debriefings, either with a psychologist or a more general debriefing, but we were not able to confirm that there was a systematic practice of psychological debriefing for all those who were deployed to Afghanistan.
50. Some GCSB deployees provided support to both non-kinetic targeting and kinetic targeting operations. Non-kinetic targeting related to the targeting of individuals and groups to understand their capabilities, intentions and activities that posed a threat to NZDF operations or were relevant to broader New Zealand force protection or foreign policy interests.
51. “Kinetic targeting” was described as the physical strike on a target such as a missile attack. “Dynamic targeting” involves tracking an HVT in “relative” real time. Dynamic tracking may serve a range of intelligence purposes, including supporting both the non-kinetic and kinetic targeting

processes. Staff reports from Afghanistan to Wellington described work carried out in monitoring targets.

52. Labelling an individual²⁶ as an HVT was a means of prioritising targets who were placed by military command on the Joint Prioritisation Effects List (JPEL). There was a strict legal threshold for placing targets on the JPEL as they had to meet the legal definition of being a “direct participant in hostilities” (DPH). This involved detailed target vetting and validation processes to ultimately ensure compliance with the Commander’s objectives, the Law of Armed Conflict²⁷ (LOAC), ROE, and relevancy of the proposed target within the target system.²⁸
53. Usually the regional commands and special forces would identify HVTs from their own intelligence and forward a request (and profile/target pack) up the military command structure for permission to have an individual included as an HVT on the JPEL. The decision to place an HVT on the JPEL was a separate decision from specific decisions involved in particular capture and kill kinetic actions.
54. GCSB staff interviewed were clear that, as civilians, they were not part of the military decision-making process to allocate resources to carry out kinetic targeting although they provided information that informed these decisions. It was pointed out to us that the role of SIGINT was to provide good quality information which the military command could take into account, along with all other relevant information, in making a decision to authorise the use of force. Those interviewed observed the military following a rigorous process before the capture or killing of a target was approved, including positive voice identifications, visual identifications, and collateral damage assessments, often on the advice of military lawyers. The actual implementation of a kinetic targeting decision was carried out by special forces and that process itself was subject to a number of authorising steps and restrictions.

Concerns expressed by deployees

55. Although GCSB deployees demonstrated a commendable degree of resilience living and working within a military environment, at interview they consistently expressed a criticism about the lack of preparation for working as civilians within a military environment. A number interviewed described the GCSB as “naïve” in its lack of explanation of how they, as civilians, were to contribute to military objectives.
56. One interviewee commented that the NZDF training did try to explain what people should expect in a combat zone. However, in hindsight it would have been helpful to have more robust support around what he could and could not do, and what it meant to be a New Zealand government official in a JPEL meeting. He noted that a deployed civilian from another country with whom he worked had very clear guidance on what was expected, even down to where he could and could not travel. This person also asked to be removed from some pieces of work

²⁶ Usually key insurgent leaders.

²⁷ The Law of Armed Conflict is known today as International Humanitarian Law (IHL). Because staff referred to it as LOAC we have used this term for the purposes of this part of the Report.

²⁸ Unclassified briefing to the US Joint Chiefs of Staff, *Joint Targeting Cycle and Collateral Damage Estimation Methodology (CDM)*, General Counsel (10 Nov 2009).

because of their national constraints. One GCSB deployee expressed his belief that certain US practices regarding kinetic targeting did not provide a model to follow.

57. Another suggested that a clear legal and policy basis for their participation in support of military operations would have been beneficial.
58. One interviewee said that they would have appreciated more advice about kinetic targeting given the deployee's role in undertaking dynamic targeting in support of the military kinetic targeting. Another said that, with hindsight, it would have been a good idea to have some comfort around how the "products" they were involved with were being used. It was less of a problem if the targeting work did not relate to kill or capture missions.
59. One interviewee thought that the GCSB was "profoundly naïve" about the implications of deploying someone into a role in support of the military targeting process that would involve them contributing to kill or capture missions. He was aware of contributing to a system which supported a number of government agencies, military and non-military groups. He believed that some of these agencies were not operating under conventional rules of engagement. There was no training on how to operate in a combined joint environment or on how to navigate the moral ambiguities inherent in counter-insurgency operations.

Comment

60. Of those deployed to Afghanistan from the GCSB, many had no military background and they were placed in roles where they operated without any direct New Zealand support from experienced officers, in a complex combined joint forces environment. Some expressed awareness that there were different rules of engagement between OEF and ISAF and what that might mean when carrying out an attack against a HVT in terms of the acceptable level of collateral damage. But they were not provided with an explanation about how they stood in relation to the different ROE. Essentially they were reliant on the direction of their Officers in Charge (OICs), who were not New Zealanders. One interviewee expressed the view that if any process involving a deployee had "gone off the rails", the GCSB would have been "dragged along with it". As far as we were able to ascertain, this did not happen but some interviewees voiced concern that they were unknowingly exposed to this risk particularly with regard to kill or capture missions.

Other GCSB roles in support of military operations in Afghanistan

61. In addition to those who were deployed to Afghanistan, there were some GCSB staff who provided support to coalition forces from a distance.

Secondees and liaison officers

62. Secondee placements were seen as providing mutual benefit to the overseas intelligence partner agency and the GCSB. The secondees brought their skills, knowledge and experience to the work of the partner agency and, in return, acquired knowledge that they could bring back for use at the GCSB. More broadly, secondments were seen as a way in which to maintain and

expand relationships with overseas counterparts, increase GCSB's credibility as a SIGINT organisation, and identify opportunities to improve the GCSB's collection capabilities.

63. A very small number of GCSB staff seconded to partner SIGINT agencies worked, during their secondments, in support of the coalition forces in Afghanistan. Their day to day work involved tasking for the partner agency and within the partner agency's legal and human rights compliance frameworks. Their work included providing intelligence in support of kinetic targeting.
64. Secondees could also contact more senior GCSB staff posted as liaison officers with partner agencies. Part of the role of GCSB liaison officers was to meet regularly with secondees and provide support. The liaison officers interviewed did not recall a secondee raising an issue about the nature of the work they were involved in or recall any personal concern about the nature of a secondee's contribution.
65. One GCSB secondee was deployed to Afghanistan by the partner agency during their secondment for the purpose of supporting the establishment of intelligence-gathering capabilities and processes. They were not involved with producing intelligence in support of military targeting. Pre-deployment training was provided by that agency, which the secondee considered to be very thorough. This deployment was approved by the GCSB which retained general oversight of the secondee. The secondee was expected to keep in contact with the appropriate GCSB managers including the relevant liaison officer.

GCSB Wellington

66. In mid-2006 a team was established at the GCSB Wellington to also provide support to the New Zealand Government's objectives in Afghanistan. It focused on providing intelligence support to the NZDF and PRT in Bamyan Province. It identified potential security threats for the PRT. It mapped out the proposed work against the then New Zealand Government Foreign Intelligence Requirements and relevant ISAF priorities.
67. During the period covered by this Inquiry, the focus for intelligence reporting seemed to be mainly on factors affecting regional and local security, including the risks posed by local insurgents.

Legal risk: preparation and safeguards

68. In assessing the adequacy of support provided to GCSB deployees, we were interested in the nature of the training they received, particularly in relation to any legal risks. These could arise by Bureau personnel being drawn, by their work in supporting the military activities of coalition forces under OEF and ISAF, into areas of operation that carried a risk of being in breach of New Zealand's legal obligations. The importance of such training was underscored by the fact that, apart from those who worked within a NZDF environment, deployees were embedded within the US and later ISAF military forces, subject to their management and reporting structures and, in many instances, contributing to the intelligence picture that informed kinetic targeting decisions. What did staff know about LOAC and the New Zealand ROE? Did they know of any

New Zealand Government restrictions²⁹ on military activities and did they have sufficient knowledge to recognise situations that potentially could have raised legal issues? Did staff need to know about these matters? Were they clear about the institutional position on staff carriage of weapons?

69. Interviewees described, to the best of their recollection, the preparation they received before deploying to Afghanistan. In addition to the interviews of nine staff deployed to Afghanistan we found a number of end-of-tour reports written by deployed staff who were not interviewed. These reports also provided information about pre-deployment preparation.
70. I set out below what we found in respect of four areas where we expected to find evidence of GCSB support to deployees: GCSB legal briefings, training on relevant LOAC and ROE, human rights policies and procedures and supervision.

GCSB legal briefings to deployees

71. Those working in support of the armed forces in Afghanistan should have received a clear explanation of the legal and policy basis for their deployments/secondments. A number of interviewees noted this omission.
72. It is not clear, from the GCSB records or interviews, what direction or advice was given by GCSB about issues and decisions that a civilian might face deployed within the complex coalition forces environment. Most deployees recollected having a meeting, before deployment, with either the Director GCSB or a member of the Senior Management team, about the GCSB's expectations in terms of behaviour and, in two cases at least, they were asked if they were "okay" with producing SIGINT products resulting in death. A number of interviewees could not recollect receiving any GCSB legal briefing before deployment but, given the passage of time, this does not establish they did not receive it. However, we found no record of briefings having occurred.
73. We considered the implementation of the directive that prohibited the carriage and use of weapons.³⁰ I expected that the instructions around this would be clear. We found they were clear to the extent that most interviewees believed that they were strictly forbidden to carry weapons at any time. What they were unsure about was the subsequent instruction that deployees were required (from 2007) to undertake weapons familiarisation training provided by the New Zealand Police. The purpose of the training was to ensure that deployees would know how to use weapons in self-defence or at least be able to make a weapon safe so that they did not inadvertently injure themselves or anyone else. The uptake of training among those interviewed was very limited perhaps due to some confusion about the legal framework for civilians and the carriage and use of weapons.

²⁹ These can be called "national caveats" and are usually contained within the Rules of Engagement as either limitations on (also known as "yellow-card restrictions) or prohibitions of (also known as "red-card" constraints) actions of armed forces.

³⁰ See para 39 above.

GCSB legal briefings for secondees and liaison officers

74. GCSB staff seconded to partner agencies and liaison officers did not receive training on potential legal risk or “no go” areas for New Zealanders in relation to military operations. While most of the secondees were not involved in work relating to the military forces in Afghanistan, a few were. These secondees were in a not dissimilar position to those who were deployed to Afghanistan as they too were working to further the objectives of coalition forces.

Comment

75. Those deployed to work with coalition forces in Afghanistan and elsewhere should have received New Zealand-specific legal briefings on the legal framework relevant to military operations even if they also received useful and thorough training from seconding agencies. That training did not obviate the responsibility on the GCSB to provide a New Zealand perspective on the LOAC and other human rights obligations.
76. I note that some partner agencies may choose to arm their non-military personnel. I would expect to see evidence from any New Zealand intelligence agency that the implications of seconding their staff to carry out work in support of the partner agencies’ military forces (albeit in coalition with New Zealand) were considered and evaluated prior to any future secondment. This would likely involve New Zealand-specific legal briefings.

LOAC and Rules of Engagement

77. Most of those interviewed said that they had received no training on the possible implications of the law of armed conflict or New Zealand’s ROE on the work they were to carry out, either directly from the GCSB or during their NZDF Minor (or Other) Missions Training Course.
78. All deployees were required to attend the NZDF course and the majority of those interviewed were positive about the information and training they received. The GCSB held little information about the content of this course but the NZDF was able to provide the Inquiry with relevant material. For the Bureau deployees the training included a country/PRT Bamian briefing, fitness testing, survival skills, mine awareness training, medical training and environmental health. Students were tested on the training components they received. Of the nine interviewed, only three said that they attended the session on LOAC/ROE training. This component was provided as background on a voluntary basis.
79. One of those who had attended the LOAC level 1 training did not think it was sufficient for the work he undertook in Afghanistan. The basic training explained the difference between a civilian and combatant, and operational rules such as not shooting prisoners. In hindsight, after completing level 3 LOAC training in another context, he thought that this level training should have been provided to GCSB staff even though they were not involved in making targeting decisions. It provided more information about how targeting decisions were made and what to look out for in terms of national caveats. He made the point that the Afghanistan counter-insurgent situation was complex and difficult in an environment where intelligence may be supporting kinetic targeting.

80. Another complexity in the Afghanistan environment related to the different ROEs for OEF and ISAF countries. The rules around the scope of a country's campaign, its objectives and operational implementation differed between coalition forces.
81. Some staff, although they were not briefed by the Bureau about the differing ROE, were aware in a general sense that there were differences between the OEF and ISAF ROE. One staff member (who was working under ISAF) tried to ensure that he worked only to ISAF's requirements even though he was in a joint OEF and ISAF environment. This staff member was reliant on the OIC (not an NZDF officer) proactively identifying work which would take the staff member into areas of engagement not authorised by the New Zealand Government.
82. Some staff said that once they were in Afghanistan they became aware of some of the differences including differences in targeting rules.³¹ Some staff said they knew that OEF had different targeting rules from ISAF and this was a source of discussion with other members of coalition forces. One interviewee said that many of the European personnel were aware of the potential liability for human rights abuses or war crimes and so care was taken with the process of providing potential "action on" intelligence to OEF.

Concerns expressed by deployees

83. One interviewee was not sure how the LOAC applied to a civilian in the context of providing support for kinetic targeting processes. It was not clear to this person when a targeted military action would become an extra-judicial killing if a civilian is providing critical support for military decisions. This interviewee did not believe that the issues arising from deploying a civilian into a military force had received adequate legal attention and analysis from the GCSB.³²
84. Another interviewee thought that specific training or discussion on the rules of engagement, would have helped deployees understand the difference between OEF and ISAF, what the New Zealand mission was and what they wanted to achieve. A couple of interviewees said that they had not received a briefing on the differences between OEF and ISAF and what, if any, impact this would have on targeting rules. The distinction between the two was clearer once they were deployed.

Comment

85. While staff did not make decisions about the use of lethal force or the necessity of capture, they conveyed information that, at times, was an important component of the ultimate decision in

³¹ In this context, these rules are a reference to the factors relevant to the proportionality analysis of and threshold for taking kinetic action against a target.

³² NZDF explained, in feedback to IGIS on the draft Report, that the question of who qualifies as a "Direct Participant in Hostilities" (DPH) is not a straightforward question. Direct participant in hostilities is not a consistently defined term and it may be interpreted more narrowly or more broadly by different military commanders in different situations. The NZDF guidelines (2017 LOAC Guideline Manual) indicate that individuals who do not make LOAC decisions are not regarded as a DPH. However other views are more expansive and are not dependent on an individual's decision-making capacity and focus more on how far up the targeting chain an individual contributes. For example, providing location intelligence for the purpose of tracking a target, voice identifications for strike purposes or providing intelligence to justify nomination as a JPEL target might qualify an individual as a DPH.

relation to those activities. In these circumstances, it is necessary and appropriate for civilians to understand the military processes accompanying their work and its legal framework, together with their responsibilities within it. Without this knowledge they are at a disadvantage in terms of understanding and evaluating the processes they were part of. It is difficult to question something that you do not adequately understand. The omission of adequate and consistent New Zealand LOAC training and/or legal briefings constituted a significant gap in the preparation of those deployed to Afghanistan, and those seconded to partner agencies in support of their military efforts in Afghanistan.

86. In light of deployees' statements that they did not know the difference between the ROE of OEF and ISAF, that they had no clear legal and policy understanding of their roles and no guidance about how to evaluate their contributions to kinetic targeting operations, I have to conclude that they were vulnerable to being involved in complex foreign state activities which raised legal risks.

Lack of human rights policies or procedures

87. GCSB staff were thoroughly trained in the relevant NZSIDs governing collection and dissemination. But they were not provided with any policies or procedures relating to the GCSB's human rights obligations and the role of civilians within a military environment working to support military operational objectives (in contrast to providing strategic intelligence). Indeed we found no evidence that the GCSB had any human rights related policies or procedures in place at the time.

Comment

88. Given that most GCSB deployees were coping (in a combat zone) with many day to day stresses and frustrations and might not have been able to access GCSB Wellington quickly or easily, it was a significant oversight not to provide easily accessible reference material. Written material would have provided an important back-up especially for those working for the first time in a combat zone and without direct New Zealand support.

Contact with Wellington, but lack of "eyes on" supervision

89. There was a general acknowledgement among interviewed deployees that they could contact GCSB in Wellington if they needed advice or if there were issues affecting their welfare. Most of the contact with GCSB Wellington concerned practical matters or related to the provision of pastoral support.
90. Those deployed in Afghanistan had a practice of sending weekly reports to GCSB Wellington. These reports contained a range of observations about general strategic matters and technical issues. Some staff were also able to contact GCSB Wellington by email and telephone. Some staff indicated that their reports were also intended to provide transparency about their work so that Wellington was fully aware of what they were doing.
91. Some interviewees expressed an impression of being at a distance from GCSB Wellington and in one case being "out of sight, out of mind". It was apparent, however, from the interviews that

the strength of connection back to GCSB Wellington improved over time as returning deployees gave their feedback. There developed a pattern of regular, often weekly, telephone contact. I also noted examples where if an issue was raised, it was dealt with as speedily as possible. Visits were made by senior management from time to time. Sir Bruce Ferguson made several visits in his capacity as Bureau Director,³³ with the primary aim of talking with Bureau staff and ensuring their wellbeing.

92. When asked what would they do if they had a question about the appropriateness of their contribution, most thought they would have contacted a GCSB manager or the Senior Military Advisor. There was some evidence that some staff on occasion raised personal concerns about kinetic targeting.

Comment

93. It is apparent that the GCSB placed considerable reliance on its choice of deployees – reasoning that those selected would exercise good judgement and make an effective contribution if they had the right values, temperament and professional expertise. At one level this worked. But best practice requires more oversight and supervision.
94. For those seconded to partner agencies, they had the option of consulting a Liaison Officer about any questions they had. However, in practice the main role for Liaison Officers in relation to secondees was to provide pastoral and administrative support. They did not have day to day insight into the work of secondees and even for performance reviews they had to rely on the assessments of secondees' team managers.

Contact with CIA by GCSB staff

95. The majority of staff interviewed had little awareness, at the time, that the CIA had a detention programme which had given rise to overseas partner agencies having serious concern about those detained by the CIA. It was expected in a combat zone that there would be prisons for those captured but the GCSB staff had no interaction with people who worked in these prisons: in their view, this aspect of the war was not a SIGINT issue.
96. All those interviewed said they had no operational contact with members of the CIA. Some staff were aware that they were not invited to certain meetings involving the US Defense Intelligence Agency, FBI and CIA. They did not know if there was or was not a CIA presence in their workspace.
97. GCSB staff were not aware of any tasking coming directly from the CIA. They also did not know if any of the work they contributed to was used by the CIA as they often had no knowledge of who it was disseminated to or used by.
98. The secondees and liaison officers interviewed advised that they had no working relationship with the CIA or access to their databases. They were aware that the CIA held things closely. The liaison officers interviewed said that their only knowledge of the CIA programme came from

³³ He had also previously made four trips to Afghanistan in his role as Chief of Defence Force.

public reports. One said that he had no sense that the work of the secondees was contributing to the CIA efforts in Afghanistan or its programme.

NZSIS SUPPORT TO COALITION FORCES IN AFGHANISTAN

99. During the period covered by my Inquiry, the NZSIS had one officer in Afghanistan. The officer was seconded to a partner agency (not the CIA) in 2008 with the intention of being deployed by the partner agency to Afghanistan.

Authorisations

100. Approval for this arrangement was given by the Minister in Charge of the NZSIS.³⁴
101. There were appropriate documents in place between the two agencies to support a secondment. The officer remained an employee of the NZSIS but during the period of secondment, the officer was bound by all instructions from and policies and legal requirements relevant to the partner agency. The officer was also to maintain the confidentiality of information acquired through the partner agency. Any deployment to an operational theatre was to be agreed in writing in advance between the agencies and comply with the requirements of the New Zealand Security Intelligence Service Act 1969.
102. While NZSIS could not locate the actual partner agency deployment agreement, we were able to view part of the template form, which included guidance on human rights obligations.

Selection and duties

103. The seconded officer applied through a contestable process within the NZSIS for the secondment. Once in Afghanistan, the officer was required by the partner agency to carry a firearm.
104. The officer believed that the purpose of the secondment, from a New Zealand perspective, was to learn new skills that could be brought back to New Zealand.

Communications with Wellington

105. While in Afghanistan, the NZSIS officer did not have direct communications with Wellington. The need to do so only arose over administrative matters. The officer had no contact with NZDF and only informal contact with GCSB staff members. There was one visit from the NZSIS Director of Security which was purely pastoral in nature. The officer could have raised issues with the NZSIS head office if there were any, but saw no need to do so.

Pre-deployment preparation

106. The officer was provided with four months of pre-deployment training with the partner agency and was expected to pass all the courses involved. The courses included training on basic IT network technology, how to write reports, 4WD handling, first aid, briefings with legal teams

³⁴ NZSIS letters of 10 December 2007 and 10 April 2008 to the Minister in Charge of the NZSIS.

and psychologists, training on LOAC, the legal context and basis for military engagement in Afghanistan, the legal basis for carrying a firearm and two weeks training on how to use it. The officer also underwent two psychological assessments. The officer viewed this training as providing thorough preparation.

107. The officer received training in how to conduct an interview with detainees and on the human rights and legal framework within which these interviews were to take place.

Comment

108. While I recognise the comprehensive pre-deployment training provided by the seconding agency, as with GCSB deployees, this officer did not receive a briefing on a New Zealand perspective on the LOAC and other human rights obligations. There was also no evidence that the NZSIS had any human rights related policies or procedures in place at the time.

Contact with the CIA

109. Aside from one meeting about a non-Afghan matter, the officer had no contact with the CIA. The officer could not recall hearing about the CIA's mistreatment of detainees or having discussed it at the time. The officer did not interview a CIA detainee.

CONCLUSION

110. Staff who support military action require a sound understanding of the particular factual and legal contexts in which they work. They must be able to evaluate received intelligence for human rights impacts, identify risks and questions, elevate concerns, and work in the knowledge and with the comfort that they are operating within the law. My observation is that the agencies' former and current staff who were deployed to roles in-theatre performed those roles to the standards required, notwithstanding the gaps in their training, pre-deployment legal preparation and a robust support framework. However, that is insufficient. Systematised support and training is necessary. The agencies cannot rely predominantly on individual staff experience and judgement. The statutory regime has since changed, the agencies have improved the relevant support and training for staff, and both current Directors-General acknowledge their responsibility to ensure compliance with New Zealand law.³⁵

Recommendations

111. I have made recommendations later in this report concerning the support to all staff engaged with the provision of support to military operations.

³⁵ See Director-Generals' statement at paragraph 19, above.

V THE ROLE OF THE FORMER DIRECTORS IN RESPECT OF AFGHANISTAN

112. I interviewed the former Directors of the GCSB and the NZSIS for the relevant period, 2001 to 2009.³⁶ They cooperated fully with my Inquiry and have had the opportunity to comment on the draft classified Report and on a draft of this public report.
113. The former Directors carried out their roles with professionalism and integrity. All of them expressed their abhorrence of the use of torture in strong terms. They made significant individual contributions at the time they were agency Directors, in terms of developing New Zealand's working partnerships with Five Eyes counterparts. There are distinctions too that can properly be drawn between the positions of each of the former Directors and between the each agency. Such distinctions can be found in the detail in the classified Report concerning the role and activities of each agency at different points in the timeframe covered by this Inquiry. For instance, there is a distinction in the number and nature of their staff deployments. The Service only had one person deployed. Similarly, as the CIA's programme wound down, the risks it posed for partner countries was objectively reduced. To a degree this factor distinguishes the position of the former Directors in the latter period covered by my Inquiry (from 2006). Mr Woods, in response to a draft of this report, notes that he was the Director of Security at the critical period (which he identifies as mid-2004 to the end of 2006) and notes that the NZSIS, not the GCSB, is the main counterpart of the CIA. For those reasons, in his view, if there was a failure to make the kind of assessment this report finds was necessary (which Mr Woods does not believe was the case), that failure was his alone, not that of the Directors of GCSB or his successor as Director of Security. Dr Tucker, for his part, disagrees that any such "failure" should be regarded as Mr Woods' alone.
114. Without seeking to detract from the Directors' specific contributions or minimising their individual responses to this Inquiry, I identify common themes that emerged from their interviews about how the two agencies responded to the situation during this period.
115. The events of 9/11 had an unprecedented impact on the international security environment. I acknowledge the difficulties and pressures for all New Zealand government agency heads, particularly the former intelligence and security agency Directors, of operating in that context. Inevitably it shaped their approach to their roles.
116. For those reasons among others, the responses of the former Directors during the period in question cannot be assessed only with the benefit of hindsight. They did not break the law; nor were they unconcerned about New Zealand's human rights obligations. But they were not fully alive to the range and extent of risks for their organisations and for the Government more generally. Those risks were not limited to moral or ethical risks, but risks that their agencies might become involved in unlawful activity. The fact that the legal risk did not crystallise does not negate the responsibility to be alive to it, and to ensure organisational processes are in place

³⁶ A list of relevant Directors for both agencies is at Appendix C.

to maintain a safe distance. Objectively assessed, the New Zealand agencies' connections to the CIA's activities at the time required more of the former Directors as heads of State agencies, albeit operating in extraordinary times.

117. The former Directors gave evidence to the Inquiry about when and how each of them became aware of the CIA's unlawful treatment of detainees, initially in the form of emerging allegations and reports about detainee treatment. Each of them cited the US government's public denial of the allegations as a reason for not taking steps to investigate the validity of the allegations and assess their relevance for the New Zealand agencies.
118. As I noted above, by mid-2004 reports in the public domain were in sufficient volume and had sufficient credibility to ground an assessment that it was highly likely the CIA was committing serious human rights breaches in relation to some detainees. There were many credible public reports by this time which may not have been common knowledge among the New Zealand public but which could and should have been known to those working in the New Zealand intelligence and security agencies.³⁷ The accounts of the inquiries triggered by the allegations in other jurisdictions (eg the UK ISC in June 2003) and the volume and credibility of the reporting from respected NGOs³⁸ and from established and reputable newspapers,³⁹ meant that the then Directors ought to have made their own inquiries. I accept that it would not have been for them alone to undertake the necessary rigorous and independent assessment of those reports, but the initial responsibility to ask the relevant questions, notwithstanding the denials and assurances of the US agencies and their government, sat with them. Had they done so, the New Zealand Directors could have formed a preliminary view of the legal and ethical risks of the alleged CIA conduct for the agencies they led and for New Zealand as a whole. This may well have prompted them to report their conclusions to wider Government, including putting appropriate Ministers on notice, so that informed decisions could be made about aspects of New Zealand's ongoing strategic engagement with US activities relating to Afghanistan. Those things did not happen.
119. In response, both Mr Woods and Dr Tucker have emphasised that they were well aware of the limits of their agencies' activities and the calibre of their personnel; it was those things that served to ensure that their agencies were ultimately not complicit in torture. As they put it "[t]his was hardly a matter of luck." As I have noted elsewhere in this report, to the extent I was able to determine, both agencies were well-served by the experience and judgement of their staff. Nor do I dispute that the former Directors were aware of the limits on their agencies' activities. However I do not think those two factors entirely meet the specific obligation to be fully aware of the activities of their closest partner agencies with whom their staff might be engaging. I have found that in some circumstances staff were doing that without adequate knowledge or preparation. I also note again the view of all of the former Directors that, if they had made their own inquiries of their partner agencies, they would have jeopardised receipt of intelligence relevant to New Zealand's security.

³⁷ See Appendix B - Chronology.

³⁸ Including Amnesty International, Human Rights Watch, and the International Committee of the Red Cross.

³⁹ For example, *The Washington Post*, *The New York Times* and *The Guardian*.

120. Sir Bruce Ferguson was appointed Director of the GCSB in November 2006. He emphasised to me the fact that the Senate Report of December 2014 noted that, by March 2006, the CIA programme was operating in only one country and that the last recorded instance of a CIA detainee being subjected to “enhanced interrogation techniques” occurred on 8 November 2007. In Sir Bruce’s submission to the Inquiry, those dates significantly affect his position and the reasonableness of the steps he took to mitigate the risk of complicity arising from intelligence sharing arrangements with the United States. I accept that, as a matter of fact, as unlawful activity by the CIA diminished and then ceased there was necessarily a significant reduction in the risk of the New Zealand agencies becoming involved in that unlawful conduct. I do not think however that the end of the CIA programme negated the obligation as Director to continue to be scanning for and assessing potential risks to the GCSB. My fundamental concern, put simply, is that there was never any internal formal consideration given by the New Zealand agencies to whether there was a live risk, and if so what that might require of them, or whether any prior risk had thoroughly dissipated.
121. In hindsight, there were a number of inter-related reasons why the then Directors did not take the steps the Inquiry now identifies as having been necessary.

Focus on re-establishing New Zealand’s role in the Five Eyes

122. All of the former Directors were very focused on strengthening the New Zealand agencies’ relationship with their United States counterparts. They saw this as vital to ensuring access to US intelligence relevant to New Zealand’s security interests. Both agencies were anxious to be seen as valuable, contributing members of the Five Eyes. I have no doubt that the Directors’ focus on restoring and building the intelligence relationship reflected the priorities of the New Zealand Government at the time.

A technical conception of “NZ’s security interests”

123. All the former Directors expressed a technical and narrow view of what was relevant to New Zealand’s security interests. CIA activities were seen as relevant only if they directly affected New Zealand’s security interests – for example, if the CIA and the NZSIS were carrying out a joint operation or if the CIA provided intelligence to the NZSIS that was directly relevant to NZSIS’s operational functions. In my view, this did not adequately reflect the full nature of the relationship and the shared objectives.
124. The former Directors emphasised what they believed was their entirely proper focus on their specific statutory operational functions: stated as obtaining and disseminating intelligence and collecting SIGINT. They noted that intelligence collection and receipt was not an end in itself, but for the purpose of disseminating relevant intelligence to their New Zealand “customers”. All of the former Directors also noted the risk of compromising intelligence flows of vital importance to New Zealanders (and thus being unable to fulfill their primary statutory functions) if they had challenged their US counterparts or ceased receipt of intelligence.
125. There can be no argument that the collection and dissemination of intelligence relevant to security was the agencies’ *raison d’être*, as was the statutory requirement to “evaluate” or

“analyse” intelligence. But a focus on collection and dissemination functions should not have precluded them from thinking about whether and how the burgeoning intelligence cooperation met other New Zealand legal and ethical imperatives, and what that might mean for them as the heads of the two government agencies most directly involved.

Reliance on personal relationships with counterparts

126. The Five Eyes relationships were personal as well as institutional. The former Directors relied to a significant extent on the personal integrity of their counterparts in the CIA and NSA and the relationships they developed with them, to assure themselves that the US agencies were acting lawfully and appropriately.
127. During this period, as the Chronology shows, it became apparent that such personal relationships provide insufficient guarantee of partner agency transparency and integrity.⁴⁰

Reluctance to ask questions of counterparts

128. It was apparent that there was an unspoken general rule that one did not ask direct questions about the operations of Five Eyes counterparts, whether one-on-one, in bilateral meetings, or in group discussions, and despite opportunities to do so.⁴¹ The former Directors did not agree that they had an obligation, whether statutory or otherwise, to ask questions of their counterparts when credible allegations about acts of torture by partner agencies came to light. I discuss the obligations and standards relevant to the intelligence agency chief executives later in this Report.
129. It is no doubt relevant that New Zealand was and is the smallest partner in the Five Eyes intelligence alliance and, as the review of Intelligence and Security in a Free Society made clear, New Zealand is a net beneficiary of intelligence under that alliance.⁴² It was implicit in discussions with the former Directors, and explicit in their feedback on the draft Report, that they felt constrained not to do anything which would have risked or reduced New Zealand’s role as part of the alliance or to the flow of intelligence. As noted above, they saw other risks, particularly the risk of compromising vital intelligence flows at a vital time, if they asked questions of their partner agencies, particularly in light of the official denial by the United States that the CIA’s programme included torture or other unlawful mistreatment of detainees.⁴³

⁴⁰ See the Chronology in Appendix B.

⁴¹ For example, multiple overseas visits to partner agencies and regular periodic conferences of Five Eyes agency heads (including in Queenstown in 2002).

⁴² Cullen and Reddy, above n 15, at [3.43]: “For every intelligence report the NZSIS provides it receives 150 international reports. Similarly, for every report the GCSB makes available to its partners, it receives access to 99 in return”.

⁴³ The issue is not unique to New Zealand: See the UK ISC Report *Detainee Mistreatment and Rendition 2001-2010*, above n 14, at 4, which talks of a “difficult balancing act” for the UK agencies in this regard. “... the agencies were the junior partner with limited access or influence, and distinctly uncomfortable at the prospect of complaining to their host [in Afghanistan]”. See also the ECHR judgments describing the roles played by Lithuania and Romania in CIA black sites and rendition in their own countries “to avoid disturbing their relationship with the United States, a crucial partner and ally”. *Abu Zubaydah v Lithuania* (Application no 46454/11) ECHR 31 May 2018, at [272], citing PACE Committee on Legal Affairs and Human Rights, Report of investigation into CIA secret detention sites, Senator Dick Marty, 7 June 2006 at [230].

130. As one of the former Directors said, it was not realistic to think that New Zealand could have said “please explain” to the United States, the most powerful country in the world. Realistically the response would have been that New Zealand would again have been cut out of the recently resumed intelligence flow, at a time when it most needed it. The former Director noted that asking questions about the allegations in these circumstances “would have put at risk the statutory objective of receiving intelligence relevant to New Zealand’s security”.
131. Mr Woods also noted the importance of the longstanding ‘need-to-know’ principle: the sources and methods used to acquire sensitive intelligence are strenuously protected. Dr Tucker confirmed that view. Here, in the absence of a joint operation between a New Zealand intelligence and security agency and the CIA, there was not a New Zealand ‘need to know’. Dr Tucker’s view was that asking questions about the allegations in these circumstances would have put at risk the statutory objective of receiving intelligence relevant to New Zealand’s security.
132. At least one of the former Directors explicitly saw it as a situation where he was required to carry out a risk assessment exercise: “what are the real risks [of continuing to cooperate and share information with the CIA]? What are the costs and benefits of mitigating those risks?” Theoretically that must be correct, but I take a different view from the former Directors as to how factually proximate the New Zealand agencies were to the CIA’s activities and its intelligence products. I have found, as detailed elsewhere in this report, that the New Zealand agencies were sufficiently proximate to oblige the Directors to make a considered assessment of what risks (legal, moral, reputational) those CIA activities involving torture posed for their own agencies and the New Zealand Government. I agree that at that point it was for Ministers to assess what the risk meant in practical terms for New Zealand’s relationship with the United States but, as noted, the Directors did not themselves raise the issue with Ministers. And in fact, none of the former Directors appear to have consciously undertaken such a risk assessment at all.

Reliance on broad official assurances

133. The former Directors relied on official assurances provided by US partner agencies at conferences and made more broadly by the US Administration in public statements. They did so even after it became evident that previous such assurances and statements about the CIA programme had been incorrect or even intentionally misleading.

No monitoring of policies and actions of partner agencies

134. Neither agency had any systematic process to regularly monitor, assess and evaluate their partners’ policies and actions, in particular to check whether partner practices accorded with

New Zealand's legal obligations, and if not, what that would require of the New Zealand agencies.⁴⁴

Role of other government agencies

135. The former Directors emphasised the related and concurrent responsibilities of other New Zealand government agencies regarding, for example, international relations and the application of IHL and articulation of the law as it applied to New Zealand government agencies. Those other agencies had access to the same (emerging) public allegations about the CIA's unlawful treatment of detainees.
136. All the former Directors placed reliance on the fact that the Prime Minister and other New Zealand government agencies such as MFAT were not asking questions or raising concerns about the CIA activities during the relevant period,⁴⁵ with the suggestion that it was not therefore for the Directors of the intelligence agencies to do so.
137. Sir Bruce Ferguson referred to Crown Law advice to NZDF, dated 2 November 2010 (after the timeframe of this Inquiry).⁴⁶ The advice sets out the key legal principles relating to complicity in the law of torture and applies them to particular aspects of NZDF's operations in Afghanistan. The advice does not consider how the law applied to the operations of the intelligence agencies in or in relation to Afghanistan. Sir Bruce's view is that if he or the other former Directors had sought advice from Crown Law at the time they would not have received any different advice. The Inquiry has found no evidence that such advice was sought by either NZSIS or GCSB during the relevant period. I agree that any Crown Law advice, had the question been asked, would likely have identified the same high threshold for State or criminal liability for complicity. It would also likely have said (as the advice to NZDF does) 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".⁴⁷ The opinion also sets out the steps that should "in practice" be taken to ensure non-complicity in the context where New Zealand involvement is "less direct", "less specific".⁴⁸ These align with my own conclusions with regard to best practice approaches: seeking on-going and credible assurances; taking all due steps to gather information about the practices of the partner agency; being aware that if circumstances change, New Zealand cooperation should be restricted or withdrawn.

⁴⁴ The New Zealand agencies were subject to their own legislation, the Government Communications Security Bureau Act 2003 (GCSB Act) and the New Zealand Security Intelligence Service Act 1969 (NZSIS Act), but also to other legislation including the New Zealand Bill of Rights Act 1990. The agencies' legal obligations are discussed further in Appendix D of this Report.

⁴⁵ MFAT notes that when it was asked to provide advice in a particular context it did so. By way of example, we located a 2004 MFAT cable (which the GCSB received) in which MFAT considered the appropriate treatment of detainees if handed over by the NZSAS to coalition forces in Afghanistan, including expectations that custody would be in accordance with IHL and human rights.

⁴⁶ The advice has subsequently been made public by the Inquiry into Operation Burnham (available at <<https://operationburnham.inquiry.govt.nz>> Document entitled "03.02 Note to Minister 484 Detainee Arrangements – Afghanistan").

⁴⁷ Note to Minister 484 Detainee Arrangements – Afghanistan at [39].

⁴⁸ Note to Minister 484 Detainee Arrangements – Afghanistan at [42].

138. The Inspector-General's jurisdiction extends only to the NZSIS and the GCSB, but it is undoubtedly correct that other government agencies had relevant roles and in retrospect there could have been more coordinated consideration of the issues arising out of the New Zealand military deployment that were posed for the government as a whole. I accept the point which I think is implicit in the former Directors' responses that it should not ultimately have been for them to make decisions or take actions which would have jeopardised receipt of intelligence relevant to New Zealand's security. Those were decisions and actions properly to be taken by Ministers. In my view that does not displace or diminish the responsibility of intelligence community Directors to raise the issues with Ministers and other relevant public sector agencies. While others had overlapping responsibilities and knowledge, the obligation to ensure New Zealand's compliance with domestic and international human rights obligations does not sit only with those that have specialised expertise in those matters. All government agencies must themselves have regard to those obligations in so far as they affect their activities. The Directors of the intelligence and security agencies were uniquely positioned by virtue of their roles and their relationships with their Five Eyes counterparts to ask factual questions and seek more information, which might have informed Ministers' decisions at a political level. Mr Woods and Dr Tucker do not accept that, as the heads of apolitical agencies, they had such a role.

Reliance on agency staff

139. All of the former Directors described their reliance on the experience, values and good judgement of their individual staff members who were deployed or seconded to Afghanistan and reliance on those staff to raise any concerns with them relevant to the treatment of detainees by the CIA, or by the National Directorate of Security in Afghanistan. While, as I have found, that reliance was well-placed in a professional and technical sense, the primary responsibility to recognise and raise such significant issues must rest with the senior leaders of the agencies.

Confidence in internal policy and training

140. The former Directors all in different ways expressed confidence in the adequacy of their agencies' policies and training of staff to identify legal risks relating to human rights obligations, and how they should be managed in day to day operational activities. Given my assessment of those matters earlier in this report, I do not think their confidence was well-founded. At the very least there should have been written policies applying the legal framework for civilians in an armed conflict and in the context of agency staff deployments; clear written parameters on involvement in or contribution to CIA interrogation; and a fully developed policy on how the agencies might identify, and then manage and respond to, information that may have been obtained through detainee mistreatment.

No re-evaluation of intelligence held by the agencies

141. Even after confirmation that the CIA had obtained information by torture, the former Directors did not re-evaluate the relevant CIA intelligence reports held on their files to assess their provenance and what that meant for whether the reports could lawfully and properly be retained and/or shared. A consequence of not doing this was that there was no consideration

of the total extent of this information. Had that occurred it might, in turn, have prompted the question of whether New Zealand's role in the exchange of information with the CIA was in accordance with New Zealand's human rights obligations and/or moral obligations, or at least needed some measure of explicit Ministerial approval.

Conclusions

142. The volume and credibility of public reporting on CIA rendition and torture of detainees meant that, in my view, the then Directors ought to have made their own inquiries and conducted a rigorous and independent assessment of those reports, notwithstanding the denials and assurances of the US agencies and the US government.
143. All chief executives, whether in core Public Service departments, in the wider State Sector, or in private enterprise, have, in addition to their operational or business mandates, a fundamental obligation to monitor, assess and protect their organisation from legal and other risk.⁴⁹ Events in respect of Al Qa'ida and Afghanistan raised an undoubtedly complex, unfamiliar, and evolving operational context, but nevertheless more was required of the Directors to ensure their agencies had a conscious and prudent approach to organisational risks of the kind at issue here.
144. I consider that it was then, and is today, for the Directors to be alert to where the most acute risks might arise; to ask the direct and difficult questions of their relevant counterparts; to model a responsibly sceptical and inquiring approach within their agencies to these inherently risky cooperation activities; and to give clear direction to their staff about how they operate in this environment. In my view, reliance by a Director on the 'need to know' principle, as justification for the lack of inquiry into allegations of torture, is at odds with the position of a Director, engaged in cooperation with close and trusted top-level counterparts in the Five Eyes intelligence community. During the relevant period there should have been more focus on New Zealand's human rights obligations, in agency policies, training, and engagements (at all levels) with Five Eyes counterparts.

Recommendations

145. Later in this report I include recommendations which relate to the role of the Directors-General of the agencies.

⁴⁹ See discussion in Appendix D of this Report.

VI SUMMARY OF NEW ZEALAND AGENCIES' INFORMATION EXCHANGES WITH THE CIA REGARDING DETAINEES

146. The Inquiry attempted to locate any information exchanges between the New Zealand intelligence and security agencies (predominantly the NZSIS as New Zealand's HUMINT agency) and the CIA, which related to CIA detainees. This was not a straightforward task. Some of the historical document management systems were more accessible than others. The hierarchy of paper files was extensive, with many potentially relevant files archived off-site.
147. We have located and reviewed many relevant documents. I cannot say with certainty that we have located all relevant information, but I am confident that the large volume of material reviewed during this Inquiry has been sufficient to form a sound basis for my conclusions on matters of fact.
148. Of the historical materials reviewed, the following have been of particular interest to the Inquiry:
- Intelligence reports on the CIA's capture of key senior operatives, predominantly from Al Qa'ida or Jemaah Islamiyah (some of whom were described as "high value");
 - Intelligence reports from "US Liaison" providing information obtained through CIA custodial interviews/debriefings/interrogations⁵⁰ of at least 16 of the 39 detainees whom the CIA subjected to torture;⁵¹
 - NZSIS' communications with the CIA about detainees, including providing questions to be put to a detainee;
 - Open source material/media reports held on file.

The nature of the intelligence reports and related documents regarding CIA detainees

149. We have reviewed hundreds of documents, including intelligence reports from the CIA received and held on file (paper and electronic) by the NZSIS, and to a much lesser extent⁵², by the GCSB. The intelligence reports contain information obtained from CIA interrogation of detainees.⁵³
150. A large volume of documents, reports and requests were received by Five Eyes and other States' intelligence and security agencies over the early years of the "war on terror". "Trace requests"

⁵⁰ These terms are interchangeably used in the intelligence reports.

⁵¹ Senate Report, above n 4, at *Appendix 2: CIA Detainees from 2002 – 2008*, lists 119 CIA detainees, with the 39 detainees known to have been subjected to the CIA's Enhanced Interrogation Techniques identified in the Appendix. Discussed further below.

⁵² The GCSB has advised us that at the date of this report it holds approximately two dozen reports.

⁵³ The Senate Report, above n 4, addressed in considerable detail intelligence reports (including some report numbers) that the CIA disseminated as a result of its interrogations of 32 of the 39 detainees (ie, the 39 subjected to enhanced interrogation techniques). Notes summarising this dissemination include, for example: at 46, that while in CIA custody "information provided by Abu Zubaydah resulted in 766 disseminated intelligence reports"; at 80 "The CIA disseminated 109 intelligence reports from the CIA interrogations of Ramzi bin al-Shibh"; at 96 "The CIA disseminated 831 intelligence reports from the interrogations of KSM [Khalid Sheik Mohammed] over a period of 3.5 years".

came from the CIA and FBI, seeking checks for intelligence held about specific names, phone numbers, IP addresses and travel movements. Due to the volume, the NZSIS advised US partners that it would only be providing “a response for those individuals for whom we hold traces”. There are also numerous CIA requests for “terrorist cell members and supporters” names and aliases to be added to Watchlists and alerts on the CUSMOD⁵⁴ system, plus:

“if any of these individuals attempt to enter your country, please detain them for questioning pursuant to your authorities and notify our service immediately”.

151. From the documents I have seen, and checks we made with the Service, it does not appear that any person so named by the CIA attempted to enter New Zealand.
152. The NZSIS also established personal files (PF) for dozens of people suspected or known to be Al Qa’ida or Jemaah Islamiyah operatives. The PF (as well as other files) included reports pre-capture and reports from interrogations post-capture. For one CIA high value detainee alone, for example, there are on file well over a very large number of post-capture intelligence reports.⁵⁵ The majority of relevant reports held on agencies’ files (predominantly on NZSIS files) were generated during the period 2002 to 2004. Most identify the detainee from whom the information was obtained, although a number refer only to “the detainee” or to “a senior Al-Qa’ida operative and detainee”.
153. The majority of the intelligence reports commence with a disclaimer from US Liaison that the information the detainee provided “may be meant to influence as well as inform. The detainee may also have been intentionally withholding information and employing counter-interrogation techniques”.
154. None of the reports confirm the country in which the CIA is holding the detainee (and it is not possible to identify this with any certainty from the multiple countries listed as the origins of the reports).
155. The recipients for the reports vary. Some were directed only to the NZSIS, most were sent to Five Eyes partners, others also went to agencies in South East Asia and/or the Middle East.

Intelligence reports and related documents about CIA detainees subjected to torture

156. I have had particular regard to the information the agencies hold which relates to CIA detainees (mostly senior Al Qa’ida or Jemaah Islamiyah operatives), who the CIA subjected to combinations of “Enhanced Interrogation Techniques”. The Senate Report identified 39 such CIA detainees. There are multiple documents and reports on file about the operatives’ movements up until capture, as well as intelligence reports consisting of the information obtained through interrogations. While I cannot be sure that we have located all such documents, I note that in particular the New Zealand agencies held multiple intelligence reports from interrogations of 16 of the 39 detainees subject to torture.

⁵⁴ CUSMOD is a border management database used by New Zealand Customs Service.

⁵⁵ Riduan Bin Isamuddin (aka Hambali); listed at 73 in the Senate Report, above n 4, at *Appendix 2: CIA Detainees from 2002 – 2008*.

157. There is nothing on the face of the intelligence reports that would alert the recipient agency to the fact that the detainee was subjected to torture to obtain the information contained in the report. Nor are there any indications in the reports that the CIA had engaged in extraordinary rendition, with these 39 detainees often moved around to several CIA black sites before appearing in detention at Guantanamo Bay, mostly around September 2006. For the New Zealand intelligence and security agencies, the detainees' whereabouts prior to Guantanamo Bay were unknown.
158. Reports considered to be relevant to New Zealand interests were issued by the NZSIS as ZI or SIR reports. The usual distribution of such reports was to the heads of the Ministry of Defence; External Assessments Bureau (EAB);⁵⁶ MFAT; GCSB; Directorate of Defence Intelligence and Security (DDIS); Intelligence Coordinator (IC); NZ Police and NZ Customs.
159. From the many documents we reviewed which relate specifically to the 39 high value CIA detainees subjected to torture, I note the following.

*Abu Zubaydah*⁵⁷

160. Abu Zubaydah was captured in March 2002. As at 6 May 2019, he was still detained at Guantanamo Bay.⁵⁸ It is now public knowledge that following his capture he was water-boarded 83 times as part of his interrogations.⁵⁹ Intelligence reports of his interrogations are on file from April 2002 and the early reports note that Abu Zubaydah was still under medication and recovering from bullet wounds suffered at capture.
161. In October 2002 the Director of Security wrote to five other New Zealand government agencies, providing intelligence obtained from the interrogations of Abu Zubaydah.
162. In November and December 2002, there was further correspondence between the CIA and the NZSIS about Abu Zubaydah.

*Ramzi bin al-Shibh*⁶⁰

163. Ramzi bin al-Shibh was captured in September 2002. As at 6 May 2019, he remains detained at Guantanamo Bay.
164. The NZSIS had some correspondence with the CIA in September 2002 relating to Ramzi bin al-Shibh. No reply from the CIA has been located.

⁵⁶ Now called the National Assessments Bureau (NAB) within DPMC.

⁵⁷ No. 1 on the list, Senate Report, above n 4, at IX. *Appendix 2: CIA Detainees from 2002 – 2008*.

⁵⁸ The Senate Report, above n 4, notes, at page 410, that the CIA conceded in 2006 that Abu Zubaydah "was not a member of Al Qaeda". From 24 January 2018, he was delisted by the UN Security Council from the ISIL and Al Qa'ida Sanctions List (on the recommendation of the UN Ombudsperson to the ISIL and Al Qa'ida Sanctions Committee (Case 78)).

⁵⁹ An article in *Time Magazine* by the Counsel for Abu Zubaydah, Joseph Margulies, dated 14 March 2018 states the majority of Abu Zubaydah's waterboarding occurred during a three week period in August 2002, and that his torture has resulted in permanent physical and psychological damage. 7

⁶⁰ No. 41 on the list, Senate Report, above n 4, at IX. *Appendix 2: CIA Detainees from 2002 – 2008*.

*Khalid Sheikh Mohammed*⁶¹

165. Khalid Sheikh Mohammed was captured in March 2003. As at 6 May 2019, he remains detained at Guantanamo Bay. It is now public knowledge that commencing shortly after his capture, he was water-boarded 183 times as part of the CIA interrogation.⁶² We located some a considerable number of intelligence reports from his interrogations on file, sometimes with several reports from the same date.
166. In May 2003 the NZSIS received a CIA intelligence report from the interrogation of an unnamed “senior Al-Qa’ida detainee”. At the time Service staff had annotated the report “almost certainly Khalid Sheik Mohammed”. The Director of Security has initialled the report, noting on it “seen by the Prime Minister”.⁶³
167. In late May 2003 the NZSIS distributed this intelligence, in a report issued to various other New Zealand government agencies.
168. In June and July 2003, there was some correspondence between the CIA and the NZSIS about this detainee. The Service provided questions for the CIA to put to the detainee and received an intelligence report in response.

*Mohd Farik bin Amin (aka Abu Zubair)*⁶⁴

169. Mohd Farik bin Amin was captured in June 2003. As at 6 May 2019, he remains detained at Guantanamo Bay. Intelligence reports provided to the NZSIS in June, July and August 2003 related to this individual.
170. NZSIS circulated the information from those reports in a report to New Zealand agencies.
171. A CIA intelligence report in August 2003 then provided information from further interrogations of Amin. The NZSIS again circulated this information in a report distributed to the same pool as the earlier report.

*Bashir bin Lap (aka Lillie)*⁶⁵

172. Bashir bin Lap (aka Lillie) was captured in August 2003. As at 6 May 2019, he remains detained at Guantanamo Bay. We located on file some a considerable number post-capture intelligence reports from the CIA interrogation of this detainee. As with the other detainees discussed in this Part, confirmed in the Senate Report, but not apparent on the face of the reports, the interrogation of this man involved torture. The NZSIS distributed the intelligence from Lillie’s interrogation to other New Zealand agencies. We did not locate any records of the New Zealand agencies responding to and seeking further information following these reports.

⁶¹ No.45 on the list, Senate Report, above n 4, at IX. *Appendix 2: CIA Detainees from 2002 – 2008.*

⁶² See the Chronology in Appendix B; Senate Report, above at n. 4, at II, page 85.

⁶³ It is not known whether the Prime Minister saw the report before or after the annotation was made, or whether this information may have been provided to the Prime Minister as a verbal update.

⁶⁴ No. 62 on the list, Senate Report, above n 4, at IX. *Appendix 2: CIA Detainees from 2002 – 2008.*

⁶⁵ No. 72 on the list, Senate Report, above n 4, at IX. *Appendix 2: CIA Detainees from 2002 – 2008.*

*Riduan bin Isamuddin (aka Hambali)*⁶⁶

173. Riduan Isamuddin (aka Hambali) was captured in August 2003. As at 6 May 2019, he remains detained at Guantanamo Bay. The NZSIS holds on file a very large number of post-capture intelligence reports from the CIA interrogation of this detainee.
174. Hambali's PF contains a document "Daily Open Source Reporting from the US Department of Transportation 27 October 2003" which has an Associated Press (AP) report that Hambali "has been interrogated by US agents at an undisclosed location" since his capture. A partner agency Daily Report from 23 January 2004 corroborates the claim that Hambali is being detained by the CIA.⁶⁷
175. Many of the intelligence reports from Hambali's interrogation by the CIA over the period 2002 to 2004 were judged to be relevant for issue as ZI reports, distributed to other New Zealand agencies.

Intelligence regarding detainees: Writs of habeas corpus

176. A further occasion for information exchanges between the Service and the CIA arose in the context of Guantanamo Bay detainees' habeas corpus cases in the US.
177. In 2008 the US Government found itself in the position of providing responses to a number of habeas corpus cases brought by detainees held at Guantanamo Bay.
178. The Service prepared itself "to service any requests" on a case by case basis. A draft reply to the CIA, found in the file, noted "an obligation to ensure that any information shared or used over which we are consulted is accurate, reliable and up-to-date".
179. The documents reviewed did not show what if any legal analysis was undertaken by the NZSIS in 2008 in relation to the use of Service intelligence, including the possibility it might have assisted with indefinite detention of individuals. I did not locate any specific information requests from the CIA nor any responses provided by the Service.

Open source material/media reports on file

180. The files I reviewed also contained open source material, mainly reports in the media, on the 39 detainees. While there was much about the capture of Al Qa'ida and Jemaah Islamiyah operatives and the potential damage done to those organisations, there were no media reports of the allegations about CIA abuse of those detainees, including their extraordinary rendition, although the sources of the material were the same and covered the same time periods, as those where numerous allegations were reported (for example, The New York Times, The Washington Post, and ABC News). The media report on file closest in time to the allegations is from The Australian in November 2003. It reports the US State Department co-ordinator for counter-terrorism J.Cofer Black being asked whether torture was being used on detainees Khalid

⁶⁶ No. 73 on the list, Senate Report, above n 4, IX. *Appendix 2: CIA Detainees from 2002 – 2008.*

⁶⁷ The AP report also records then President George W Bush promising to return Hambali to Indonesia for trial "once American Investigators have finished questioning him". Hambali remains detained at Guantanamo Bay.

Sheikh Mohammed and Ramzi bin al-Shibh, to which he replied: “All I can say to that is that there is a before and an after September 11. We have taken off our kid gloves.”

Conclusions

Intelligence exchange inadvertently brought the agencies into close contact with torture by the CIA

181. The treatment of the CIA detainees was not known by the Service at the time of many of the information exchanges with the New Zealand agencies, ie, during 2002 and 2003, but plausible reports were already in the public domain (see the Chronology at Appendix B). In hindsight the usual intelligence exchange process - seeking, receiving, evaluating and providing – inadvertently brought the New Zealand intelligence and security agencies, and the NZSIS in particular, into direct connection with the CIA’s interrogation of a detainee, including its use of torture or other CITD.

Unknown effects of actions by NZSIS on detained individuals

182. It is not possible to know whether there was any cost to Khalid Sheikh Mohammed by the NZSIS providing questions to the CIA, seeking his answers about the specific issue they were concerned with. The Inquiry could not tell, at this remove, whether any of the other information provided by the NZSIS resulted in CIA interrogations of individuals, possibly involving torture, or assisted with the further detention of individuals without trial.

Holding of detainees in undisclosed locations, incommunicado, not flagged as a human rights breach

183. I did not locate any documents, reports, or briefings for relevant Ministers, that demonstrated any concern about the CIA holding detainees in undisclosed locations. I am satisfied that this fact would have been known to the New Zealand agencies – it was widely reported in the media from before 2004, and is a ‘red flag’ for abuse of human rights. I would expect it to have been flagged as a matter of some importance in records relating to the relevant overseas partner.

Information obtained by torture held in other New Zealand Government agency records

184. As detailed above, these documents also demonstrate how information obtained as a result of torture by the CIA (‘tainted’ information) and therefore unreliable⁶⁸ found its way into the files and records of other government agencies within New Zealand.

⁶⁸ Information obtained by torture is described in the Ministerial Policy Statement *Cooperation of New Zealand intelligence and security agencies (GCSB and NZSIS) with overseas public authorities*, above n 13, at [26], as “inherently unreliable.” As to reliability, see also: Ian Leslie “The scientists persuading terrorists to spill their secrets” *The Guardian* (online ed, London, 13 October 2017); FBI-administered High Value Detainee Interrogation Group’s Report *Interrogation Best Practices* 26 August 2016, identifying effective interrogation practices as those “that are individualised, flexible, rapport-based and information-seeking, and do not rely on formulaic approaches and techniques”, at 7; Senate Report, *Executive Summary* at 300, 398, 400, 433, 485 and “Finding #1 The CIA’s use of its enhanced interrogation techniques was not an effective means of acquiring intelligence or gaining cooperation from the detainees”, “While being subjected to the CIA’s enhanced interrogation techniques and afterwards, multiple CIA detainees fabricated information, resulting in faulty intelligence. Detainees provided fabricated information on critical intelligence issues, including the terrorist threats which the CIA identified as its highest priorities.”, “Finding # 2 The CIA’s justification for the use of its enhanced interrogation techniques rested on inaccurate claims of their effectiveness.”

Records remaining in NZSIS and GCSB systems not annotated as to origins or reliability, then or now

185. The records identified in this Part of my Report still remain on the NZSIS and GCSB document management systems with no notation or indication of their provenance. The agencies did not take any action to review the files when the torture became confirmed public knowledge. These reports are now historical, the content likely obtained by unlawful means, and of highly questionable reliability so should not be used or shared. They are irrelevant to current intelligence activities. The agencies should, subject to their obligations under the Public Records Act 2005, purge these reports from their systems and advise other New Zealand government agencies with whom they shared this information at the time, so they too can review their files. If they cannot dispose of this material, they should seal access to it.

Recommendations

186. These conclusions inform the recommendations I make later in this report.

VII THE LEGAL FRAMEWORK IN RELATION TO THE PROHIBITION OF TORTURE

Introduction

187. In the course of the Inquiry my office developed a Discussion Paper setting out the law relating to the prohibition on torture and complicity in torture, some possible developments in State and individual accountability, and an assessment of the Service's and Bureau's policies in this area, having regard to best practice in other comparable jurisdictions. Following the agencies' preliminary responses to that Discussion Paper, it was included in revised form in the draft of the classified Report which was circulated for consultation.
188. We received extensive, detailed and helpful feedback on that part of the draft Report, including from MFAT, which has primary responsibility for advising the Government on New Zealand's international law obligations. As a result of that consultation process, at the time of finalising this report, MFAT is working with Crown Law, NZDF and the intelligence and security agencies to formalise a statement of New Zealand's obligations in relation to the law of torture and complicity in torture.
189. I welcome that development, which I expect will provide a clear legal framework, not only for the intelligence and security agencies, but for other New Zealand public sector agencies also. In light of that development (and because I have found no unlawful conduct by the agencies or individual officers or staff of the agencies) it is not necessary to include in this Report the more detailed discussion of the law of torture and complicity in torture which was originally anticipated.
190. Appendix D sets out in brief terms the prohibition on torture and complicity in torture, at international and domestic law. It also states what can be said with a degree of certainty, at the current time, about the legal standards bearing on State and individual criminal responsibility (international and domestic) for complicity in torture. It canvasses commentary from various bodies and academics in other jurisdictions about how the law of complicity might or should develop; some of that commentary is in the context of the operations of intelligence and security agencies. That material is intended to inform the necessary discussion about what is "best practice" for the New Zealand intelligence and security agencies, consistent with a precautionary approach and in light of New Zealand values.

VIII BEST PRACTICE APPROACHES TO INFORMATION SHARING AND COOPERATION: ENSURING LAWFUL ACTION

Benefits from observing best practice

191. As identified elsewhere in this report, some difficult practical questions arise in the context of intelligence-sharing arrangements, particularly in routine and reciprocal relationships between intelligence and security agencies. The likelihood of States being held responsible for the actions of officials sharing or using information obtained by torture as part of systematic and mutual information sharing arrangements between States is relatively untested. New Zealand intelligence and security agencies are net beneficiaries of information sharing and co-operation with foreign partners, and with the Five Eyes partners in particular.⁶⁹ These relationships are highly valued and New Zealand is keen to preserve them, alongside developing other connections. However, it is plain that relying on relationships of trust, and personal assurances provided at high level by foreign States and agencies, are not sufficient to guarantee compliance with international and domestic law.
192. This report demonstrates the legal, political and practical complexities that New Zealand's intelligence and security agencies have to navigate, in sharing information and cooperating with foreign States and agencies, to ensure the actions of New Zealand agencies are legally compliant. This best practice section proposes that the prudent and precautionary approach is to observe requirements to exercise due diligence⁷⁰ and adopt a best practice approach to both policy and operational practice. Measures must provide a margin of safety, be effective and apply across agency functions. They need to be relevant to instances where there is an established intelligence relationship as well as where the connection with the foreign authority is ad hoc, one-off, or infrequent.
193. The classified version of this Report contained an extensive survey and analysis of the elements of best practice. Set out below is a brief discussion of that material, followed by a summary of the principal elements of best practice.

⁶⁹ Cullen and Reddy, above n 15, at [3.43] and [3.47].

⁷⁰ See the discussion of due diligence in Anja Seibert-Fohr "From Complicity to Due Diligence: When do States Incur Responsibility for Their Involvement in Serious International Wrongdoing?" *German Yearbook of International Law*, (2018) (60) (Forthcoming) at 11 - 19.

Elements of Best Practice

Ministerial Directions: Provide high-level regulation and guidance

194. Our Inquiry scrutinised high level guidance in the UK and Canada as well as New Zealand and a brief summary of each follows.

New Zealand: 2017 Ministerial Policy Statement

195. The ISA in 2017 established Ministerial Policy Statements (MPSs) as:

- “a mechanism to enable the responsible Minister to regulate the lawful activities of the agencies”;
- “to enhance oversight and compliance”; and
- “to ensure the agencies have clear and objective guidance about how they are to carry out their lawful activities”.⁷¹

196. The MPSs provide guidance to the intelligence and security agencies in relation to ten stated areas.⁷² The Ministerial Policy Statement on Cooperation of New Zealand intelligence and security agencies (GCSB and NZSIS) with overseas public authorities (MPS Overseas Cooperation) sets out procedures to authorise intelligence cooperation, assistance and sharing, and the protections and restrictions that need apply. The MPS Overseas Cooperation took effect from 28 September 2017 for three years, unless amended, revoked or replaced sooner. It makes reference to this Inquiry, and notes “when completed, the conclusions from that Inquiry may give cause for the issuing Minister to review and reissue this MPS”.⁷³

UK: Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence relating to Detainees, July 2010 (Consolidated Guidance)

197. The Consolidated Guidance is issued by the UK Government. It has been criticised by the UK Intelligence and Security Committee: “it does not appear to have achieved its aim of increasing public confidence in the Agencies. It does not provide guidance and it is misleading to present it as such.”⁷⁴

198. In June 2018 the UK Prime Minister invited the Investigatory Powers Commissioner (IPCO) to make proposals as to how the Consolidated Guidance could be improved, taking account of the ISC’s views and civil society. IPCO presented a revised version of the Consolidated Guidance to the Prime Minister for her consideration. In July 2019, the updated policy was published, now

⁷¹ DPMC Cabinet Paper 2 *Warranting and authorisation framework* at [99] and [101].

⁷² Available at <<https://www.nzic.govt.nz/legislation/>>.

⁷³ MPS Overseas Cooperation, above n 13, at [67].

⁷⁴ UK ISC *Detainee Mistreatment and Rendition: Current Issues* (June 2018), above n 14, at 4.

entitled *The Principles relating to the detention and interviewing of detainees overseas and the passing and receipt of intelligence relating to detainees*.⁷⁵

Canada: 2017 Ministerial Directions

199. In 2017 the Canadian Minister of Public Safety and Emergency Preparedness issued Ministerial Directions on Avoiding Complicity in Mistreatment by Foreign Entities (CSIS MD), issued to agencies including the Canadian Security Intelligence Services (CSIS); Royal Canadian Mounted Police (RCMP) and the Canada Border Services Agencies (CBSA). The 2017 Directions replaced 2011 Ministerial Directions and more clearly state the Canadian Government's "values and principles against torture and mistreatment and commitment to the rule of law", by:

- condemning torture and mistreatment;
- referring to relevant rights and protections in Canada's Charter of Rights and Freedoms;
- promising commitment to the rule of law; and
- compelling increased transparency and accountability through required reporting to review bodies, the relevant Parliamentary Committee, the Minister and the public.

200. The CSIS MD recognises that information-sharing with foreign entities is vital to CSIS' ability to maintain strong relationships and address threats to national security, while also recognising that torture or other CIDTP serve no legitimate military, law enforcement, or intelligence-gathering purpose, with any information yielded "very likely unreliable".⁷⁶

201. The CSIS MD requires CSIS to publish information that explains how the MD is implemented, including how risk assessments are conducted, in line with Canadian values including those in the Canadian Charter of Rights and Freedoms.⁷⁷ CSIS is also directed to produce a classified annual report for the Minister (and the oversight body, the Security Intelligence Review Committee (SIRC)) containing number and details:

- of 'substantial risk' cases where the MD was engaged; and
- the restriction of any arrangements due to concerns related to mistreatment.⁷⁸

202. The CSIS MD⁷⁹ provides a useful model for the New Zealand Government to consider in the forthcoming review of the New Zealand MPSs, in terms of the following points.

⁷⁵ While high level, the Principles require each agency to which these Principles apply to provide more detailed advice and guidance (including legal) to their personnel (at page 1); See updates regarding the *Consolidated Guidance* at <<https://www.ipco.org.uk>>.

⁷⁶ Ministerial Direction to the Canadian Security Intelligence Service: *Avoiding Complicity in Mistreatment by Foreign Entities* (25 September 2017) (CSIS MD) at [13].

⁷⁷ CSIS MD, above n 76, at [19].

⁷⁸ CSIS MD, above n 76, at [24] and [25].

⁷⁹ Aspects of Canada's 2017 MDs have now been codified, added to Bill C-59 as the Avoiding Complicity in Mistreatment by Foreign Entities Act. Bill-C59 received Royal Assent in June 2019.

The need for clarity and controls if information derived from torture is used in “exceptional circumstances”

203. UNCAT states that no exceptional circumstances or public emergency may be invoked as a justification of torture.⁸⁰ A distinction is made between committing acts of torture (which is prohibited), and using information likely obtained by torture (ie, viewed by some as permitted in “exceptional circumstances”, or if received “passively”). Governments which decide to allow such use must ensure clear and strict controls exist.

Define with care “exceptional circumstances” and/or “public emergency”

204. If a State considers information likely obtained by torture can be used by intelligence agencies, the exceptional circumstances or public emergency where this may occur must be clearly and appropriately defined. Such exceptional situations are colloquially described as ‘ticking bomb’ scenarios. The Canadian CSIS MD limits exceptional circumstance to one where use of the information is “necessary to prevent loss of life or significant personal injury”.⁸¹ Both the Dutch General Intelligence and Security Service (GISS) and the UK Joint Committee on Human Rights have also considered this issue⁸² and emphasised that sharing of information in this situation will be a rare event and should not occur if there are indications that providing personal data may lead to the violation of human rights.

Place explicit limits on permissible use of torture-derived information in emergencies

205. Canada’s CSIS MD sets out processes or purposes for which information likely obtained through mistreatment may not be used; what is required of officials where they decide there are “exceptional circumstances”. It requires that the Minister, the relevant oversight body (SIRC) and relevant Parliamentary Committees must be informed.

Ensure realistic assessments of the reliability and credibility of torture-derived information

206. The CSIS MD states that torture and CIDPT serve no legitimate intelligence-gathering purpose, with any information yielded “very likely unreliable”.⁸³

207. The use of such information by government may potentially affect public perceptions around the integrity and credibility of executive decision-making. Courts in relevant jurisdictions have noted the negative effect admitting evidence obtained by torture would have on perceptions of the integrity of the courts and systems of justice.⁸⁴ To date the same attention and analysis has

⁸⁰ UNCAT, Article 2(2).

⁸¹ CSIS MD, above n 76, at Appendix C, 1c.

⁸² CTIVD Review Report 22a on the cooperation by GISS with foreign intelligence and security services (2009) at 24; UK JCHR *The UN Convention Against Torture* (Session 2005-6 HL Paper 185-1, HC 701-1) at [55].

⁸³ CSIS MD, above n 76, at [13].

⁸⁴ See, for example, *A and others v Secretary of State for the Home Department (No.2)* [2005] UKHL 71; [2006] 2 AC 221; [2006] 1 All ER 575 (A (No 2)) at [52].

not been applied to the use of torture-derived information in executive and operational decision-making.

208. Relevant contextual factors in assessing the reliability of information received include:

- Persons most targeted by torture are political detainees and perceived terrorists;
- The more self-inculpatory the nature of the information provided by an individual, the less likely it was provided voluntarily;
- Corroborated intelligence does not mean that it has not been derived from torture; the level of detail or the reliability of the information are not, on their own, useful factors in assessing whether there are reasonable grounds to believe that information was obtained by torture; the issue is not whether it is true or false, or corroborated or not but whether it is obtained by torture;
- Reports from bodies such as Amnesty International, Human Rights Watch and the UN Committee Against Torture represent the best evidence available since there is very little direct evidence of torture;
- Intelligence agencies cannot simply rely upon anecdotal information or personal relationships that may exist between special liaison officers and security officials in foreign countries (as those with poor human rights records may be more interested in maintaining a relationship with the Service than actually providing truthful information on human rights conditions);
- To establish that information was obtained by the use of torture requires more than simply pointing to the poor human rights records of a given country.

Define the applicable law in a guide

209. Prudent practice is to provide a standalone guide to the applicable law, both domestic and international, which can then be referenced by other related policies and procedures, and inform staff (including if in-theatre). Setting out the legal standards can act as a quick reference to existing benchmarks, which will be relevant if, for example, another State appears to be relying on a different interpretation of the law or signals that it has or will cease to apply relevant legal obligations.

Create agreements between States/agencies outlining provision of assistance and information sharing

210. Best practice for information sharing arrangements between States (or between their agencies) requires that such agreements or MOUs must:

- be in writing;
- be signed off by Directors and/or Ministers;

- set out rules (ie mutually agreed standards and expectations) governing the use of shared information, not least to “reduce the scope for informal intelligence-sharing which cannot be easily reviewed by oversight institutions”;⁸⁵
- include a statement of parties’ compliance with human rights and data protection requirements;
- include a requirement to observe in practice the ‘third party rule’ or where more appropriate, the ‘third country rule’ (ie where information obtained may only be provided to others if the service/country from which the information originates has given permission to do so);⁸⁶
- address the situation where the NZSIS or GCSB receives information at third hand (ie where the information is disclosed to New Zealand by a liaison service not suspected of mistreatment of individuals but which obtained that information indirectly from a third party which is);⁸⁷
- make provision for the sending service to request feedback on the use of the shared information;⁸⁸
- be regularly reviewed;⁸⁹
- when concluded or revised, be provided to independent oversight institutions for review.⁹⁰

211. Canada provides an example of oversight of such arrangements. CSIS is required by statute to have Ministerial approval for information sharing arrangements with foreign intelligence agencies⁹¹ and to provide the oversight body, SIRC, with a copy of any written arrangement that CSIS enters into with the government of a foreign State;⁹² any institution therein; or any international organisation of States or an institution of such a body.⁹³ SIRC must “carefully

⁸⁵ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin *Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism* A/HRC/14/46 (17 May 2010) at [45].

⁸⁶ CTIVD *Review Report 22a*, above n 82, at 22 and 23.

⁸⁷ UK Intelligence Services Commissioner Rt Hon Sir Mark Waller *Supplementary to the Annual Report for 2015* (House of Commons, HC 458, 2016) identifying this as a gap in the *Consolidated Guidance*.

⁸⁸ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin *Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism*, above n 85, at [45].

⁸⁹ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (Ottawa: Public Works and Government Services Canada, Volume 3, 2006) at 321.

⁹⁰ Privacy International Report *Secret Global Surveillance Networks: Intelligence Sharing Between Governments and the Need for Safeguards* April 2018, at 44, 47 to 48; Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin *Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism*, above n 85 above, at [48] - [49].

⁹¹ Canada Security and Intelligence Service Act 2002, ss 13 and 16.

⁹² Canada Security and Intelligence Service Act 2002, s 17.

⁹³ Privacy International Report *Secret Global Surveillance Networks*, above n 90, at 34.

examine these arrangements and monitor the exchange of information to ensure that the terms of the arrangements are upheld".⁹⁴

Have a policy to guide informed assessments of State/agency human rights records and accurately identify risks around engagement

212. The UN Special Rapporteur has recommended that, before either entering into an intelligence-sharing agreement or sharing intelligence on an ad hoc basis, intelligence services undertake an assessment of the counterpart's record on human rights and data protection, as well as the legal safeguards and institutional controls that govern the counterpart (and whether there is independent oversight). Before handing over information, intelligence services should make sure that any shared intelligence is relevant to the recipient's mandate, will be used in accordance with the conditions attached and will not be used for purposes that violate human rights.⁹⁵
213. Sections 3, 17 and 18 of the ISA require the GCSB and the NZSIS to act in accordance with New Zealand law and all human rights obligations recognised by New Zealand law. Implicit in those obligations is a need to be actively thinking and asking questions about where and how risks of being implicated in acts of torture or CIDTP by other States and agencies might arise and assessing those risks.

Policy to establish an appropriate overall process

214. Policies in partner jurisdictions outline the scheme of inquiry to be followed. Examples are provided in the UK Consolidated Guidance and Human Rights Guidance, by the UK's Overseas Security and Justice Assistance (OSJA), which addresses a wider range of activities overseas than the Consolidated Guidance.

Policy to inform assessment of State/agency human rights records

215. Agencies need a policy to inform their assessments of other State or agency human rights records. The Netherlands' oversight body (CTIVD) amongst others has considered this question.⁹⁶
216. Policy guidance for making these assessments must include the range of credible sources for officials to consult. There are many reliable and accessible sources that provide information about a State's human rights record, including (in no specific order):
- discussions with State authorities (including at diplomatic and ministerial levels);
 - Governmental reports and published Government legal opinions;⁹⁷

⁹⁴ CSIS 'Sharing Intelligence Internationally', accessed at <<https://csis.gc.ca/bts/shrng-en.php>>.

⁹⁵ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin *Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism*, above n 85 at [47].

⁹⁶ The Netherlands Review Committee on the Intelligence and Security Services (CTIVD) Review Report 22a on the cooperation by GISS with foreign intelligence and security services (2009) at [14.2].

⁹⁷ For example, Office of Legal Counsel in US Department of Justice; selected opinions are published on DOJ's website.

- Ministerial directives;
- reports of Parliamentary committees;⁹⁸
- Presidential orders;⁹⁹
- public statements and official policies of the foreign agency or State;¹⁰⁰
- reports of fact-finding commissions and independent monitors;
- reports from States' independent oversight agencies (eg oversight of human rights or intelligence and security matters);
- country profiles drawn up by the Ministry of Foreign Affairs and Trade, and reports from embassies;
- UN reports (eg, country visits by Special Rapporteurs; Concluding Observations by the Committee Against Torture, on State compliance with UNCAT; Concluding Observations by the UN Human Rights Committee, on State compliance with ICCPR; Reports from UN Assistance Mission in Afghanistan (UNAMA));
- Council of Europe reports;
- US State Department country reports;
- International Committee of Red Cross (ICRC) reports;
- relevant caselaw (eg, European Court of Human Rights; UK, Canadian and NZ Supreme Courts);
- recent reports from civil society and independent international human rights protection organisations (eg NGOs such as Amnesty International and Human Rights Watch);¹⁰¹
- information from partner agencies and other States; and
- media reports.

217. In addition, knowledge of wrongful conduct and its duration may be gained through long-standing prior cooperation with a foreign agency, or from geographical proximity.

⁹⁸ For example, the UK Parliament's Joint Committee on Human Rights.

⁹⁹ A recent example is US President Trump's Executive Order 13823 of 30 January 2018 *Protecting America Through Lawful Detention of Terrorists* in which it is ordered at 1.(d) that "[t]he detention operations at the U.S. Naval Station Guantanamo Bay are legal, safe, humane, and conducted consistent with United States and International law".

¹⁰⁰ See Erika de Wet "Complicity in the Violations of Human Rights and Humanitarian Law by Incumbent Governments through Direct Military Assistance on Request" (2018) 67 ICLQ at 18, citing V Lanovoy *Complicity and its Limits in the Law of International Responsibility* (Hart Publishing, Oxford, 2016) at 101 and 238.

¹⁰¹ When considering potential breaches of IHL by a trading partner, Saudi Arabia, the UK Foreign Office reported in October 2015 that "we have taken into account recent NGO reports in our assessment and we are ensuring that we are meeting our responsibility to avoid any risk of "wilful blindness"; as referenced by the High Court in *Campaign Against the Arms Trade v Secretary of State for International Trade* [2017] EWHC 1754 (Admin) at [154].

Policy to require assessments that include the treatment of detainees

218. To assess the treatment of detained individuals, the policy must guide officials to consult reports on conditions in a State's detention facilities, for example, reports from a National Preventive Mechanism established under the Optional Protocol to UNCAT. The UK Consolidated Guidance¹⁰² requires that before passing information to, or seeking information from, a liaison service, desk officers must ask themselves specific questions to ascertain the risk to an individual's human rights. When CSIS is considering using information received from or sent to a foreign entity, risk assessment criteria include asking similar questions, plus whether the information comes from a self-incriminating confession and if there is other information indicating potential mistreatment, such as a poor human rights record or a practice of extraordinary rendition.¹⁰³

Policy to provide links to sources – Library of previous country assessments

219. Both a policy with links to the sources as listed above, and a library of the agency's previous country assessments, provide sound reference points for operational staff.

Ask the hard questions to inform assessments: What comprises sufficient inquiry regarding allegations of torture?

220. A key element of best practice is an agency's willingness to ask the difficult but essential questions, to assess the level of risk involved in engaging with activities of a foreign agency. This is particularly the case when specific indications of human rights breaches necessitate questions to an agency with which there is a long-standing relationship. In *Chahal v United Kingdom*¹⁰⁴ the ECHR identified the need for States to make a "rigorous examination" and exercise "close scrutiny" with regard to potential evidence of torture.¹⁰⁵ The recent report of the UK House of Lords Select Committee on International Relations, "Yemen: giving peace a chance", regarding the sale of arms to Saudi Arabia in light of the war in Yemen, stated that: "[r]elying on assurances by Saudi Arabia and Saudi-led review processes is not an adequate way of implementing the obligations for a risk-based assessment set out in the Arms Trade Treaty".¹⁰⁶ The UK Court of Appeal reiterated this view: "[T]he User's Guide call specific attention to the question of past violation as a relevant consideration when assessing whether there is a real risk of future violation. In our view that is obviously correct. How could it reasonably be otherwise?" The Court of Appeal held that the Secretary of State had erred in law by making no assessment of whether Saudi Arabia (leading the Coalition in the Yemen conflict) had committed past

¹⁰² UK Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees (July 2010) at [9], [23] and [27].

¹⁰³ Canadian Security Intelligence Service, Deputy Director Operations' Directive *Information sharing with foreign entities* (issued under the 2011 Ministerial Direction; released under the Access to Information Act).

¹⁰⁴ *Chahal v United Kingdom* (1996) 23 EHRR 413.

¹⁰⁵ For accepted standards of investigation into acts of torture in a State's territory, see the UN *Manual on the Effective Investigation and Documentation of Torture and Other Cruel Inhuman or Degrading Treatment or Punishment* (The Istanbul Protocol), Professional Training Series (No 8/Rev 1) 2004; The fundamental principles of any viable investigation into alleged incidents of torture are competence, impartiality, independence, promptness and thoroughness.

¹⁰⁶ UK House of Lords Select Committee on International Relations, *6th Report of Session 2017 – 19* (16 February 2019) at [72].

violations of IHL, and so whether there was a “real risk” for the future, and whether Saudi Arabia had “genuine intent” and “capacity to live up to the commitments made”. The Court’s decision resulted in the UK International Trade Secretary having to review past decisions on arms sales to Saudi Arabia and temporarily suspend any new ones.¹⁰⁷

221. A decision-maker should be able to satisfactorily explain why it was not considered necessary to have regard to credibly-sourced reports of State or agency involvement in acts of torture, and adjust the intelligence exchanges or cooperation accordingly, if that was the case.

Require assessment of all unsolicited information received by agencies

222. In the context of information sharing relationships between States, information that is received unsolicited by intelligence and security agencies must nevertheless be subject to comparable legal constraints, inquiry, analysis and rigour as all other information sought or sent. This is addressed in, for example, the UK Consolidated Guidance.¹⁰⁸

Mitigate risks of torture or cruel, inhuman or degrading treatment or punishment

223. States have a range of measures at their disposal which may serve to mitigate the risk that their actions are associated with torture or cruel, inhuman or degrading treatment or punishment. Reliance on one measure alone will seldom provide sufficient mitigation or reduction of risk. Nor will a substantial reliance on caveats and assurances without accompanying comprehensive assessments and monitoring of the human rights record and practices of the country/agency. On the other hand, mitigation of risk may be achieved simply by editing the information to omit identifying information of individuals.¹⁰⁹
224. Another approach when real risk exists is to make assistance conditional, as recommended in the 2015 UNAMA report on the treatment of detainees in Afghanistan.¹¹⁰
225. The main tools used by intelligence and security agencies to mitigate identified risk are caveats, assurances and legal initiatives.

Mitigation tool: Caveats

226. The caveat system is widely used and based on trust. In essence it describes directions on permissible use, attached to information when dispatched. Caveats do not guarantee that a recipient of information to which a caveat is attached will honour that caveat. The system is primarily about source protection. Caveats are not legally enforceable.¹¹¹ However, the ability and willingness of agencies to respect caveats and seek consent before using information will

¹⁰⁷ *R (on the application of Campaign Against Arms Trade) v The Secretary of State for International Trade and Intervenors* [2019] EWCA Civ 1020 20 June 2019 at [138] to [144].

¹⁰⁸ UK Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees, above n 102, at [27] and [28].

¹⁰⁹ Canada Communications Security Establishment, Operational Policy OPS-6, *Policy on Mistreatment Risk Management* (2 August 2016) at [3.6].

¹¹⁰ UN High Commissioner for Human Rights and UN Assistance Mission in Afghanistan *Update on the Treatment of Conflict-Related Detainees in Afghan Custody: Accountability and Implementation of Presidential Decree 129* February 2015, Kabul, Afghanistan at 113 and 114.

¹¹¹ UK ISC *Detainee Mistreatment and Rendition: Current Issues*, above n 14, at [143].

affect the willingness of others to provide information in the future – a significant incentive for agencies to respect caveats. “Common sense tells us the incentive is greater when caveats are clear and in writing.”¹¹²

Mitigation tool: Assurances

227. Diplomatic assurances take a variety of forms, ranging from oral to written documents signed by officials from both governments. Assurances may restate commitment to the state’s international law obligations or more specifically address what it will do or not do in a particular situation, such as intelligence sharing or deportation.¹¹³ There is no general rule or practice at international law preventing a state from seeking and obtaining assurances where a risk of torture is at issue, although such assurances are not legally enforceable and will not absolve a state of its duty to comply with its international law obligations.
228. Assurances must be practical and meaningful, with regard to the actions a State will take on receiving the information in question, or upon receiving the transferred/deported individual. Obvious considerations relate to whether an individual to be deported or identified in the information will be detained and the State’s record of treatment of detainees. Mere assurances that the activities of foreign agents will comply with international and national law, although frequently seen, may not be considered sufficient to ensure adequate protection against the risk of torture or ill treatment.
229. Assurances have, in some circumstances, proved unreliable. With regard to the CIA’s extraordinary rendition of detainees from CIA-run ‘black sites’ in European States, it was submitted to the ECHR that by 2005:¹¹⁴
- “any Contracting Party would or should have known that any US assurances that a detainee previously subjected to the US programme would be treated in a manner consistent with international law, in the case of further transfer, lacked credibility”.
230. Assurances have been considered by the House of Lords in *RB and U (Algeria) and OO (Jordan) v Secretary of State for the Home Department*¹¹⁵ which held that such assurances need to provide a reliable guarantee; the absence or otherwise of torture or ill-treatment in a country is a question of fact; and, should reliable sources point to a real risk of torture or ill-treatment in that country, it will not matter what assurances have been given. The Afghanistan Government’s Ministry of Foreign Affairs in 2009 provided an assurance to the NZDF, set out in an “Arrangement” for “the transfer of persons between the New Zealand Defence Force and the

¹¹² Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar *Report of the Events Relating to Maher Arar: Analysis and Recommendations*, above n 89, at 106 and 107.

¹¹³ In a paper on “International Legal Issues Relating to Detention”, presented to the Government Inquiry into Operation Burnham on 30 July 2019, Dr Penny Ridings noted safeguards to assist compliance with non-refoulement obligations relating to deportation, including assurances: “Additional safeguards that assist with complying with the non-refoulement obligation are the obtaining of formal assurances that a detainee will be treated in accordance with international human rights standards. Assurances are usually considered in combination with complementary mechanisms, such as monitoring of detainees, ... efforts to gather and maintain knowledge about law enforcement and detention facilities”.

¹¹⁴ *Abu Zubaydah v Lithuania*, above n 43, at [471]; submissions by the International Commission of Jurists and Amnesty International.

¹¹⁵ *RB and U (Algeria) and OO (Jordan) v Secretary of State for the Home Department* [2009] UKHL 1.

Afghan Authorities” with regard to observing human rights obligations for the treatment of detainees. The Arrangement states inter alia that both participants will “observe applicable international and domestic law”.¹¹⁶ While further detail on the applicable legal obligations may have been preferable, I note this Arrangement was not the only mechanism NZDF relied upon to monitor the treatment of any detainees.

231. The subsequent decision of the High Court of England and Wales in *R (on application of Maya Evans) v Secretary of State for Defence*¹¹⁷ considered the nature and effectiveness of formal assurances made to the UK forces by the Afghanistan Government, to similarly observe human rights in the treatment of transferred detainees. The Court concluded that, despite genuine efforts by UK forces to ensure the arrangements were accepted by relevant Afghanistan authorities, reliance on such assurances was misplaced given the public record of mistreatment of detainees by several Afghanistan authorities.¹¹⁸ Instead, the critical question was how those arrangements operated in practice.
232. The comprehensive 2017 UK report *Deportation with assurances* by David Anderson QC and Professor Clive Walker QC observed, “deportation with assurances is not at all realistic for chronically ‘problematic’ countries or ‘countries of concern’”.¹¹⁹ Although the report specifically considered deportations its conclusions are relevant here:¹²⁰

“The key consideration to be taken into account in developing safety on return processes is whether compliance with assurances can be objectively verified through diplomatic or other monitoring mechanisms”.

233. The 2018 UK ISC Report on *Detainee Mistreatment and Rendition: Current Issues* identified that obtaining assurances in writing can be problematic, as “it can be taken to imply suspicion”, “undermine trust and jeopardise future cooperation”.¹²¹ The Committee recommended that:¹²²

“where it is not possible to obtain a written assurance from a liaison partner, a written record of the oral assurance should be produced and sent to the liaison partner so that there is a shared understanding of expectations”.

234. Similarly the UK’s 2019 Consolidated Guidance (now called The Principles) states that “[w]hen an assurance or caveat is not made in writing, personnel must keep an accurate record of any discussions and, whenever feasible, should share it with the foreign authority as a formal note as soon as is practicable.”¹²³

¹¹⁶ *Arrangement Between the Ministry of Foreign Affairs of the Islamic Republic of Afghanistan and the New Zealand Defence Force Concerning the Transfer of Persons Between the New Zealand Defence Force and the Afghan Authorities* 12 August 2009.

¹¹⁷ *R (on application of Maya Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin).

¹¹⁸ *R (on application of Maya Evans)*, above n 117.

¹¹⁹ David Anderson QC and Professor Clive Walker QC *Deportation with assurances* ((House of Commons, CM 9462, July 2017) at [7.6].

¹²⁰ David Anderson QC and Professor Clive Walker QC *Deportation with assurances*, above n 119, at [3.36] - [3.42].

¹²¹ David Anderson QC and Professor Clive Walker QC *Deportation with assurances*, above n 119, at [62] Recommendation V.

¹²² UK ISC *Current Issues*, above n 14, at [62] Recommendation V.

¹²³ *The Principles relating to the detention and interviewing of detainees overseas and the passing and receipt of intelligence relating to detainees* (July 2019).

The New Zealand position on assurances

235. New Zealand's position has been stated in an international forum.¹²⁴ While diplomatic assurances should not be used to undermine the principle of non-refoulement, the practice of such assurances is well-established internationally and there can be circumstances in which assurances meet certain minimum quality and reliability thresholds, so it is possible for a State to take diplomatic assurances into account consistent with the principle of non-refoulement. It will depend on all the factors of a case, including the human rights situation in the receiving State, the risk factors associated with the individual, and the quality and practical enforceability of the assurances.
236. Recently the New Zealand Court of Appeal judicially reviewed a decision by the (former) Minister of Justice to allow the extradition of a Mr Kim to the People's Republic of China (PRC).¹²⁵ Mr Kim had argued that he was at risk of torture and extrajudicial killing and that he would not receive a fair trial under international law if returned to the PRC. The Court confirmed that New Zealand is not prohibited by international law from accepting or relying on diplomatic assurances when assessing whether there is a substantial risk that a person will be tortured or otherwise subjected to breaches of human rights.¹²⁶ However the Court held that consideration of the preliminary question, whether the general human rights situation in China is such that assurances should not be sought or accepted, was not sufficient.¹²⁷ The Court found that it was not reasonably open to the Minister to conclude on the evidence before her that Mr Kim was not a high risk. In this case the Minister erred in accepting assurances in relation to torture as adequate to protect Mr Kim on return to the PRC. The Court held that the Minister erred in failing to address inadequacies in the assurances and how they could protect against torture in the PRC when:¹²⁸
- Torture is already against the law, yet persists;
 - The practice of torture is concealed by the State and its use can be difficult to detect;
 - Torture often occurs outside the videotaped interrogation;
 - Evidence obtained by torture is frequently admitted in court; and
 - There are substantial disincentives for anyone, including the detained person, reporting the practice of torture.

¹²⁴ New Zealand Government "Observations of New Zealand on the Committee Against Torture's draft revised General Comment No.1 (2017) on the Implementation of Article 3 of the Convention on the Context of Article 22" (24 March 2017); Responding to the Committee's *Draft General Comment No 1 (2017) on the implementation of Article 3 of the Convention in the context of Article 22*, Committee Against Torture 60th session CAT/C/60/R.2 (2 February 2017); Now confirmed as *General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22* (Advance unedited version, 9 February 2018).

¹²⁵ *Kyung Yup Kim v Minister of Justice and the Attorney-General* [2019] NZCA 2019, 11 June 2019.

¹²⁶ *Kyung Yup Kim*, above n 125, at [70].

¹²⁷ *Kyung Yup Kim*, above n 125, at [275.b].

¹²⁸ *Kyung Yup Kim*, above n 125, at [275.f(i) to (v)].

Practical factors for considering assurances

237. Practical factors to take into account, in evaluating the appropriate use of assurances and whether received assurances can be relied upon, are broadly instructive and applicable across a number of areas, such as information sharing. These factors include:

For assurances developed with regard to deportation:

- whether the general human rights situation in the receiving State excludes accepting any assurances whatsoever (eg, including consideration of any actions by the country taken in response to previously critical external reports);¹²⁹
- whether the assurances are specific or are general and vague;¹³⁰
- who has given the assurances and whether that person can bind the receiving State;¹³¹
- if the assurances have been issued by the central government of the receiving State, whether regional authorities can be expected to abide by them;¹³²
- whether the assurances concern treatment which is legal or illegal in the receiving State;¹³³
- the length and strength of bilateral relations between the sending and receiving States, including the receiving State's record in abiding by similar assurances;¹³⁴
- whether the individual has previously been ill-treated in the receiving State;¹³⁵
- whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms;¹³⁶ including providing unfettered access to the individual's lawyer;¹³⁷ and to the individual themselves;
- whether there is an effective system of protection against torture in the receiving State, including a willingness to cooperate with international monitoring

¹²⁹ *Othman (Abu Qatada) v United Kingdom* (Application No. 8139/09) ECHR, 17 January 2012 (*Othman*) at [188]; David Anderson QC and Professor Clive Walker QC *Deportation with assurances*, above n 119, at 49, noting this as "the key consideration to be taken into account when developing safety on return processes".

¹³⁰ *Othman*, above n 129, at [189(ii)] citing *Saadi v Italy* (GC) no 37201/06 ECHR 2008.

¹³¹ *Othman*, above n 129 at [189(iii)] citing, *inter alia*, *Baysakov and Others v Ukraine* (54131/08) ECHR 18 February 2010 at [51]; *Soldatenko v Ukraine* (2440/07) ECHR 23 October 2008 at [73].

¹³² *Othman*, above n 129, at [189(iv)] citing *Chahal v United Kingdom* 15 November 1996 *Reports of Judgments and Decisions 1996-V* at [105] to [107].

¹³³ *Othman*, above n 129, at [189(v)] citing, *inter alia*, *Cipriani v Italy* (221142/07) ECHR 30 March 2010; *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3.

¹³⁴ *Othman*, above n 129, at [189(vii)] citing, *inter alia*, *Al-Moayad v Germany* (35865/03) ECHR 20 February 2007 at [68].

¹³⁵ *Othman*, above n 129, at [189(ix)] citing, *inter alia*, *Koktysh v Ukraine* (43707/07) ECHR 10 December 2009 (*Koktysh v Ukraine*) at [64].

¹³⁶ UK Intelligence Services Commissioner *Report of Intelligence Services Commissioner for 2015* (House of Commons, HC 459, 2016) at 43.

¹³⁷ *Othman*, above n 129, at [189(viii)] citing, *inter alia*, *Chentiev and Ibragimov v Slovakia* (21022/08 and 511946/08) ECHR 14 September 2010.

mechanisms (including UN special procedures and international human rights NGOs);¹³⁸

- whether the State is willing to investigate allegations of torture and to punish those responsible;¹³⁹
- whether the reliability of the assurances has been examined by the domestic courts of the sending State;¹⁴⁰

For assurances in general:

- whether the assurances are in writing or, at a minimum, a written record of an oral agreement;¹⁴¹
- whether a package of assurances can be delivered more satisfactorily through a collective MOU, than an individually tailored arrangement;¹⁴² and
- whether there are clear and effective steps in place to take in case of suspected breach of the assurance.

Mitigation tool: Legal initiatives

238. Legal initiatives can be engaged in order to understand a recipient State's interpretation of the law. This may seek to build a common understanding of international law and, where there are differences, to explore whether such interpretive differences can be bridged or managed, for example through the use of conditions, assurances and independent monitoring.¹⁴³ Where there are concerns about the recipient State's compliance with international law, it will be for the New Zealand government, as a matter of foreign policy, to decide how to respond.

Mitigation tool: Practising segmented cooperation or confining assistance to particular parts of a State

239. Where intelligence and security agencies hold concerns about particular agencies within a State, they may elect in future to share information only with specific parts of the State, or they may assess the risk to be lower if exchanging only specific types of information. This might comprise, for example, sharing 'building block intelligence' which contributes to a picture of a terrorist

¹³⁸ *Othman*, above n 129, at [189(ix)] citing, *inter alia*, *Koktysh v Ukraine*, above n 135, at [63].

¹³⁹ *Othman*, above n 129, at [189(ix)] citing, *inter alia*, *Koktysh v Ukraine*, above n 135, at [63].

¹⁴⁰ MFAT *Expulsion with Diplomatic Assurances in the Context of Torture and Ill-Treatment* (DATE) citing *Othman*, above n 129, at [189(xi)] citing in turn, *inter alia*, *Babar Ahmad and Others v United Kingdom* (24027/07, 11949/08 and 36742/08) ECHR 6 July 2010 at [106].

¹⁴¹ UK Intelligence Services Commissioner *Report of Intelligence Services Commissioner for 2015*, above n 136, at 43, regarding best practice for UK intelligence services when sharing intelligence with liaison partners and using assurances to mitigate against CIDT. See UK *Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees* above n 102.

¹⁴² Anderson QC and Professor Clive Walker QC *Deportation with assurances*, above n 119, at [7.5].

¹⁴³ Harriet Moynihan "Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism" (Research paper, International Law Programme, Chatham House 2016) citing Brian Egan "International Law, Legal Diplomacy, and the Counter-ISIL Campaign" (ASIL Conference, Washington DC, 1 April 2016) at 10 to 11.

group over time, but not ‘actionable intelligence’ which may be more specific to individuals and thus more capable of giving rise to a breach of international law.¹⁴⁴

Consider establishing a separate evaluative body

240. An external or cross-government body for approval can ensure transparent, robust and documented decision-making, and avoids the risk that agencies may conflate their operational or relationship objectives with the quite separate question of whether particular information sharing or cooperation is lawful or proper in any particular case.
241. Under the CSIS MD, if there is a substantial risk of mistreatment in a given instance of information sharing and it is unclear whether that risk can be mitigated, the decision is automatically referred to the Director of CSIS, via an Information Sharing Evaluation Committee (ISEC). Members of ISEC are senior CSIS officials and representatives from other government departments.¹⁴⁵ ISEC makes a decision subject to guidelines.

Where a substantial/real risk of torture or CIDTP exists exchange or cooperation should not proceed

242. Only after identifying likely or actual circumstances, assessing the risk, and, if necessary, considering options for mitigation, should a decision be taken on whether to proceed with the intelligence exchange or proposed assistance (eg at a detainee interview). If, despite taking appropriate steps in mitigation, there remains a real risk of torture, then best practice dictates that the exchange or cooperation should not proceed. The information sharing or participation in a detainee interview should be suspended, deferred or cease altogether.
243. “Quite apart from the political and reputational risks involved, to proceed with assistance in the knowledge of noncompliance with international law by the recipient State entails responsibility under international law for the assisting State.”¹⁴⁶
244. The UN Special Rapporteur’s Report on best practice states that “for sharing information about specific individuals, unsurprisingly the advice is to maintain an absolute prohibition on the sharing of any information if there is a reasonable belief that sharing information could lead to the violation of the rights of the individual(s) concerned”.¹⁴⁷ This stance reflects that the condemnation of torture “is more aptly categorised as a constitutional principle than as a rule of evidence”.¹⁴⁸

¹⁴⁴ On this distinction for sharing purposes, see Sir Peter Gibson *The Report of the Detainee Inquiry* (December 2013) at [4.15]; also UK Intelligence Services Commissioner *Supplementary to the Annual Report for 2015*, above n 85, at [21.3(2)], citing the approach taken in the OSJA *Human Rights Guidance*.

¹⁴⁵ Security Intelligence Review Committee 2017-2018 Annual Report, “Case Studies Regarding CSIS Information Sharing with Foreign Entities”.

¹⁴⁶ Harriet Moynihan “Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism”, above n 143.

¹⁴⁷ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin *Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism*, above n 85, at [47].

¹⁴⁸ *A (No 2)*, above n 84 at [12] per Lord Bingham.

Have in place robust monitoring, regular reviews and adequate record-keeping

Robust monitoring and regular review of State/agency actions

245. A country's record on human rights requires regular as well as responsive review. Monitoring developments in other jurisdictions must include measuring the extent to which recipient States comply with caveats and assurances and, as necessary, access to detainees remains open. A review of information sharing arrangements by SIRC in Canada found a State's failure to adhere to assurances to be a trigger for review.¹⁴⁹ Current litigation in the UK has identified a concern that the Government may have relied upon assurances, despite UK intelligence agencies having, but not disclosing, information that undermined those assurances.¹⁵⁰
246. If reviews, monitoring or other follow-up actions give rise to serious concerns about the compatibility of the actions of the recipient State or agency with the international law, best practice dictates that the agency inquires into any alleged torture or ill-treatment of individuals. The results of these inquiries will contribute to the reassessment or final decision on whether it is lawful to exchange information.

Regular review of policy: Content and compliance

247. A process of regular review must include an agency's own policy, to ensure it adequately equips staff to consider and respond to risk, and make certain it is being complied with. The UK Consolidated Guidance was reviewed in 2016 by the then Intelligence Services Commissioner, Rt Hon Sir Mark Waller. In 2018 the ISC summarised current issues with its breadth of application and content, including that it actually provides little specific guidance and that in the seven years it has been in place:

“there appears to have been remarkably little attempt to evaluate or review its operation beyond ensuring compliance for oversight purposes. ... While the Investigatory Powers Commissioner considers compliance with the Guidance, it is not his responsibility to consider whether the Guidance is achieving its policy objectives”.¹⁵¹

248. As part of its review of the consolidated guidance, IPCO commenced a consultation round with civil society on 20 August 2018. The publication of the relevant Guidance and public consultation as to content is a model that New Zealand should consider. Such transparency serves to emphasise the need for regular review of keep an agency's policy content fit for purpose.

Adequate record-keeping

249. The routine creation of an auditable trail of documents, recording the decisions and activities of intelligence services and their partners, is essential to both their internal operation and management and their external oversight.¹⁵²

¹⁴⁹ Security Intelligence Review Committee 2017-2018 Annual Report at 15 to 17. This followed a first review by SIRC in 2015.

¹⁵⁰ *Kamoka & Ors v Security Services & Ors* [2017] EWCA Civ 1665 at [99] and [115].

¹⁵¹ UK ISC *Current Issues*, above n 14, at 1 and 2.

¹⁵² UK Intelligence Services Commissioner *Supplementary to the Annual Report for 2015*, above n 85, at [22.1].

Summary: The Elements of Best Practice

Clear Ministerial Directions:

- Set out the Minister's expectations and guidance to staff so that information sharing and cooperation by the intelligence and security agencies avoids any connection with acts of torture or CIDTP by other States and agencies;
- Clarify the exceptional circumstances, if any, in which the Minister considers that information likely obtained by torture may be used by the agencies and, if so, the constraints around such use.

Applicable law in a standalone guide for staff:

- Provide relevant domestic and international law on human rights, data protection and IHL.

Written formal arrangements/agreements on information sharing between parties (ie, between States or State agencies):

- Have clear rules governing the use of shared information, signed off by the Director of the intelligence and security agency or Minister;
- Include statements of compliance with human rights law, data protection obligations, and with the third party rule;
- Address situations where receipt is at third hand, and allow for the sending party to request feedback on use of the information;
- Ensure regular review, including by oversight bodies when arrangements/agreements are concluded or revised.

Policy to inform the assessment of a State's human rights record and risks around engagement:

- Provide a range of sources for information about States' human rights records and practices, including the treatment of detainees, and require assessments to be comprehensive by drawing on multiple sources of information;
- Be clear that making such assessments can involve asking hard questions, and that best practice should dictate an inquiry into allegations of torture or ill-treatment;
- Consider the nature of the information to be sent or received and the particular circumstances;
- Assess the likelihood of a real/substantial risk of human rights breaches;
- Include templates to guide making these assessments; and
- Ensure that information received unsolicited or "passively" by agencies also undergoes the requisite risk assessment as to whether it has likely been obtained by torture.

Take action to mitigate the risk of contributing to acts of torture:

- Employ caveats to set conditions (originator control) on how information may be used by the receiving party (or parties): in writing; establish procedures to monitor adherence to caveats by the receiving party; not appropriate as a sole method to mitigate risk or for a State/agency where caveats previously breached or with a poor human rights record;

- Seek assurances: in writing or at least a written and shared record of an oral undertaking; of sufficient detail; able to be monitored for compliance (for example, through right of access to a detainee); not appropriate as a sole method to mitigate risk or for a State/agency where assurances previously breached or with a poor human rights record;
- Use legal initiatives: to, for example, build a common understanding with partners of obligations under international law;
- Practise segmented cooperation or confine assistance to particular parts of a State; or distinguish between 'actionable' and 'building block' intelligence.

Where there is a real/substantial risk of torture, ensure agency responses are lawful and proper:

- Have a plan in place for, when necessary, the immediate cessation of information sharing and cooperation with a State/agency, pending further inquiry;
- The plan should include seeking legal advice, informing the relevant Minister and oversight body.

Establish regular and responsive monitoring and review:

- Regularly review a State or foreign agency's human rights record and practices (including a State's legal approach to prohibiting acts of torture); trigger reviews in response to indications of human rights breaches; practice due diligence;
- Periodically monitor State/agency compliance with caveats, assurances and other undertakings;
- Regularly review policy content and your own agency's compliance with policy.

Require adequate record-keeping:

- Ensure adequate and informative records are available if decisions, in particular any relating to torture-derived information, are to be revisited or reviewed, and to facilitate effective democratic oversight.

IX ADEQUACY OF GUIDANCE MATERIALS UNDER THE GCSB AND NZSIS ACTS: AS AT APRIL 2017

250. In April 2017 my office reviewed NZSIS and GCSB policies that were in effect during the period 2001 and 2009 and relevant to terms of reference 1 and 2 of this Inquiry. I provided my assessment to the agencies for comment as part of my April 2017 Discussion Paper.
251. In summary, that review highlighted the need for clearer guidance on applicable law and to identify those responsible and accountable for decision-making. A number of policies with useful and relevant information remained in draft, others were incomplete or inadequate. Since September 2017, those policies have been replaced by guidance material developed by the agencies under ISA. My office has reviewed these guidance materials, as at July 2018.

X ADEQUACY OF CURRENT GUIDANCE MATERIALS UNDER ISA: AS AT JULY 2018

252. I have reviewed three levels of guidance and authorisations which apply to the GCSB and NZSIS:

- the **Ministerial Policy Statement** *Cooperation of New Zealand intelligence and security agencies (GCSB and NZSIS) with overseas public authorities* (MPS Overseas Cooperation): required under the ISA. MPSs are policy documents which set out the Minister’s expectations for how the agencies properly perform these functions and establish a framework for good decision-making and best practice conduct, although they do not set out enforceable legal obligations;¹⁵³
- the **Ministerial authorisations**: required under the ISA. These are conditional authorisations for the GCSB and NZSIS to provide intelligence and cooperation to foreign partners and others; and
- the **Joint Policy Statement** ‘Human Rights Risk Management’ (JPS); developed by the GCSB and NZSIS and required by the MPS Overseas Cooperation and the Ministerial authorisations. The purpose of the JPS is to provide staff with guidance for making necessary human rights assessments within a consistent frame of reference, to ensure the agencies meet the ISA requirement to “act in accordance with New Zealand law and all human rights obligations recognised in New Zealand law”; the JPS also introduces the ‘Approved Party’ status for information sharing, which requires approval by the Minister.

253. The table that follows sets out the internal agency processes for giving effect to each of these.

¹⁵³ MPS Overseas Cooperation, above n 13, at [2].

**Cascading human rights requirements in foreign cooperation and intelligence exchanges:
Overview**

Ministerial Policy Statement on Cooperation with overseas public authorities

ISA ss 207(1)

Framework guidance on expected agencies' policy and process regarding human rights when cooperating with overseas public authorities and States

Agencies must have in place policies and procedures to ensure they act in accordance with NZ law and all human rights obligations recognised by NZ law [MPS 31]



Ministerial authorisations on intelligence cooperation with countries

ISA ss 10(3) and 12(7)

Agencies' request case-by-case or standing Ministerial authorisations to cooperate and share intelligence with foreign partners

Requests for Ministerial authorisations must include an assessment of the partner/country's human rights practices [MPS 40]

Requires ongoing monitoring of partner practices [MPS 43]

Requires risk assessment if specific instance of cooperation may lead to human rights breaches [MPS 43]

A standing authorisation must be reviewed by the Minister if changes to policy or practice by a country under that authorisation may increase the likelihood of human rights breaches [MPS 43]



Joint Policy Statement Human Rights Risk Management

ISA ss 3(c)(i), 10(3), 12(7), 17(a) and 18(b)

The policy must set out factors to be considered when assessing whether a real risk of human rights breaches may exist in connection with cooperation with overseas public authorities [MPS 58]

Human rights risk assessments (HRRRA) [JPS Appendix 1]

Human rights risk approvals [JPS 17 to 23]

Human rights risk reviews (HRRR) [JPS 24 to 30]

Approved Parties [JPS 16, 32 to 40]

Approved Information [JPS 41 to 42]

Meaning of terms (eg, contribute; general possibility; specific indication) [JPS Appendix 1]

XI MINISTERIAL POLICY STATEMENT ON COOPERATION OF NEW ZEALAND INTELLIGENCE AND SECURITY AGENCIES (GCSB AND NZSIS) WITH OVERSEAS PUBLIC AUTHORITIES

The Ministerial Policy Statement relevant to this Inquiry

254. The MPS Overseas Cooperation is discussed in relation to several different aspects of this Report.¹⁵⁴ The MPS focuses on guidance for the agencies, regarding cooperation, sharing intelligence and providing advice and assistance to overseas public authorities. The term ‘overseas public authority’ is defined broadly as “a foreign person or body that performs or exercises any public function, duty, or power conferred on that person or body by or under law”.¹⁵⁵

Positive obligations and guidance established by the MPS

255. The MPS Overseas Cooperation:

- emphasises the Government’s commitment to actively preventing torture, including that New Zealand will not encourage, aid or abet such acts;¹⁵⁶
- states that agency compliance with international and domestic human rights obligations in ISA¹⁵⁷ necessitates a practice of due diligence; a duty to take reasonable steps when deciding whether to engage with an overseas authority; and, to identify and monitor risks of human rights being breached by partner countries and international actors;¹⁵⁸
- requires the GCSB and NZSIS to have appropriate internal policies in place to ensure they are not associated, directly or indirectly, with unlawful or improper activities;¹⁵⁹
- reinforces the positive obligation on the agencies to provide the Minister with sufficient information on the legality of cooperation with an overseas public authority, to inform his or her decision on whether to authorise it;¹⁶⁰
- clarifies that, despite any standing authorisation from the Minister for agency information sharing, the agencies are not excused from the obligation to monitor and ensure that such sharing and cooperation remains consistent with the framework in the MPS;¹⁶¹

¹⁵⁴ See for example the above discussion in Part VIII Best Practice, in this Report.

¹⁵⁵ MPS Overseas Cooperation, above n 13, at 1.

¹⁵⁶ MPS Overseas Cooperation, above n 13, at [22].

¹⁵⁷ ISA, ss 10(3), 12(7) and 17(a).

¹⁵⁸ MPS Overseas Cooperation, above n 13, at [23] and [24].

¹⁵⁹ MPS Overseas Cooperation, above n 13, at [24], [30], [31] and [36].

¹⁶⁰ ISA, ss 10(3) and 12(7); MPS Overseas Cooperation, above n 13, at [32].

¹⁶¹ MPS Overseas Cooperation, above n 13, at [43].

- provides non-exhaustive lists of factors that the agency must consider when assessing the human rights records and human rights practices of a foreign State or overseas public authority;¹⁶²
- sets the threshold for when the intelligence and security agencies will enquire or further enquire at the level of: an “indication”¹⁶³ of human rights breaches; where breaches are “suspected”;¹⁶⁴ and where there “may be uncertainty or cause for concern”;¹⁶⁵
- requires the agencies to decline or to stop cooperating, including receiving or sharing intelligence, with an overseas public authority when a real or substantial risk of a breach of human rights obligations is identified;¹⁶⁶
- states that if there are changes to the domestic policy or practice in any country subject to a standing authorisation that may increase the likelihood of a violation of human rights, the agency must ensure the authorisation is reviewed by the responsible Minister.¹⁶⁷

Gaps in the MPS

256. While not itself a formal statement of New Zealand’s interpretation of all relevant legal obligations, the MPS Overseas Cooperation should state the core obligations clearly and unambiguously. To the extent aspects of the law are uncertain, the MPS should indicate that propriety requires that the agencies act cautiously. In its current form the MPS has some significant gaps, which are summarised below.

The prohibition of torture is non-derogable

257. The MPS does not specifically state that the prohibition of torture is non-derogable. It addresses the concept of non-derogation only in the context of using information gained through torture as evidence in any proceedings. It does not address its use in operational matters.¹⁶⁸

Specificity of circumstances in which ‘tainted’ information might be used

258. The MPS does not describe the circumstances which the Minister considers might justify an intelligence and security agency taking action on the basis of information likely obtained through torture and does not specify limits on the use of the information.

¹⁶² MPS Overseas Cooperation, above n 13, at [37] and [41].

¹⁶³ MPS Overseas Cooperation, above n 13, at [24].

¹⁶⁴ MPS Overseas Cooperation, above n 13, at [27].

¹⁶⁵ MPS Overseas Cooperation, above n 13, at [33].

¹⁶⁶ MPS Overseas Cooperation, above n 13, at [24] and [35].

¹⁶⁷ MPS Overseas Cooperation, above n 13, at [35].

¹⁶⁸ MPS Overseas Cooperation, above n 13, at [26]; UNCAT, arts 2 and 15.

Protection of property?

259. The MPS Overseas Cooperation¹⁶⁹ indicates that information which has been, or is suspected to have been, obtained through human rights breaches, including torture, may be used in order to protect property. In other jurisdictions, there has been a move away from according property primacy over protecting human rights. In my view that approach should also be reflected in this MPS Overseas Cooperation.¹⁷⁰

Varying formulations of threats or risks used as criteria

260. The threats or risks that, when identified, would allow the agencies to share information gained through human rights abuses are both too general and inconsistent.

Controls when providing tainted information to law enforcement to use?

261. The MPS Overseas Cooperation is not sufficiently clear as to whether the Directors-General may or should pass the information to the relevant enforcement agency;¹⁷¹ nor how the intelligence and security agencies anticipate being able to restrict the enforcement agency's subsequent use of the information to "operational purposes" only.

"Unsolicited information"

262. The MPS Overseas Cooperation emphasises information obtained or suspected to have been obtained by torture being received by the intelligence and security agencies in an "unsolicited" manner. It is unclear what "unsolicited" means in the context of an ongoing intelligence-sharing relationship, and why this distinction is necessary or relevant.

Is information obtained by torture 'credible' or inherently unreliable?

263. The MPS Overseas Cooperation refers¹⁷² to situations where intelligence is received by the GCSB or NZSIS that has been or is suspected to have been obtained by torture and which indicates a "credible" national security threat or "credible risk to safety". It is difficult to reconcile this reference to credibility with the preceding statement¹⁷³ that information gained through torture "is inherently unreliable".¹⁷⁴

¹⁶⁹ MPS Overseas Cooperation, above n 13, at [28] and [46].

¹⁷⁰ See the CSIS MD discussed in Part VIII Best Practice.

¹⁷¹ Paragraphs 28 and 46 of the MPS Overseas Cooperation, above n 13, are inconsistent on this point.

¹⁷² MPS Overseas Cooperation, above n 13, at [27] and [28].

¹⁷³ MPS Overseas Cooperation, above n 13, at [26] and see further at [46].

¹⁷⁴ Regarding reliability: See US Army Field Manual FM- 2-22.3 at [M-16]; stating that it is impermissible to use any form of torture, abuse or inhumane or degrading treatment; "Beyond being impermissible, these unlawful and unauthorised forms of treatment are unproductive because they may yield unreliable results, damage subsequent collection efforts, and result in extremely negative consequences at national and international levels."; US Senate Intelligence Committee Report, 2014, *Executive Summary*, at Finding #1 "While being subjected to the CIA's enhanced interrogation techniques and afterwards, multiple CIA detainees fabricated information, resulting in faulty intelligence. Detainees provided fabricated information on critical intelligence issues, including the terrorist threats which the CIA identified as its highest priorities"; See also Part VIII of this Report.

Review of the MPS

264. The MPS itself anticipates that findings from this Inquiry may result in review and amendments to the MPS.¹⁷⁵
265. For the reasons set out above I recommend later in this Report, that a review of the MPS Overseas Cooperation receive early attention.

¹⁷⁵ MPS Overseas Cooperation, above n 13, at [67].

XII MINISTERIAL AUTHORISATIONS FOR SHARING INFORMATION

266. Under the ISA the GCSB and NZSIS are required to seek authorisations from the Minister before carrying out information sharing and cooperation with foreign parties which may impact on individuals' human rights. The Ministerial authorisations specifically relate to functions in the ISA which allow:

- the GCSB and NZSIS to provide intelligence collected or an analysis of that intelligence, to any person or class of persons whether in New Zealand or overseas;¹⁷⁶ and
- the GCSB to use information – obtained in carrying out information assurance and cybersecurity activities – to produce reports related to threat to, or interference with, infrastructures important to the New Zealand Government and provide those reports to any person or class of persons whether in New Zealand or overseas.¹⁷⁷

267. Before the Minister authorises intelligence or reports to be provided to any overseas person¹⁷⁸ or class of persons, ISA requires:¹⁷⁹

“the Minister must be satisfied that, in providing the intelligence and analysis [or report], the intelligence and security agency will be acting in accordance with New Zealand law and all human rights obligations recognised by New Zealand law”.

Two broad standing authorities

268. Shortly before the ISA came into effect, the agencies sought, and the Minister authorised, two very broad standing authorisations for information sharing and cooperation with foreign States and agencies. One authorisation was for the GCSB, the other the NZSIS, covering a large number of states.

Ministerial authorisations subject to condition: reliance on the JPS

269. The Minister issued these authorisations:¹⁸⁰

“subject to the condition that the NZSIS [or GCSB] comply with the Joint Human Rights Risk Management Policy before providing any intelligence and analysis [or reports] to any overseas person or class of persons.”

¹⁷⁶ ISA, s 10(1)(b)(iii).

¹⁷⁷ ISA, s 12(5).

¹⁷⁸ As defined in the Overseas Investment Act 2005, s 7. For the purposes of the ISA the most relevant part of the definition is that an overseas person is not a New Zealand citizen or permanent resident.

¹⁷⁹ ISA, ss 10(3) and 12(7).

¹⁸⁰ NZSIS, Ministerial Authorisations, 18 September 2017 at [2] and GCSB Ministerial Authorisations, 18 September 2017 at [2] and [6].

270. The Minister recorded in the authorisation that, given this condition, he was “satisfied”, as required by the ISA, that the agencies would be acting in accordance with New Zealand law and all human rights obligations recognised by New Zealand law.¹⁸¹
271. Compliance with the JPS therefore provides a material assurance to the Minister that the agencies in any particular case have adequately managed the risk of contributing to actions by foreign parties that may breach human rights. It means the JPS must be fit for purpose, fully complied with, and result in lawful action by the agencies. However, my review of the JPS, summarised later in this Report, identifies a number of issues which call into question its adequacy and effectiveness.

Process for authorisations: Human rights risk assessments of countries to support decision-making

272. On 17 October 2017 I sought from the agencies “copies of all the human rights assessments that accompanied and/or supported the applications from the agencies to the Minister for these two standing authorisations”.¹⁸²
273. Out of the large number of countries covered by the two Ministerial authorisations for intelligence sharing and cooperation, the Minister received accompanying human rights assessments for less than 20. In general, these are countries with overall sound human rights records.
274. For more than two thirds of the countries covered by the standing authorisations, the agencies had not provided the Minister with any supporting information about the states’ human rights records before seeking his authorisation. Of the States for which no supporting information was provided none are Approved Parties.¹⁸³ They include countries with well-publicised poor human rights records.
275. The two Ministerial authorisations were expressly conditional on compliance with the JPS. Once the two broad Ministerial authorisations were signed, the responsibility of ensuring compliance with domestic and international human rights law in relation to all information sharing and cooperation by the agencies under ss 10 and 12 of the ISA, shifted to rest squarely and solely on the agencies’ application of the JPS. It continues to do so.¹⁸⁴ For sharing and cooperation with parties who are not Approved Parties, the agencies consider the assessment of human rights implications is best done at the point of the particular sharing or cooperation. Reliance on the JPS to test particular instances of sharing provides “a more agile and considered approach”.¹⁸⁵ I do not disagree.
276. Under the processes created in the JPS, the Minister has no further oversight of information sharing with foreign parties, unless the agencies want to provide intelligence or reports in an

¹⁸¹ NZSIS, Ministerial Authorisations, 18 September 2017 at [3] and GCSB Ministerial Authorisations, 18 September 2017 at [3] and [7].

¹⁸² IGIS Letter to Acting Chief Legal Advisers, GCSB and NZSIS, 17 October 2017.

¹⁸³ Further detail about Approved Parties and what that status means is set out below in relation to the JPS.

¹⁸⁴ This means, for example, that for each information-sharing transaction with one of the many authorised but non-Approved-Party countries, a human rights risk assessment will be required before approval of the transaction can be considered. Information sharing with the other countries who are now also Approved Parties requires no such case-by-case assessment of the human rights risks involved.

¹⁸⁵ Letter to IGIS from Directors-General GCSB and NZSIS, 28 February 2019, Annex B at [15].

instance where the human rights risk assessment identifies a substantial risk of human rights breaches. Then the Minister is the approval authority for sharing that information.

277. My concern is that the two, broadly framed, standing authorisations referred to above approve many countries for “in principle” sharing without the Minister having been provided with any material on which to base even a high-level human rights assessment. I would not expect the type of detailed material to be before the Minister that is necessary to support specific sharing arrangements under the JPS or to achieve Approved Party status. However, the ISA’s requirement that the Minister must be “satisfied” (s 10(3) ISA) that in providing intelligence and cooperation the agencies will be acting in accordance with all human rights obligations seems to me to anticipate that there would be some country-specific material to support the Ministerial level approval. In sum, I would like to see something additional to support this level of authorisation beyond the assurance that the agencies have in place a Joint Human Rights Risk Management Policy, drafted by them, which they will follow.

XIII JOINT POLICY STATEMENT: HUMAN RIGHTS RISK MANAGEMENT

278. The Joint Policy Statement ‘Human Rights Risk Management’ (JPS) is the pivotal document for providing a substantive check and balance that the intelligence and security agencies are ‘acting in accordance with New Zealand law and all human rights obligations recognised in New Zealand law’, as required under ISA.¹⁸⁶ It was approved for use by the Directors-General of the GCSB and the NZSIS as of 28 September 2017.
279. The purpose of the JPS is to provide staff with authoritative guidance for making necessary human rights assessments within a consistent frame of reference.¹⁸⁷ The Service has stated¹⁸⁸ that: “The JPS will govern all interactions by NZSIS and GCSB with foreign parties, including overseas public authorities”. The Bureau advised¹⁸⁹ that: “Since the Inquiry was undertaken, the Joint Policy Statement on Human Rights Risk Management has been approved and implemented. The JPS established processes to manage the risk of contributing to breaches of human rights by foreign parties. GCSB and NZSIS plan to work together to implement complementary processes that suit each organisation’s operational requirements. There are no plans for any further joint policies or procedures on this topic.” The GCSB further advises staff¹⁹⁰ that they can be reassured that the JPS includes all relevant legal requirements.¹⁹¹
280. In keeping with best practice, the JPS should provide a clear process for the agencies’ judgements and assessments to be made: how to identify relevant human rights and to make informed assessments of the human rights risk presented by the practices of another country/foreign agency, and by GCSB or NZSIS intelligence cooperation with that country. In my view, it falls short of these requirements.

Problems with clarity and accuracy of JPS for staff and oversight review

281. The JPS does not provide sufficiently clear guidance for agency staff. While the agencies have developed other tools and training to supplement the JPS, the JPS itself should provide a clear and consistent frame of reference.

Human Rights Risk Assessments

282. In our classified Report we have raised more detailed concerns regarding:

- definitions of key terms used in assessments;

¹⁸⁶ I note the JPS at [5] permits a Director-General to “authorise variations to this policy for specific purposes in order to comply with any ministerial requirements for interacting with foreign parties”. The extent to which this authorisation has been used by the Directors-General is unknown, nor the circumstances in which it has arisen or might arise. A review of the JPS in such circumstances would provide greater clarity for staff.

¹⁸⁷ Sitting beneath the JPS are underlying documents and procedures such as the framework for “Cooperating/sharing/receiving intelligence with foreign parties” and the Standard Operating Procedure (finalised in June 2018) “NZSIS – Sharing and protecting intelligence – SOP”.

¹⁸⁸ By letter of 23 November 2017 to IGIS, at [3].

¹⁸⁹ By letter of 15 June 2018 to IGIS, at [14].

¹⁹⁰ In the GCSB e-learning module for information sharing with foreign parties.

¹⁹¹ For example, all requirements from NZBORA, the Crimes of Torture Act and the ICCPR.

- the complexity of the assessment process;
- the guidance for identifying and assessing the risk category; including the thresholds adopted for each category;
- the brevity and lack of clarity of guidance provided about possible mitigations;
- the lack of a clear process for when applications to approve the information sharing or cooperation are declined.

Reviews of the human rights risk assessment process in practice

283. The Inquiry reviewed a number of actual human rights risk assessments, including two by the NZSIS relating to sharing information with states in respect of which human rights risks plainly might arise. We reviewed one GCSB assessment in the same category. In both of the cases involving the NZSIS, the assessment of the human rights record and situation in the country in question was comprehensive and well-balanced. However, in both, consideration of mitigation strategies became mixed with detailing and assessing the level of risk of human rights abuses. It is necessary to form an assessment of risk before noting any mitigation strategies. This helps to direct attention to whether the mitigation strategies undertaken, or to be undertaken, can provide the individuals in question with sufficiently robust protection and, if not, whether the information sharing as proposed should continue.
284. One of these cases also raised a question about the standard checks carried out by the Service prior to establishing a new relationship with a foreign agency. In the particular case the Service advised that the relationship was only in its formative stages, but should “be viewed in the context of New Zealand’s broader, well-established relationship with [the particular geographic area]”. It noted the subsequent introduction of the JPS and that all future interactions would be subject to a case-by-case risk assessment.
285. In the second example, the NZSIS relied on the “prior assurances” of the intelligence agency in the other country. The substance of those prior assurances did not appear to have been provided for the decision-maker.
286. The GCSB HRRRA application from late 2017 which we reviewed, involved sharing information with an agency in a country about which the US State Department had reported that human rights abuses (such as arbitrary detention or arrest, breach of a fair trial rights, lack of access to legal rights and minimal standards of criminal procedure) are “present in nearly any arrest/detention by government agencies”. This report was available to the GCSB, as were two further reports, by the US State Department and the UN, both of which provided highly relevant information.
287. The HRRRA assessed as likely that the individual about whom the GCSB would share intelligence would be located, and arrested/detained, as a result of the information provided by the GCSB. The risk of human rights abuses was assessed as “speculative”. It is difficult, on the basis of the human rights record and violations listed in the HRRRA, to understand how the assessment arrived at a “speculative likelihood of any human rights breach” and not as a substantial/real risk of human rights abuses.

288. In my view, this situation called for a high-level decision on whether or not to provide the information in question to the foreign agency and consideration of whether alternatives were available that reduced the risks to GCSB by providing this assistance.
289. As with the NZSIS assessments, there was a blurring of primary risk assessment and mitigation strategies.
290. Finally the HRRR did not address what would happen if the individual was detained by the foreign agency (as the HRRR indicated was likely): if or when the individual was interrogated, how any resulting information received by the GCSB (and involved partners) would be assessed to identify whether it has been obtained through abuse of the individual's human rights, given the poor human rights record of the foreign country? If the information had been obtained through abuse, what steps would be taken by the GCSB to assess the reliability of the information and limit its use?

Human Rights Risk Review (HRRR)

291. The requirement to carry out an HRRR applies when the agencies receive information from foreign parties and “where there was no reasonable prior opportunity to carry out an HRRR”.¹⁹² However, in the case of Approved Parties an HRRR is not required unless there is a “specific indication” that the information received was obtained as a result of a breach of human rights,¹⁹³ or that information to be provided by GCSB or NZSIS to a foreign party will contribute to a breach of human rights.¹⁹⁴ A process of regularly monitoring human rights practices of foreign states or agencies, which could bring a ‘specific indication’ by an Approved Party to light, is not addressed in the JPS.
292. For an Approved Party, the JPS requires an HRRR be completed in response to a “specific indication”, but in other parts of the JPS it refers to a different, lower threshold or standard, that of “suspecting” human rights breaches and requiring investigation into the same. Further the interplay between the actions required by different parts of the JPS,¹⁹⁵ in response to such a ‘suspicion’, is not clear.
293. Where there is insufficient information for the agency to carry out a HRRR, the default risk is set at a low risk category.¹⁹⁶ Why this low level of risk is considered appropriate, for example, after a specific indication involving “specific and reliable information” of a potential breach of human rights, is not made clear.
294. The “Risk Mitigation” section should provide a fuller explanation of what “measures” might be relevant in this context.

¹⁹² JPS at [24].

¹⁹³ JPS at [25].

¹⁹⁴ JPS at [16].

¹⁹⁵ JPS at [30] and [44].

¹⁹⁶ JPS at [28].

Approved Parties under the JPS

Effect of grant of Approved Party status

295. Countries, agencies, non-government entities, and individuals holding Approved Party status are not required to undergo HRRRA/HRRR when information is exchanged, unless a “specific indication” of a human rights breach occurs, which then requires a HRRR. This means that care is required when seeking and granting Approved Party status.
296. The JPS states that the governments and any foreign public agency of Five Eyes countries are Approved Parties. I have also been provided with copies of the Minister’s subsequent approval of more than ten other countries as Approved Parties. Such approvals are current for three years and it is presumed, although not clear from the JPS, that renewals will require a new application to the Minister. I suggest that for some States with a dynamic and swiftly changing political scene, three years may be too long.
297. In the classified Report I record my concern that the JPS allows for a Tier 3 Manager to approve non-government entities and individuals.¹⁹⁷

Criteria for a body to be considered for approval as an Approved Party

298. There is no information in the JPS, or in other documents reviewed, that indicates the criteria used to decide for which countries and agencies, and which non-government entities and individuals, the New Zealand agencies will seek Approved Party status. The JPS has no specific threshold stated that would make a State, agency, non-government entity or individual a candidate.

Required content of applications for Approved Party status

299. The JPS requires “all relevant information that is reasonably available”¹⁹⁸ to be included in an application for Approved Party status. However there are some inconsistencies with these requirements, which I have identified in the classified Report.
300. An example of an inconsistency is that the JPS sets out the matters on which the GCSB and NZSIS “must” advise the Minister¹⁹⁹ when applying for Approved Party status for a government or foreign public agency. However, when seeking Approved Party status for non-government entities and individuals, there is no requirement for the equivalent of an HRRRA to be carried out, nor does the JPS require specific information be advised to the approval authority (a Tier 3 Manager or delegated officer approved by the Director-General). In my view, the Minister should be the decision-maker for Approved Party status of non-government entities and individuals, as well as for governments and foreign public agencies.

¹⁹⁷ JPS at [33].

¹⁹⁸ JPS at [34].

¹⁹⁹ JPS at [37].

Review of Approved Party applications and approvals

301. In October 2017 I requested from the GCSB and NZSIS copies of all applications and approvals for Approved Party status. The JPS requires that “all approvals of Approved Parties must be in writing”.²⁰⁰ I have reviewed all documents received. No applications and/or approvals exist for Approved Party status of non-government entities and individuals.
302. My review therefore focused on the applications and approvals for the Five Eyes and other approved countries. The human rights assessments and supporting documentation of those countries, as provided to the Minister, were generally comprehensive and covered matters required by the JPS. As noted above, the JPS establishes no requirement for regular monitoring of the human rights records of parties who are Approved Parties. This calls into doubt whether the necessary “specific indication” of a human rights breach will be identified, or identified in a timely manner.

Absence of direct authorisation/approval by Minister for Five Eyes partners to be Approved Parties

303. While I received copies of the Minister’s signed approvals for Approved Parties, there were not copies of the same authorisations for the four Five Eyes countries. The GCSB and NZSIS make the point that the approval is implicit in the Minister’s authorisation for the agencies’ activities under ss 10, 11 and 12 of ISA,²⁰¹ because it is expressly conditional on compliance with the JPS. In turn, the JPS states that the four Five Eyes countries are [ie are deemed to be] Approved Parties. Notably, however, a human rights assessment for each of the four Five Eyes countries was provided to the Minister at the time he issued the two broad Ministerial authorisations.

Approved Information under the JPS

304. Under the JPS, a category of information can be approved by the Director-General as “Approved Information”²⁰² if there is no likelihood that the type of information could contribute to a breach of human rights. The agencies can provide such Approved Information to “any party” and “grant permission for another party to provide the approved information to any party”.²⁰³
305. As at July 2018, the NZSIS had six categories of Approved Information. The risk assessments for four of the categories specifically exclude the sharing of information “relating to those aspects of security and intelligence – such as the identities of individuals of security interest – that could contribute to human rights breaches by any foreign party”. Two of the categories – Intelligence Analysis Methodology Training and NZSIS protective security services, advice and assistance – do not explicitly exclude individuals of security interest. Whether such identifying details are exchanged under those categories is as yet, unknown to my office.
306. As at July 2018 we had located a relatively low number of HRRAs/applications for review. This suggests that either there is a very limited amount of information being provided by the Service to the many authorised countries who are not Approved Parties, or there is potentially a large

²⁰⁰ JPS at [35].

²⁰¹ These are the Ministerial authorisations discussed above, commencing at page 69.

²⁰² JPS at [41] and [42].

²⁰³ JPS at [16.e] and [16.f].

amount of information being shared with foreign parties under the categories of Approved Intelligence.

Conclusions: JPS and human rights risk assessments and applications for approval of action

Explaining the relevant law: No strong statement on torture

307. The JPS includes general statements about human rights, including torture and CIDTP, and where the obligations arise in in domestic and international law. More detail would be helpful for staff. In particular it would be useful to include the full definition of torture in Article 1 of UNCAT, s 3 of the Crimes of Torture Act 1989, and information about complicity in acts of torture.

Framework for assessments inadequate for risk of torture

308. The JPS lacks a clear process for judgements and assessments to be made. It is not sufficiently clear, consistent and accurate for staff to use as intended (and as required by the Minister).

309. The JPS does not explain what information²⁰⁴ should be provided to the Minister to assist in assessing whether to approve the proposed cooperation with an overseas public authority.

310. There is some useful procedural material, sitting beneath the JPS, to provide guidance to staff but more is needed.

Limited guidance on steps to take in mitigation of risk

311. There is very limited advice provided in the JPS on mitigation strategies and how best practice directs that such strategies are to be engaged.

312. There is a reliance (observed in the HRRRA I reviewed) on the actions of a third party to mitigate risk, despite no assessment being made by the New Zealand agencies of the safeguards for human rights that the third party can actually provide.

Procedures where real risk identified after mitigations applied

313. There is no guidance provided on appropriate steps to take if the application for information sharing approval is declined.

314. The three HRRRA I have reviewed demonstrated that the framework for assessments is not sufficiently clear; human rights risk assessments merged with mitigation strategies; highlighted the risk of human rights breaches being assessed at a low level of seriousness despite a country's human rights record and the specific circumstances described; and did not engage sufficient and prudent mitigation strategies to reduce legal risk.

315. These elements can result in a lack of clear and necessary connection being made between a real risk to an individual's human rights and the actions to be taken by the GCSB or NZSIS.

²⁰⁴ ISA, ss 10(3) and 12(7); MPS Overseas Cooperation, above n 13, at [32].

Accountability for decision-making: role of the Minister

316. These elements can also result in the decisions whether to approve the risk of human rights breaches being taken at an inappropriately low level, when in practice it should be a decision for the Minister.

Conclusions: JPS and Approved Parties*Ministerial authorisation of Five Eyes partners as Approved Parties*

317. Given the implications of being an Approved Party the JPS's general requirement that Approved Party status is conferred by the Minister is appropriate. As a matter of sound policy, I do not consider that the Five Eyes partners should be exempted from this requirement by the special "deeming" provisions in the JPS. In my view an express approval should be sought from the Minister to make any country an Approved Party. The agencies have agreed to this, and in July 2019 they submitted an application for specific approvals to the Minister.
318. The Directors-General of the GCSB and the NZSIS advised in February 2019 that they will "seek an explicit stand-alone Ministerial approval for Five-Eyes as approved parties", with the intent to provide a briefing to the Minister seeking the approval "in the coming months". I intend to keep this particular authorisation under review and have sought a copy of the Minister's approval.

No threshold for making applications for Approved Party status

319. There is no material in the JPS (or in other documents reviewed) that identifies why the New Zealand intelligence and security agencies choose a particular country, agency, non-government entity or individual as a candidate for whom to seek Approved Party status.

No requirement to regularly monitor human rights in relation to Approved Parties

320. The JPS does not explain how the agencies will implement their obligation to monitor the human rights compliance of foreign partners.²⁰⁵ In particular, there is no requirement for regular monitoring of the human rights records of Approved Parties, meaning that the necessary "specific indication" of a human rights breach may not be identified in a timely manner (or at all). This is particularly essential where a country may have a high number of agencies with varying histories of respect for human rights.

²⁰⁵ MPS Overseas Cooperation, above n 13, at [43].

XIV CONCLUSIONS AND RECOMMENDATIONS

Conclusions

321. There were serious and ongoing repercussions for the intelligence agencies and governments of other countries which failed to identify and respond to the unlawful rendition and mistreatment of detainees by the CIA in the course of counterterrorism operations overseas, after 9/11.²⁰⁶
322. The New Zealand intelligence and security agencies did not participate in the rendition and detention, or directly in the interrogation of detainees; nor were they complicit in the CIA's unlawful activities. The failing was one of omission, in not identifying that the CIA programme raised risks for their agencies and for the New Zealand Government, because of their close cooperation (including in Afghanistan) and ongoing intelligence relationships with the US intelligence and security agencies, including the CIA.²⁰⁷
323. The argument consistently put to me by those in positions of control at the time was that they did not initially know of and understand the gravity of the unlawful CIA activities and how those activities might impact on the responsibilities of their own agencies. I accept that we must be careful not to attribute the current level of knowledge to those who were leading the agencies at the time and this report does not seek to apportion blame to individuals for past failures or omissions.
324. I also accept that, once the CIA's programme was confirmed to the Directors of the day or sufficient information was in the public domain for partner agencies to be on alert, any decision to cease or curtail some aspects of the intelligence-sharing relationship with the US would have been a whole-of-government matter and ultimately a decision for Ministers to make. But because the Directors at the time did not, in my view, adequately identify, assess and monitor the risk posed, they were not in a position to provide what ought to have been their unique perspective or insights to Ministers or other relevant government agencies. I acknowledge that there appears not to have been any broader systematic Government evaluation and response to the CIA programme,²⁰⁸ based on the information in the public domain, or known to other government agencies by virtue of their own responsibilities and relationships, to plot New Zealand's independent course through the legal obligations and risks involved.
325. As at 2019, ignorance can no longer be an excuse. It has been clear for some 15 years that, despite its denials at the time, the CIA did in a systematic way subject some detainees to torture in breach of international law and contrary to New Zealand's legal and moral standards. Much more recently, members of the US Administration have made public statements which make it

²⁰⁶ See Part II of this Report.

²⁰⁷ See Parts II, IV, V and VI of this Report.

²⁰⁸ I emphasise however that the Inspector-General's jurisdiction extends only to the NZSIS and the GCSB. This Inquiry could not and did not directly examine the role of other Government agencies.

apparent that the practices employed by the CIA in the period 2001 to 2009 are not ruled out for the future.

326. In 2017, I discussed with the Directors-General how they had satisfied themselves that the ban on torture in the US would continue, given certain comments made by President Trump while he was a presidential candidate. The Directors-General advised me that following the change of administration in the USA, they had received verbal, but absolutely clear, assurances in person by the then CIA Director that the ban would continue.
327. The Directors-General have also told me that they placed considerable reliance upon statements made under oath during confirmation hearings in the Senate by Mike Pompeo and Gina Haspel, stating in absolute terms that they would not resume practices such as the “enhanced interrogation” programme. Those statements were as follows:
- At the 12 January 2017 hearing to confirm this appointment as CIA Director Mike Pompeo was asked “if you were ordered by the President to restart the CIA’s use of enhanced interrogation techniques that fall outside of the Army Field Manual, would you comply?” He replied “... absolutely not.”
 - On 9 May 2018 Gina Haspel stated to the Senate Select Committee on Intelligence: “I can offer you my personal commitment, clearly and without reservation, that under my leadership CIA will not restart such a detention and interrogation program.”
328. The Director-General of Security, who has the primary relationship with the CIA, advised me that she could not see that any further purpose would be served by writing to ask for the same assurances as those already given personally and publicly under oath. Both Directors-General have advised me that from time to time they have raised difficult issues at high level bilateral meetings, and the message has always been delivered diplomatically but clearly, and acknowledged respectfully. The Directors-General have advised further that although they would think very carefully about whether to raise a difficult issue with another intelligence agency, they would do so if it were necessary – for example, if there were evidence of possible human rights violations by partner agencies. This would be their approach regardless of the disparity in size between New Zealand’s agencies and the agencies of most other jurisdictions.
329. In my view that is very important. It is vital that New Zealand not be deterred from raising issues simply because it is the smallest and least powerful member of the Five Eyes partnership. I acknowledge that New Zealand is overwhelmingly a net beneficiary of intelligence flows from the Five Eyes partners. This was one of the considerations highlighted to me by the previous agency Directors. But if the agencies are relying on verbal assurances and more general statements made in other contexts (even those made under oath), their underlying structures, policies and practices become even more important, in all New Zealand’s intelligence cooperation and sharing relationships – not just with the US but with some other countries whose human rights records and current practice is open to question. By way of example, I note that in 2018 the UK ISC considered it necessary to specifically recommend that the UK

intelligence agencies closely monitor their US liaison partners to identify early any change in US policy or practices concerning detainees.

330. It is essential that the New Zealand intelligence and security agencies and other relevant Government agencies have in place structures, policies and practices (including regular monitoring) to detect any unlawful conduct by partner agencies and prevent New Zealand involvement, direct or indirect, in that conduct. There is no question that a key duty on the intelligence agencies now is to know and fully understand the gravity of what the relevant chosen partnerships involve, and to ensure that informed decisions (by the Minister or Ministers where that is appropriate) are made on the basis of that knowledge. All of my recommendations relate to that central theme. The Directors-General fully accept their responsibility in this regard, as they have emphasised in the statement included in paragraph 19 of this report.

Recommendations: Review of MPS, Ministerial authorisations and the JPS internal guidance

331. The ISA includes an explicit requirement for the NZSIS and the GCSB to “act in accordance with New Zealand law and all human rights obligations recognised by New Zealand law”.²⁰⁹ The recommendations about authorising documents, policy and other guidance are directed to that requirement.

A. Early review of the MPS Overseas Cooperation having regard to the gaps identified in this report, and the forthcoming whole of government legal advice on torture. The legal status and directive power of the MPS should be considered. Consultation with relevant NGOs and other members of the public is recommended.

Response: The Department of the Prime Minister and Cabinet has the responsibility for developing and reviewing the MPSs, on the Minister’s behalf. DPMC has advised that it will brief the Minister Responsible for the NZSIS and the GCSB shortly on the proposed review of the Overseas Cooperation MPS.

In parallel to the review of the MPS, MFAT is leading, working with Crown Law, NZDF and the intelligence and security agencies to formalise a statement of New Zealand’s obligations in relation to the law of torture and complicity in torture. DPMC will consult with the Inspector-General, as well as relevant government agencies throughout the review.

Whether consultation on the MPS should occur with relevant non-governmental organisations or others, as recommended in the report, is a decision for the Minister.

B. Ministerial authorisations: The GCSB and NZSIS should provide the Minister with adequate material to allow a meaningful human rights risk assessment to be made in all cases where Ministerial authorisation is sought. Within six to twelve months, fresh applications with relevant supporting material should be submitted by the agencies

²⁰⁹ ISA, s 17(a).

for all countries currently subject to a Ministerial authorisation, where that material was not previously provided.

Response: The agencies will seek new Ministerial authorisations for all states previously authorised without an accompanying human right risk assessment within twelve months of the date of this Report. The form of the applications for Ministerial authorisation will be considered alongside the review of the MPS and during the review of the JPS.

332. As necessary, the GCSB and NZSIS should include for the Minister's consideration a human rights risk assessment for specific intelligence agencies within these countries (eg if there are or have been plausible indications of human rights abuses by the agency).

C. Joint Policy Statement on Human Rights Risk Management: the agencies' JPS on human rights risk assessments and associated guidance materials should be reviewed within six months of the date of this Report to address the deficiencies identified in detail in the classified version of the Report.²¹⁰

Response: The JPS was scheduled for review starting March 31, 2019. The agencies consider that improvements can be made to simplify and clarify the JPS. During the review of JPS, GCSB and NZSIS will consider all of the recommendations in the report that are relevant to the JPS, in light of the Crown legal position on complicity and the standards in the Intelligence and Security Act. The review of the JPS will occur following the proposed MPS review so that any changes to the MPS are able to be reflected in the JPS.

D. Approved Party status for Five Eyes partners: should be sought by the agencies from the Minister as a matter of priority.

Response: In July 2019 the agencies provided human rights risk assessment for Five Eyes partners to the Minister along with a briefing requesting that they be re-authorised as approved parties. Notwithstanding this, the agencies consider that the existing Ministerial authorisation issued on 18 September 2017, together with the JPS on which the authorisation is made conditional, authorised the agencies' Five Eyes partners to be approved parties.

Recommendations: Training and support for staff

333. This Report shows that staff at many levels in the agencies need a good understanding of the factual and legal contexts in which the issues identified here might arise. They must be able to evaluate received intelligence for human rights impacts, identify risks and questions, elevate

²¹⁰ The Directors-General of GCSB and NZSIS advised me in February 2019 that the agencies will undertake a review of the JPS from 31 March 2019.

concerns, and be secure in the knowledge that they are operating within the law. In particular, the New Zealand agencies should ensure that staff are properly equipped through targeted legal training and sufficiently close supervision if they are engaged in any capacity to provide support to military operations. I recommend that:

- E. GCSB and NZSIS support to military operations:** the GCSB and the NZSIS should ensure that their staff have supervision commensurate with their experience of military operations and are provided with adequate information (including in writing) and training about:
- the legal and policy basis for their roles as civilians in support of military objectives;
 - IHL, New Zealand ROE and any New Zealand Government restrictions relevant to the context in which they are providing support;
 - the GCSB's and the NZSIS' policies and procedures relating to New Zealand's human rights obligations and those particular aspects of the policies and procedures relevant to their particular roles; and
 - the process for raising any questions or concerns about the nature of their work as it relates to IHL, ROE, or the risk of breaching human rights obligations.

Response: The agencies generally agree with recommendation E. The GCSB has concerns about the applicability and relevance of rules of engagement and New Zealand Defence Force law of armed conflict training to GCSB staff, however, where those matters are contextually relevant to deployed GCSB and/or NZSIS personnel they may be considered for inclusion in pre-deployment preparation.

Recommendation: Government authorisation for support to military operations

334. The GCSB and NZSIS should ensure there is clear government authorisation for the support it provides to military operations. I recommend that:

- F. A complete record of government authorisations** to provide support to military operations should be maintained by each agency.

Response: The agencies accept that there should be a complete and accurate record of government authorisations for providing support to military operations (where specific authorisation is required or appropriate). Improving recordkeeping practices continues to be an area of focus for both the GCSB and the NZSIS.

Recommendations: Monitoring of partner country practices and human rights records

335. Active and ongoing monitoring of partner country (including Five Eyes) political and legal developments and any changes to working practices is critical if New Zealand is to engage in information-sharing and cooperation with its eyes wide open. Ignorance and wilful blindness are not an excuse where relevant information is readily available to be discovered. I recommend that:

G. Best practice monitoring: Both agencies should develop a policy that clearly states how they will give effect to best practice monitoring of partner countries. The policy should provide for reassessment of a country's human rights record every six months for countries where the political or human rights situation is volatile or in a state of flux.

Recommendations: Agency to agency practice

336. Organisational culture should be led from the top. As with all state sector chief executives, the Directors-General need to be alive to the full scope of legal risk their work entails, willing to ask hard questions, and should actively promote the human rights laws and values their organisations are required by law to observe. The current Directors-General of the NZSIS and the GCSB have advised me of their full commitment to those obligations. Their statement is at page 8 of this Report. I recommend that where there are plausible indications by other States and foreign agencies of practices unacceptable to New Zealand, the Directors-General of the agencies:

H. Form an independent view of partner agencies' compliance: Use the full range of sources and enquiry available to form an independent view of their partner agencies' compliance with New Zealand's legal requirements and standards of State conduct.

I. Best practice tools and mitigation strategies: Ensure their agencies engage with the range of best practice tools and mitigation strategies identified in this Report, for example, by seeking, where necessary, sufficiently specific assurances in writing, or recorded in writing, with regular and active monitoring and recording of whether those assurances are being complied with.

Recommendations: A whole of government approach

337. A whole of government approach is necessary to protect national security. A whole of government approach is also necessary to ensure that the mechanisms for achieving national security are consistent with domestic and international law and with New Zealand's humanitarian values. The intelligence agencies have a vital role to play in keeping the wider government well-informed. They hold the key relationships, and are often best placed to obtain the information necessary to inform decisions on how partner relationships can be maintained consistently with New Zealand law and values. The State Sector Act requires chief executives to collaborate to ensure necessary information is known across departments and raised with Ministers as appropriate. I recommend that:

- J. Cooperation and sharing where risks identified** The Directors-General should:
- Share with other relevant departments and/or elevate to Ministers their key assessments of such issues, concerns and steps taken to address them.
 - Obtain an informed and documented mandate from relevant Ministers for any ongoing information sharing and cooperation with a foreign state or agency in any case where serious legal and humanitarian issues have been raised.

Response to recommendations G, H, I and J: The JPS review will cover how monitoring may be strengthened while taking into account operational requirements and the practicalities of international relations. While the agencies already draw on a wide range of information when drafting human rights assessments, this review will include consideration of whether any further sources of information are available and necessary to ensure that assessments are made using a range of current and trusted information.

In order to take a more all-of-Government approach and provide greater objectivity when drafting approved party applications for countries, we will seek to involve agencies such as MFAT and DPMC (National Security Group).

The review will consider the form of the input such agencies could take in the assessment process, in consultation with those agencies.

Recommendations: Review historic files

338. The agencies should review their historic files which contain information obtained by torture or cruel, inhuman or degrading treatment or punishment. I recommend that:

- K.** The agencies assess and document the provenance of such information and dispose of material containing such information. In doing so, they may need to navigate any obligations under the Public Records Act 2005. If they cannot dispose of this material they should seal access to it.

Response: While there is no legal obligation for the agencies to dispose of the material, the agencies are reviewing the extent of the files identified by the Inspector-General and where possible will dispose of or limit access to such information, subject to obligations under the Public Records Act 2005.

APPENDIX A: INQUIRY TERMS OF REFERENCE

1. The Inquiry had three purposes, cast as the following terms of reference:
 - **Term of reference 1:** To examine what steps were taken by the GCSB and the NZSIS during the relevant period to address any risk of complicity in the CIA programme, including policies, practices and/or training or other support to staff deployed in or otherwise engaged in intelligence activity in respect of Afghanistan.
 - **Term of reference 2:** To examine whether, and if so to what extent, the NZSIS and the GCSB:
 - a. were aware of the CIA programme;
 - b. were directly involved in the CIA programme;
 - c. provided any intelligence to support the CIA programme;
 - d. received any intelligence reports arising from the interrogation of individuals under the CIA programme; and
 - e. raised concerns or objections about the CIA programme informally or formally with the CIA and/or the United States government.
 - **Term of reference 3:** To examine what policies, guidance and training have been developed and are currently implemented by the GCSB and the NZSIS to ensure that their staff comply with New Zealand's domestic human rights law and its international legal obligations when cooperating with other nations.

APPENDIX B: CHRONOLOGY

The information in this chronology is sourced entirely from material in the public domain, and the sources are referenced. Its purpose is to show what allegations and information were publicly available, at particular dates. I do not purport to confirm the accuracy of the specific content of the material referenced.

DATE	EVENT IN OR RELEVANT TO AFGHANISTAN / NEW ZEALAND INTELLIGENCE AND SECURITY AGENCIES AND NZDF SUPPORT TO OEF & ISAF / UNITED STATES OF AMERICA GOVERNMENT & CIA	PUBLICATION – INTERNATIONAL ORGANISATION; GOVERNMENT; NON-GOVERNMENT ORGANISATION	PUBLICATION – MEDIA
2001			
2001	Dr Warren Tucker, Director of GCSB; from 1999.		
2001	Mr Richard Woods, Director of NZSIS; from 1999.		
2001	George Tenet, Director of CIA; from 1996.		
11 Sept 2001	Terrorist attacks on USA by Al Qa'ida.		
14 Sept 2001	US Congress passed an authorisation for the use of military force in Afghanistan.		
17 Sept 2001	President Bush signed a covert action Memorandum of Notification authorising the CIA Director to “undertake operations designed to capture and detain persons who pose a continuing, serious threat of violence or death to U.S. persons and interests or who are planning terrorist activities.”		
7 Oct 2001	Operation Enduring Freedom (OEF) commenced in Afghanistan: US-led coalition forces began attacks on Taleban targets. US and UK reported to UN Security Council that military force was used in self-defence.		

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Nov 2001	US captured first detainees in Afghanistan. Kabul taken by coalition forces.		
13 Nov 2001	President Bush issued a Military Order permitting detention of any terrorist at a location anywhere in the world and providing trial of detainees by Military Tribunal.		
6 Dec 2001	Fall of Kandahar – last Taleban city stronghold. Prisoners were detained. Hamid Karzai sworn in as head of an interim power-sharing government.		
11 Dec 2001	NZ SAS left for Kandahar.		
20 Dec 2001	UN Security Council Resolution 1386 authorised an International Security Assistance Force (ISAF), as a UN mandated coalition of the willing, to help maintain security in Kabul and surrounding areas in Afghanistan.		
2002			
2002	38 CIA detainees; 10 subjected to enhanced interrogation techniques.		
10 Jan 2002	First interview by UK SIS of US-held detainee in Afghanistan where concerns noted about treatment.		
23 Jan 2002			<i>The Evening Post</i> "Clark OK with prisoners' lot" notes the arrival of 158 detainees at Guantanamo Bay. NZ PM Helen Clark accepted UK PM Tony Blair's assurances that British detainees at

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			Guantanamo Bay had no complaints re their treatment.
29 Jan 2002		Amnesty International wrote to UK Foreign Secretary Jack Straw, re concerns with detention of Al Qa'ida and Taleban prisoners at Guantanamo Bay.	
7 Feb 2002	President Bush issued Memorandum <i>Humane Treatment of Taliban and al Qaeda Detainees</i> , stating: Al Qa'ida and Taleban detainees do not qualify as POWs under Geneva Conventions; common Article 3 requiring humane treatment of individuals in a conflict did not apply to these detainees. Memo does require US Armed Forces to treat detainees humanely, consistent with applicable law.		
11 Mar 2002			<i>The Washington Post</i> "US behind secret transfer of terror suspects" refers to US transporting detainees to countries with close links to CIA (eg, Egypt and Jordan) where detainees can be subject to torture.
12 Mar 2002			<i>The Guardian</i> "US sends suspects to face torture" partly based on above <i>The Washington Post</i> article; reports CIA spokesperson had 'no comment' on the allegations.
28 Mar 2002	CIA captures Abu Zubaydah.		

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1 Apr 2002			<i>The New York Times</i> “A Nation Challenged: The Capture; New Confidence US has a Qaeda Leader” on Abu Zubaydah’s capture, wounding and removal to unknown location.
14 Apr 2002		Amnesty International <i>Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantanamo Bay</i> , with reports of US torture; claims detainees transferred to states where torture permissible; names detainees including Abu Zubaydah.	
15 Apr 2002			<i>Time Magazine</i> “Anatomy of a Raid: Inside the capture of al-Qaeda chief Abu Zubaydah and his terror network” discusses if Abu Zubaydah might be subject to torture (under a heading “How do we make him talk”).
26 Apr 2002			<i>The New York Times</i> “Officials say Al Qaeda suspect has given useful information” reports a denial by US officials that Abu Zubaydah is being subjected to torture; “non-violent forms of coercion are being used”.
24 May 2002	Raid on Band e Timur, Helmand Province.		Treatment of detainees from the raid on Band e Timur were the subject of May 2011 <i>Metro</i> article “Eyes Wide Shut” by Jon Stephenson.

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1 Aug 2002	US Attorney-General Alberto Gonzales approves US Justice Dept, Office of Legal Counsel Memorandum by Assistant A-G Jay Bybee <i>Re Standards of Conduct for Interrogation Under 18 U.S.C. paras 2340-23404</i> ('Torture Memo'; reported in full by media June 2004).		
Aug 2002		Human Rights Watch <i>United States, Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees</i> (Vol 14. No.4 (G)), states detainees subjected to arbitrary detention; due process and presumption of innocence violated.	
12 Dec 2002	NZSAS returned to NZ.		
26 Dec 2002		Human Rights Watch (HRW) <i>United States: Reports of Torture of Al-Qaeda Suspects</i> reports "stress and duress" techniques being used by the CIA.	
26 Dec 2002			<i>The Washington Post</i> "US Decries Abuse but Defends Interrogation: Stress and Duress Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities" describes rendition of detainees; details the "takedown teams packaging prisoners" for transport, with hoods, gags, and being bound to stretchers with duct tape; accuses US of using torture with detainees including at Bagram Airbase in Kabul; names

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			detainees including Abu Zubaydah. Refers to the above HRW report.
2003			
2003	Further 53 CIA detainees; 19 subjected to enhanced interrogation techniques.		
Jan 2003			<i>The Washington Post</i> article of 26 Dec 2002 (see above) receives wide exposure, including an editorial in <i>The Economist</i> and statement by the World Organisation against Torture.
28 Jan 2003	CIA <i>Guidelines on Interrogations Conducted Pursuant to the Presidential Memorandum of Notification of 17 September 2001</i> , with the standard and enhanced techniques available when interrogating detainees, approved by Director George Tenet.		
Mar 2003	US-led coalition invaded Iraq.		
1 Mar 2003	Khalid Sheikh Mohammed arrested in joint Pakistan/CIA operation.		
8 Mar 2003			<i>The Economist</i> article “Special report Al-Qaeda: The other war” notes the capture of Khalid Sheikh Mohammed.
9 Mar 2003			<i>The New York Times</i> “Threats and Responses: Interrogations; Questioning Terror Suspects in a Dark and Surreal World” covers interrogation techniques used on Abu Zubaydah (eg, sleep,

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			medical treatment and food withheld), and which might be used on Khalid Sheikh Mohammed; notes allegations of CIA torture by released detainees.
17 Mar 2003			<i>Time Magazine</i> "The biggest fish of them all" discusses capture of Khalid Sheikh Mohammed 1 March 2003, notes his whereabouts is now unknown and authorities' claims that use of "temperature discomfort", sleep deprivation and hooding was not torture.
Apr 2003		International Helinski Federation for Human Rights <i>Anti-terrorism Measures, Security and Human Rights: Developments in Europe, Central Asia and North America in the Aftermath of September 11</i> notes 'special interest' detainees being held incommunicado, denied medical treatment; and beaten by guards.	
28 May 2003		Amnesty International <i>Report 2003: United States of America</i> discusses conditions of transfer of detainees to Guantanamo Bay and of detention.	
10 Jun 2003		UK Parliament Intelligence and Security Committee (UK ISC) first raises issues of treatment of detainees with the UK PM.	

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Mid 2003		European Court of Human Rights, in <i>Al Nashiri v Poland</i> 24 July 2014, identified mid-2003 as the time by which Poland ought to have known of the CIA's programme of detention and rendition, given the "knowledge and emerging wide-spread public information about ill-treatment and abuse of detained terrorist suspects in the custody of the US authorities".	
Jun to Aug 2003	The Taleban resurgence in Afghanistan was launched.		
26 Jun 2003		Parliamentary Assembly of the Council of Europe, Resolution 1340 (2003) (PACE Resolution) <i>Rights of persons held in the custody of the United States in Afghanistan or Guantanamo Bay</i> , states deep concern at the conditions of the unlawful detention; notes contradictory US position that Guantanamo Bay is fully within US jurisdiction but outside protection of the US Constitution.	
11 Aug 2003	NATO takes the lead of the ISAF mission in Afghanistan (in Kabul initially).		
18 & 20 Aug 2003		Amnesty International <i>United States of America, The threat of a bad example: Undermining international standards as 'war on terror' detentions continue and Incommunicado detention/Fear of ill-</i>	

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		<i>treatment</i> , these reports address rendition of detainees to countries without formal human rights protections; the risk of ill-treatment; and undermining of the rule of law.	
Sept 2003	NZ Provincial Reconstruction Team (NZ PRT) deployed to Afghanistan.		
9 Oct 2003		International Committee of the Red Cross (ICRC) issued public statement noting a “deterioration in the psychological health of a large number of the detainees”.	
3 Nov 2003			<i>The Australian</i> “S11 chiefs reveal bin Laden role” reports disclosures made by Khalid Sheikh Mohammed and Ramzi bin al-Shibh detained at an unknown location; reports the US State Department co-ordinator for counter-terrorism J.Cofer Black when asked if torture was being used on the two detainees, saying “All I can say to that is that there is a before and an after September 11. We have taken off our kid gloves.”
2004			
2004	Further 22 CIA detainees; 7 subjected to enhanced interrogation techniques.		

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8 Jan 2004		UK ISC wrote to UK PM informing PM of decision to report on detainees.	
Feb 2004	NZSAS redeployed to Afghanistan.		
Feb 2004		ICRC report identified concerns about US treatment of detainees in Abu Ghraib prison in Iraq.	
4 Mar 2004		Public statement by ICRC <i>United States: ICRC President Urges Progress on Detention-Related Issues</i> : “Beyond Bagram and Guantanamo Bay, the ICRC is increasingly concerned about the fate of an unknown number of people captured as part of the so-called global war on terror and held in undisclosed locations”; repeats ICRC request for access to detainees.	
7 Mar 2004		Human Rights Watch Report <i>Enduring Freedom: Abuses by U.S. Forces in Afghanistan</i> includes explicit reports of torture from released detainees, mentions torture of Abu Zubaydah; names many other detainees eg, Khalid Sheikh Mohammed.	
28 Apr 2004			First US media photos of prisoner abuse at Abu Ghraib prison, Iraq.
May 2004		UK SIS officials raise concerns with Foreign Secretary about interrogation techniques in Afghanistan in 2002/2003.	

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10 May 2004			<i>The New Yorker</i> "Torture at Abu Ghraib".
Jun 2004		UK Ministry of Defence (MoD) issued formal guidance on treatment of detainees to SIS officers; based on MoD Sept 2003 Standard Operating Instructions on the Policy for Apprehending, Handling and Processing Detainees and Internees (SOI). (The SOI was described by the UK Defence Secretary in a Parliamentary Answer (PQ 172994) on 7 July 2004.)	
Jun 2004		UK ISC <i>Annual Report 2003/2004</i> provides findings to date on detainees, noting concerns about the treatment of US detainees and their conditions of detention.	
Jun 2004		Human Rights Watch Report <i>The Road to Abu Ghraib</i> .	
Jun 2004			US media attention on interrogation policies relating to 'high value' detainees.
7 Jun 2004			<i>Wall Street Journal</i> "Pentagon Report Set Framework for Use of Torture" releases Defense Dept Working Group Memo of 6 March 2003 that identifies new interrogation guidelines for Guantanamo Bay detainees; incorporates the legal reasoning of the

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			Gonzales and Bybee 1 August 2002 'Torture Memo'.
8 Jun 2004			<i>The Washington Post</i> "Memo Offered Justification for Use of Torture" refers to US Justice Dept 2002 Gonzales and Bybee memo; covering treatment of Al Qa'ida detainees in CIA custody offshore; including definition of torture as "pain accompanying serious physical injury such as organ failure, impairment of bodily function, or even death"; refers to March 2003 Defense Department review of torture for "exceptional interrogations"; refers to Secretary of Defense Rumsfeld's classified directive of 16 April 2003 approving the use of 24 interrogation techniques in Guantanamo Bay.
13 Jun 2004			<i>The Washington Post</i> "Justice Dept Memo Says Torture 'May Be Justified'" releases the Bybee 'Torture Memo' of 1 August 2002; also releases Memo of 6 March 2003 by Defense Department Working Group (above).
21 Jun 2004			<i>The New York Times</i> "The Reach of War: US Said to Overstate Value of Guantanamo Detainees" Defense Department officials acknowledge that under pressure to produce intelligence

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			in Iraq they “adapted some new more intensive interrogation techniques that were approved by Secretary of Defense Donald H Rumsfeld for use at Guantanamo”.
1 Jul 2004		UK Security Service issued guidance to all officers involved in detainee interviews (based on MoD SOI).	
Jul 2004	John E McLaughlan commences as Acting Director, CIA.		
Sept 2004	NZSAS return to NZ.		
Sept 2004	Porter J Goss commences as Director, CIA.		
Oct 2004	Hamid Karzai elected President of Afghanistan.		
26 Oct 2004		Amnesty International <i>United States of America: Human dignity denied: Torture and accountability in the ‘war on terror’</i> provides an overview of US Administration’s response to 9/11, “violating basic rights in the name of national security or military necessity”, including with regard to detainees in US custody in Afghanistan.	
30 Nov 2004		The New York Times <i>Red Cross Finds Detainee Abuse in Guantanamo</i> reports on leaked copy of ICRC report to US Government that asserts physical and psychological treatment of detainees in	

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		Guantanamo Bay is “tantamount to torture” (after ICRC visit in June 2003).	
2005			
2005	Further 4 CIA detainees; 2 subjected to enhanced interrogation techniques.		
2005	Increased insurgency activity in Afghanistan and increased use of IEDs and suicide bombings, plus increased anti-Western and anti-American sentiment.		
6 Jan 2005	US military authority announces further review of allegations of detainee abuse at Guantanamo Bay.		
1 Mar 2005		UK ISC report <i>The handling of detainees by UK Intelligence Personnel in Afghanistan, Guantanamo Bay and Iraq</i> presented to UK Parliament. Identifies 10 detainees in US “ghost prisons” including Khalid Sheikh Mohammed; Abu Zubaydah; Riduan Isamuddin (aka Hambali); Abd al Rahim al Nashiri. Records US confirmed in June 2004 the hooding, food and sleep deprivation of Guantanamo Bay detainees between Nov 2002 and Jan 2003. Confirms that formal guidance on the treatment of detainees (based on the MoD SOI) was issued to SIS officers in June 2004.	

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Apr 2005		Human Rights Watch Report <i>Getting Away With Torture? Command Responsibility for the US Abuse of Detainees</i> details rendition and widespread and systematic torture of US detainees. A list of those 'disappeared' while in CIA custody includes Abu Zubaydah; Ramzi bin al-Shibh, Khalid Sheikh Mohammed and Riduan Isamuddin (aka Hambali).	
10 May 2005	US Deputy Assistant A-G Steven Bradbury issues three Memoranda, including on "combined effects" of "enhanced interrogation techniques". (Partially reported in media October 2007; declassified 2009).		
Jun 2005	NZSAS redeployed to Afghanistan.		
12 Jun 2005			<i>The New Yorker</i> "Interrogating Ourselves" refers to waterboarding of Khalid Sheikh Mohammed in 2003.
Oct 2005	Vice President Cheney and CIA Director Porter Goss ask Congress to exempt CIA employees from legislation that would bar cruel and degrading treatment of any prisoner in US custody.		
Nov 2005	NZSAS return to NZ.		
2 Nov 2005			<i>The Washington Post</i> "CIA Holds Terror Suspects in Secret Prisons". The <i>Post</i> report identifies CIA prisons in Thailand, Eastern Europe and Afghanistan; mentions Abu Zubaydah.

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6 Nov 2005		Human Rights Watch <i>Statement on US Secret Detention Facilities</i> cites independent HRW research that corroborates above <i>Washington Post</i> article, eg, CIA plane movements from Afghanistan to specifically identified countries; anonymous US Govt. officials confirm torture, waterboarding.	
8 Nov 2005			<i>The New York Times</i> “Report Warned CIA on Tactics in Interrogation” on 2004 classified report by CIA’s Inspector-General, John Helgerson, stating interrogation “techniques appeared to constitute cruel degrading and inhuman treatment” under UNCAT; mentions waterboarding of Khalid Sheikh Mohammed; possible exposure of CIA officials to legal liability; CIA asserts techniques are lawful. (Inspector-General’s report publicly released, heavily redacted, on 24 August 2009.)
18 Nov 2005			<i>ABC News</i> “CIA’s Harsh Interrogation Techniques Described” describes the use of these techniques on at least a dozen high value detainees, including Khalid Sheik Mohammed and Ibn al Shaykh al Libbi. Notes the death of two CIA detainees as a result of torture (Gul Rhamin in Kabul and another in Iraq).

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30 Nov 2005		Human Rights Watch <i>List of "Ghost Prisoners" Possibly in CIA Custody</i> , lists 26 detainees, including Abu Zubaydah; Ramzi bin al-Shibh; Abd al-Rahmin al- Nashiri; Khalid Sheikh Mohammed, Riduan Isamuddin (sic) (aka Hambali); Mohammed Farik Amin (aka Zubair) and Mohamad Nazir bin Lep (aka Lillie).	
5 Dec 2005	US Secretary of State, Condoleezza Rice, denies use of rendition for purpose of interrogation and torture; says rendition a lawful weapon.		
9 Dec 2005			<i>Dominion Post</i> "Fighting evil with evil" on CIA's "enhanced interrogation techniques".
12 Dec 2005		United Nations (E/CN.4/2006/7) <i>Report of the Working Group on Arbitrary Detention</i> includes "reliable reports" of secret prisons, extraordinary rendition to those sites and indefinite detention under the surveillance of US agents as part of the "global war on terror"; concludes this is incompatible with international humanitarian and human rights law, including right to be free from torture and CIDTP.	

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2006			
2006	Further 1 CIA detainee; not subjected to enhanced interrogation techniques.		
2006	Increased UK and US public pressure and concern related to rendition and treatment of detainees.		
18 Jan 2006		European Parliament establishes a Temporary Committee, investigating CIA transportation and illegal detention of prisoners (TDIP) and allegations of CIA prisons in Europe (Fava Inquiry).	
27 Feb 2006		United Nations ECOSOC report (E/CN.4/2006/120) <i>Situation of detainees at Guantanamo Bay</i> , joint report by five UN special procedure mandate holders, identifies treatment of 500 plus detainees at Guantanamo Bay includes torture.	
27 Feb 2006			<i>The New Yorker</i> (Jane Mayer) "The Memo. How an internal effort to ban the abuse and torture of detainees was thwarted" includes an interview with Alberto Mora, former General Counsel, US Navy.
May – Jul 2006	ISAF and Afghan forces in Operation Mountain Thrust directed at Taleban insurgency in southern Afghanistan.		
30 May 2006	General Michael Hayden commences as Director, CIA.		

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7 Jun 2006		Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights (PACE Committee) adopts the first Report (the 2006 Marty Report) <i>Alleged secret detentions and illegal transfers of detainees involving Council of Europe member states</i> , report notes a global “spider’s web” of CIA detentions and transfers; alleged collusion by 14 Council of Europe member states with the CIA in these unlawful activities, while other countries “ignored them knowingly or did not want to know”. “The main concern of some governments was clearly to avoid disturbing their relationships with the Unites States, a crucial partner and ally.”	
29 Jun 2006	US Supreme Court ruling in <i>Hamdam v Rumsfeld</i> that common Article 3 of the Geneva Conventions applies to all detainees, of any nationality, held in any country, in US custody.		
Jul 2006 approx	General Hayden, Director CIA gives a personal assurance to Five Eyes agency heads including Directors of GCSB and NZSIS that the CIA will go right up to but not cross the line of legality/illegality. (Discussed in General Hayden’s 2016 book <i>Playing to the Edge: American Intelligence in the Age of Terror.</i>)		

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1 Aug 2006	Transfer of southern and eastern regions in Afghanistan to NATO/ISAF.		
Sept 2006	End of Dr Warren Tucker's term as Director of GCSB.		
6 Sept 2006	President Bush acknowledges existence and use of secret CIA prisons overseas; advises remaining detainees to be transferred to military custody at Guantanamo Bay.		
Oct 2006	End of Mr Richard Woods' term as Director of NZSIS.		
Nov 2006	Dr Warren Tucker commences as Director of NZSIS.		
Nov 2006	Air Marshal Sir Bruce Ferguson commences as Director of GCSB.		
2007			
2007	Further 1 CIA detainee; 1 subjected to enhanced interrogation techniques.		
2007	Continued insurgency activity in Afghanistan.		
14 Feb 2007		<p>European Parliament approved the Fava Report on CIA renditions. It identified at least 1,245 flights operated by CIA in European airspace between 2001 and 2005.</p> <p>European Parliament adopted the 'Resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of</p>	

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		prisoners’, deploring that governments of European countries did not feel the need to ask the US government for clarification on the existence of secret prisons; noting “the strong possibility that some European countries may have received, knowingly or unknowingly, information obtained by torture”.	
11 Jun 2007		Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights (PACE Committee) adopts the second Report (the 2007 Marty Report), revealing that ‘high value’ detainees had been held in CIA detention centres in Europe from 2003 to 2005.	
28 Jun 2007		UK ISC report on <i>Rendition</i> presented to UK Parliament.	
20 Jul 2007	President Bush issues Executive Order 13440, determining that CIA ‘s programme of detention and interrogation “fully complies” with Geneva Conventions common Article 3, provided CIA practices do not include torture or CIDTP.		
21 Jul 2007			<i>The Washington Post</i> “Bush approves new CIA methods” details the previous abuse of detainees and the new Executive Order; notes actual CIA interrogation guidelines are contained in a classified document; reports new safeguards include every use of an

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			enhanced technique is to be signed off by CIA Director General Hayden.
4 Oct 2007			<i>The New York Times</i> "Secret US Endorsement of Severe Interrogations" discloses the existence of the Department of Justice's 2005 opinion on acceptable 'combined effects' of EIT (the Bradbury memos), approved by A-G Alberto Gonzales.
7 Dec 2007			<i>The New York Times</i> "CIA Destroyed 2 Tapes Showing Interrogations" notes at least two tapes were destroyed, including those of 2002 severe interrogations of Abu Zubaydah; includes CIA Director General Hayden stating videotapes were a security risk.
2008			
Early 2008	US Admiral describes situation in Afghanistan as "precarious and urgent"; increase in US and UK troops.		
5 Feb 2008			<i>The Guardian</i> "CIA admits 'waterboarding' al-Qaida suspects" reports General Hayden told the Senate Intelligence Committee that Khalid Sheikh Mohammed, Abu Zubaydah and Abd al-Rahim al-Nashiri were waterboarded by the CIA in 2002 and

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			2003; reports General Hayden saying he opposed limiting CIA interrogation techniques to those permitted in US Army Field Manual.
10 Mar 2008	President Bush vetoes legislation (HR 2082 Intelligence Authorization Act 2008 for Fiscal Year 2008) that would limit CIA and US government agency interrogations to those permitted by US Army Field Manual standards. The President's <i>Veto Message</i> (110-100) said the Bill would "impose several unnecessary and unacceptable burdens on our Intelligence Community. ...It is vitally important that the CIA be allowed to maintain a separate and classified interrogation program".		The veto is widely criticised in US media as allowing CIA torture of detainees to continue.
11 Mar 2008	US Congress sustains the President's veto on Bill HR 2082 (which required a vote of two-thirds of both the House of Representatives and Senate).		
7 Apr 2008		Human Rights Watch <i>Double Jeopardy: CIA Renditions to Jordan</i> outlines the torture of CIA detainees transferred to Jordan during 2001 to 2004 or later, including some 14 non-Jordanian detainees transferred there from the US; includes the torture of Ramzi bin al-Shibh.	
13 Jun 2008	Taleban fighters liberated 1200 prisoners from jail in Kandahar, Afghanistan.		
15 Jul 2008			Journalist Jane Mayer's book <i>The Dark Side: The Inside Story of How a War on</i>

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			<i>Terror Turned into a War on American Ideals</i> is published; includes details of the US Administration approved treatment of detainees by the CIA; book is reviewed in the media.
20 Nov 2008	Report of the Committee on Armed Services, United States Senate <i>Inquiry into the treatment of detainees in US Custody</i> , determined as part of the 19 conclusions that CIA interrogation techniques were at odds with the commitment to humane treatment of detainees in US custody; created a serious risk of physical and psychological harm to the detainees; and that the Office of Legal Counsel opinions (the “Torture Memos”) distorted the meaning and intent of anti-torture laws, rationalised the abuse of detainees and influenced Department of Defense determination as to legal interrogation techniques for use by US military.		
2009			
22 Jan 2009	President Obama, on second day in office, signs: Executive Order 13491 Ensuring Lawful Interrogation; Executive Order 13492 Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Close of Detention Facilities; and Executive Order 13493 Review of Detention Policy Options.		
Feb 2009	Leon Panetta commenced as Director, CIA.		

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2 Mar 2009			<i>The New York Times</i> "US Says CIA Destroyed 92 Tapes of Interrogations" article on the US Government discussing the extent of the 2005 destruction of tapes held at the CIA station in Thailand; notes this is where Abu Zubaydah and Abd al-Rahmin al-Nashiri were interrogated.
19 April 2009			<i>The New York Times</i> "Waterboarding Used 266 Times on 2 Suspects" concerns a 30 May 2005 US Justice Dept legal memo, now publicly released, that states the extent of waterboarding of detainees Abu Zubaydah (83 times) and Khalid Sheikh Mohammed (183 times). Article also details, from another released 2005 Justice Dept memo, that waterboarding was used more frequently and with a greater volume of water than the CIA rules permitted.

APPENDIX C: FORMER DIRECTORS OF THE GCSB AND NZSIS 2001-2009

GCSB Director	Period in role	NZSIS Director of Security	Period in role
Dr Warren Tucker	1999 to Sept 2006	Richard Woods	Nov 1999 to Oct 2006
Air Marshal Sir Bruce Ferguson KNZM OBE AFC	Nov 2006 to Nov 2010	Dr Warren Tucker	Nov 2006 to April 2014

APPENDIX D: LEGAL FRAMEWORK

Prohibition of torture – sources of law

International law

1. Article 38(1) of the Statute of the International Court of Justice sets out the four main sources of international law, which are, in summary:
 - international conventions (treaties);
 - international custom, as evidence of general practice accepted as law;
 - general principles of law; and
 - judicial decisions and expert commentary, as subsidiary means for the determination of rules of law.²¹¹

International conventions

2. New Zealand has signed and ratified the following relevant international conventions:
 - The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).²¹² UNCAT requires that States shall “prevent acts of torture”²¹³ and provides that “no exceptional circumstances whatsoever ... may be invoked as a justification of torture”.²¹⁴ It also prohibits ‘complicity’ in torture²¹⁵ and requires that States prevent “other acts of CIDT and punishment”.²¹⁶ The prohibition in UNCAT on torture and CIDT also extends to acts committed “at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”,²¹⁷
 - The International Covenant on Civil and Political Rights (ICCPR)²¹⁸ which states that no person shall be subjected to torture or to CIDT or punishment; and requires that “persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”,²¹⁹

²¹¹ Statute of the International Court of Justice 892 UNTS 119 (26 June 1945).

²¹² Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 4 February 1985; Treaty Series No 107 (1991); Cm 1775).

²¹³ UNCAT, art 2(1).

²¹⁴ UNCAT, art 2(2).

²¹⁵ UNCAT, art 4.

²¹⁶ UNCAT, art 16.

²¹⁷ UNCAT, art 16.

²¹⁸ International Covenant on Civil and Political Rights (New York, 19 December 1966; Treaty Series No. 6 (1977); Cmnd 6702).

²¹⁹ ICCPR, art 7.

- The four Geneva Conventions of 1949 and Additional Protocols of 1977.²²⁰ These require humane treatment of detainees and specifically prohibit torture, and cruel and degrading treatment in the context of an armed conflict. The Geneva Conventions and the Additional Protocols are sometimes referred to as the law of armed conflict (LOAC) or International Humanitarian Law (IHL);
- Rome Statute of the International Criminal Court (ICC), which includes torture as a 'crime against humanity', when committed as part of a widespread or systematic attack against any civilian population.²²¹

Customary international law

3. The prohibition on torture is a rule of customary international law.²²² Such law is established through state practice together with a belief that the practice is required by law (*opinio juris*).
4. The prohibition on torture is also a *jus cogens* norm,²²³ a fundamental principle of international law from which no derogation is possible.

Decisions of international courts and tribunals

5. A subsidiary means for determining international law is the decisions of various international courts and tribunals that have considered cases in which torture has been alleged. Of most relevance in this context are the decisions of the ICC.²²⁴ The ICC is the court of last resort for the prosecution of serious international crimes; it is complementary to national criminal jurisdictions.²²⁵ The decisions of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), both established in accordance with resolutions of the United Nations Security Council, and the International Court of Justice (ICJ) are also relevant.

International Law Commission Articles on State Responsibility for Internationally Wrongful Acts (ILC Articles)

6. In addition, there are relevant secondary rules of international law, including codifications of international law produced by specialist organisations. The International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles) (said to, in large part, codify customary international law) constitute a framework through which State responsibility can arise under international law for any internationally wrongful act, including

²²⁰ Conventions for the Protection of War Victims 75 UNTS 287 (opened for signature 12 August 1949; entered into force 21 October 1950).

²²¹ Rome Statute of the International Criminal Court 2187 UNTS 90 (opened for signature 17 July 1998, entered into force 1 July 2002), art 7(1)(f) (Rome Statute).

²²² *Prosecutor v Furundzija (Judgment)* ICTY Appeals Chamber IT-95-17/1-T, 10 December 1998 at [137].

²²³ *Jus cogens* in Latin means 'compelling law', in essence representing certain legal rules which uphold fundamental values, from which it is not possible to contract out.

²²⁴ Rome Statute.

²²⁵ Rome Statute, art 1.

torture.²²⁶ Under Article 16, a State has international responsibility where that State materially aids or assists another State in the commission of an internationally wrongful act, if it does so with intent and knowledge of the circumstances of that wrongful act and the act would be internationally wrongful if committed by that State. The Articles also address serious breaches of peremptory norms. Article 40 defines a breach as serious “if it involves a gross or systematic failure by the responsible State.” Article 41 requires States to cooperate to bring an end through lawful means to any serious breach within the meaning of Article 40 and not to recognise as lawful a situation created by a serious breach nor render aid or assistance in maintaining that situation. Article 41 is less likely to represent settled or customary international law.

Other expert sources

7. Article 38(1) of the ICJ Statute also recognises commentary from eminent scholars as a subsidiary means of identifying international law. Such commentary is among other significant contributions to the debate on what at international law amounts to ‘complicity’. Some of these are canvassed below. While not primary sources of the law, they may amount to persuasive and influential commentary. They help to elucidate the areas that remain the subject of debate and may lead to the progressive development of international law.

Domestic law

8. Various New Zealand laws, particularly those which incorporate the international conventions referred to above, are also relevant. They are set out in more detail later.

Defining torture

9. The three key elements of torture are:²²⁷
 - the intentional infliction of severe pain or suffering, physical or mental;
 - by, or at the instigation, or with the consent or acquiescence of, an official or public person acting in an official capacity;
 - for certain purposes such as obtaining third person information or a confession.
10. While UNCAT also requires States to prevent “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined”,²²⁸ CIDT, as it is known, is not itself defined.

²²⁶ See ILC Articles, art 2: “There is an internationally wrongful act of a State when conduct consisting of an act or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.” UN General Assembly Resolutions have commended the ILC Articles to the attention of States (eg, *Responsibility of States for internationally wrongful acts* A/RES/56/83 (2001); *Responsibility of States for internationally wrongful acts* A/RES/ 62/61 (2007). The Secretary-General’s Report (A71/80) in 2016 noted a further 72 cases between 2013 and 2016 in which international courts, tribunals and other bodies cited the ILC Articles.

²²⁷ UNCAT, art 1.

²²⁸ UNCAT, art 16.

How the definition of torture has been interpreted in relevant contexts

11. Several jurisdictions have specifically considered what would constitute “torture” in relevant contexts. While the US Manual and UK training documentation referred to in the boxes below do not have any status under international law, except to the extent they reflect the practice of those countries, they are a useful guide to what kinds of activities might constitute torture in this context.

United States examples of prohibited treatment amounting to torture: The United States Army Field Manual *Human Intelligence Collector Operations* explicitly prohibits torture and cruel, inhuman and degrading treatment or punishment of detainees, including prohibiting the following actions in intelligence interrogations:

- having the detainee naked or perform sexual acts or pose in a sexual manner
- using hoods or duct tape over the eyes
- beatings, electric shocks, burns or other forms of physical pain
- waterboarding
- using military working dogs
- inducing hypothermia or heat injury
- conducting mock executions
- depriving the detainee of necessary food, water or medical care.²²⁹

United Kingdom examples of prohibited treatment amounting to torture: The United Kingdom Joint Services Intelligence Organisation’s training documentation identifies – similar to the United States but more widely – the following techniques as ‘expressly and explicitly forbidden’:

- physical punishment of any sort
- the use of stress positions
- intentional sleep deprivation²³⁰
- withdrawal of food, water or medical treatment
- degrading treatment (sexual embarrassment, religious taunting etc)
- the use of ‘white noise’
- torture methods such as thumb screws etc.²³¹

²²⁹ United States Army Field Manual 2-22.3 *Human Intelligence Collector Operations* 2006 at [5.74] to [5.75]. Note that the Manual’s Appendix M *Restricted Interrogation Technique – Separation*, which is intended to prolong the shock of capture and prevent detainees communicating, continues to attract criticism in relation to: a detainee possibly being allowed only four hours of continuous sleep every 24 hours; physical separation for up to 30 days (the “initial duration”); the use of earmuffs and goggles or blindfolds on detainees for separation in the field for 12 hours (the “initial duration” at the “initial interrogation site”), not including the time blindfolds or goggles and earmuffs are used on detainees “for security purposes during transit and evacuation”.

²³⁰ The Senate Report, above n 4, identified that the sleep deprivation of some detainees lasted for 170 hours (7½ days).

²³¹ UK ISC *The Handling of Detainees by United Kingdom Intelligence Personnel in Afghanistan, Guantanamo Bay and Iraq* (Cm 6469, March 2005) at [29]. The broader scope of specific prohibitions in the UK material reflects ECHR caselaw, which is binding on the UK.

Absolute prohibition

12. The prohibition of torture is absolute, with no derogation allowed.²³² “No exceptional circumstances, whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture”.²³³ The Committee against Torture “is deeply concerned at and rejects absolutely” any efforts by States to justify torture and ill treatment as a means to protect public safety and avert emergencies.²³⁴
13. As former UN Secretary-General Kofi Annan said in 2005 “The threat of terror is real and immediate. Yet fear of terrorists can never justify adopting their methods.”²³⁵

“Recent times have witnessed an especially disturbing trend of countries claiming exceptions to the prohibition on torture based on their own national security perceptions. Let us be clear, torture can never be an instrument to fight terror, for torture is an instrument of terror.”²³⁶

14. Nowak and McArthur note that:²³⁷

“Article 2(2) [of UNCAT] confirms the prohibition of torture is one of the few absolute and non-derogable human rights. ... This provision therefore provides a clear answer to all attempts aimed at undermining the absolute prohibition of torture for the sake of national security in combatting global terrorism, such as the ‘ticking bomb scenario’ or special interrogation methods authorised by Israel and the US Government in their respective counter-terrorism strategies”.

What UNCAT requires of States

15. Among other things, UNCAT requires States to:
- Ensure that all acts of torture, attempts to commit torture and any act by any person which constitutes complicity or participation in torture, are offences under its criminal law.²³⁸
 - Take “effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”.²³⁹

²³² UNCAT, art 2(2).

²³³ Supported by *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (1984), which at [58] provide that “no state party shall, even in time of emergency threatening the life of the nation, derogate from the Covenant’s guarantees of ... freedom from torture, cruel, inhuman or degrading treatment or punishment”. The Siracusa Principles were developed at a colloquium composed of 31 distinguished experts in international law, held at Siracusa, Italy, in 1984. The purpose was to identify the limitation and derogation provisions in the International Covenant on Civil and Political Rights (ICCPR) and develop principles for their application. The colloquium was a response to the abuse of these provisions by some governments.

²³⁴ UN Committee against Torture, General Comment 2 *Implementation of article 2 by state parties*, CAT/G/GC/2, 24 January 2008 at [5].

²³⁵ Kofi Annan “Message for Human Rights Day”, (8 December 2005).

²³⁶ Kofi Annan “Message for Human Rights Day”, above n 235.

²³⁷ Manfred Nowak and Elizabeth McArthur *The United Nations Convention Against Torture: A Commentary* (Oxford University Press, Oxford, 2008) at 89.

²³⁸ UNCAT, art 4.

²³⁹ UNCAT, art 2.

- Take such measures as necessary to establish jurisdiction over the offences referred to in Article 4 in the following cases:
 - when the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
 - when the alleged offender is a national of that State;
 - when the victim is a national of that State, if that State considers it appropriate.²⁴⁰
- Ensure that its competent authorities “proceed to a prompt and impartial investigation, wherever there are reasonable grounds to believe that an act of torture has been committed in any territory under its jurisdiction.”²⁴¹
- Not use any statement “established to have been made as a result of torture” as evidence in any proceedings.²⁴²
- Prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.²⁴³

The prohibition of torture in New Zealand law

16. The legal obligations in relation to torture resulting from ratification of UNCAT and ICCPR are given domestic effect in New Zealand principally by the Crimes of Torture Act 1989 (Crimes of Torture Act) and the New Zealand Bill of Rights Act 1990 (NZBORA). Other New Zealand statutes also incorporate into New Zealand law and give effect to related international legal obligations:
- Crimes Act 1961 (Crimes Act) (offences relating to aiding and abetting criminal acts);²⁴⁴
 - Geneva Conventions Act 1958;
 - International Crimes and International Criminal Court Act 2000 (makes further provision for the punishment of the international crimes of genocide, crimes against humanity, and war crimes and enables New Zealand to cooperate with the International Criminal Court established by the Rome Statute in the performance of its functions);

²⁴⁰ UNCAT, art 5.

²⁴¹ UNCAT, art 12.

²⁴² UNCAT, art 15. The phrase ‘evidence in any proceedings’ refers only to the assessment of evidence before a judicial or administrative authority acting in accordance with certain rules of taking evidence laid down in the respective (*criminal, civil or administrative*) procedural code, ie the application of Article 15 presupposes the assessment of evidence in a formal procedure which leads to a decision of the respective court or administrative agency.

²⁴³ UNCAT, art 16.

²⁴⁴ Note the *Fifth Periodic Report of New Zealand CAT/C/NZL/5* 2007 lists offences in ss 66(1), 128, 167, 168, 171, 188, 193, 196, 204A and 204B of the Crimes Act 1961 as relevant to the domestic implementation of UNCAT.

- Abolition of Death Penalty Act 1989 (relating to the ICCPR and the Second Optional Protocol to the ICCPR ‘Aiming at the Abolition of the Death Penalty’);
- Extradition Act 1999 (relating to extradition of individuals for offences under the Crimes of Torture Act);
- Immigration Act 2009 (Part 5 regarding obligations under the UN Convention of the Status of Refugees and codifying certain obligations under UNCAT and ICCPR); and
- Mutual Assistance in Criminal Matters Act 1992.

Offences under the Crimes of Torture Act 1989

17. Section 2(1) of the Crimes of Torture Act defines an “act of torture” in essentially the same terms as Article 1(1) of UNCAT. Section 3 creates the criminal offence: a person is liable upon conviction to 14 years imprisonment who, being “a public official” or “acting in an official capacity,” or “acting at the instigation or with the consent or acquiescence of such a person,” whether in or outside New Zealand:²⁴⁵
 - a. commits an act of torture;
 - b. does or omits an act for the purpose of aiding any person to commit an act of torture;
 - c. abets any person in committing an act of torture; or
 - d. incites, counsels or procures any person to commit an act of torture.
18. Section 3 also criminalises other familiar forms of liability and secondary participation. It is an offence²⁴⁶ for a public official to attempt to commit an act of torture, or conspire with another person to commit an act of torture, or be an accessory after the fact to an act of torture.
19. The New Zealand Government has reported to the Committee against Torture²⁴⁷ that “New Zealand law makes no provision for waiver of the provisions of the Crimes of Torture Act 1989 or of the Crimes Act 1961, nor can exceptional circumstances such as a state or threat of war, internal and political instability, or other public emergency be invoked as defences for any offence referred to [in New Zealand legislation]”.²⁴⁸

²⁴⁵ Crimes of Torture Act, s 3(1).

²⁴⁶ Crimes of Torture Act, s 3(2).

²⁴⁷ The Committee against Torture was established under Part II of UNCAT in 1984 and commenced work in 1987. The Committee receives States’ reports (Article 19), has an inter-state complaint competence (Article 21) and may hear individual communications (Article 22). In both the latter cases, it is necessary that the state or states concerned should have made a declaration accepting the competence of the Committee: Malcolm N Shaw *International Law* (8th ed, Cambridge University Press, Cambridge, 2017) at 247.

²⁴⁸ UN Committee against Torture *Fifth Periodic Report of New Zealand CAT/C/NZL/5*, 15 August 2007 at [70].

Rights and freedoms under the New Zealand Bill of Rights Act 1990 (NZBORA)

20. NZBORA “affirm[s] New Zealand’s commitment to the International Covenant on Civil and Political Rights”. NZBORA applies to the actions of government and those acting in performance of a public function.²⁴⁹ It therefore covers the actions of both intelligence and security agencies.
21. The legal obligations under Article 7 of the ICCPR are found in s 9 of NZBORA, which provides that “everyone has the right not to be subjected to torture or to cruel, degrading or disproportionately severe treatment or punishment”.²⁵⁰
22. New Zealand has affirmed the non-derogable nature of the prohibition on torture: “The Government considers the prohibition of torture under article 2(2) of the Convention and s 9 of NZBORA to be absolute and thus not amenable to reasonable limitations.”²⁵¹

Complicity in torture

23. UNCAT specifically prohibits complicity in torture, as well as torture itself. However, UNCAT does not define what ‘complicity’ means. It implies the involvement of a party as a secondary participant, for example by providing assistance or support, rather than as a primary perpetrator of an act of torture. As a result of the lack of definition, Courts, lawyers and academics have looked to related and analogous practice in respect of other international instruments and cases to answer the question. However, as others have noted²⁵² great care needs to be taken when transferring concepts and interpretations from one instrument to another.
24. Complicity in torture can give rise to both State responsibility and individual criminal liability. The same facts might give rise to issues of complicity for a State and for its individual public officials, but the thresholds for establishing State responsibility for complicity in torture on the one hand, and individual criminal liability under international law, on the other, are different.
25. International law as it applies to both State responsibility and individual liability is complex and far from settled. What follows is a statement of the generally accepted elements required to establish complicity in respect of each. As the Introduction to the Report notes, the terms of reference for the Inquiry did not assume any involvement by New Zealand, or New Zealand officials, in conduct that amounted to a breach of human rights, including torture or complicity in torture. The legal tests set out below are those that I considered and which informed the Inquiry findings. I reiterate that I am satisfied that the agencies, their Directors at the time and their individual staff members, did not breach the law; nor were they complicit in such breaches.

²⁴⁹ NZBORA, s 3.

²⁵⁰ The right not to be deprived of life is provided in NZBORA, s 8.

²⁵¹ Committee against Torture *Fifth Periodic Report of New Zealand* CAT/C/NZL/5 (15 August 2007), Article 2 at [14]; Restated in *New Zealand’s Sixth Periodic Report of New Zealand* CAT/C/NZL/6, 20 December 2013, Article 3 at [95], simply as the “Protection against torture is absolute”.

²⁵² Sir Peter Gibson *The Report of the Detainee Inquiry* (December 2013) Annex B ‘The Detainee Inquiry seminar on international and domestic law on torture, other ill-treatment, and complicity’ at [18].

State responsibility for complicity in torture

26. State responsibility might arise in two ways: by the actions or omissions of organs of the State or if the illegal acts of individual officials can be attributed to the State.²⁵³ International law imposes a high threshold before attributing responsibility for complicity in torture, although the standard varies as between the jurisprudence of the International Court of Justice (ICJ) on the one hand, and the ad hoc tribunals (ICTY, ICTR) on the other. This stems (at least in part) from the fact that the ICJ's jurisdiction is over States which have non-criminal liability and the ICTY and ICTR's jurisdiction is over individuals who have criminal liability. So although all three bodies deal with genocide, there are differences in, for example, whether the presumption of innocence applies; whether forms of complicity beyond just aiding and abetting are recognised. Case law shows that while the ICTY and ICTR construe 'assistance' to include encouragement and moral support, the ICJ limits it to political, military and financial aid.²⁵⁴
27. The high bar for finding one State complicit in the seriously wrongful acts of another State is reflected in two decisions of the ICJ, the *Nicaragua* case²⁵⁵ and the *Bosnia* case.²⁵⁶ In *Nicaragua* the Court said:²⁵⁷
- “[the Court takes] the view that United States participation, even if preponderant and decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of its whole operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua.”
28. In *Bosnia* the ICJ applied essentially the same test for State responsibility for complicity as in the *Nicaragua* case:²⁵⁸

“The Court sees no reason to make any distinction of substance between ‘complicity in genocide’, within the meaning of Article III, paragraph (e) of the [Genocide] Convention, and the ‘aid or assistance’ of a State in the commission of a wrongful act by another State within the meaning of the aforementioned Article 16 [of the ILC Articles] In other words, to ascertain whether the Respondent is responsible for ‘complicity in genocide’ within the meaning of Article III, paragraph (e), [the Court] must examine whether organs of the respondent State or persons acting on its instructions or under its direction or effective control, furnished ‘aid or assistance’ in the commission of the genocide in Srebrenica, in a sense not significantly different from that of those concepts in the general law of international responsibility.”

²⁵³ ILC Articles, Article 8.

²⁵⁴ Amabelle C. Asuncion “Pulling the Stops on Genocide: The State or the Individual” *The European Journal of International Law* (2009) 20(4) at 1212 - 1217.

²⁵⁵ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America (US))* [1986] ICJ Rep 4 (*Nicaragua case*).

²⁵⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v Serbia on the Prevention and Punishment of the Crime of Genocide)* [2007] ICJ Rep 17 (*Bosnia case*).

²⁵⁷ *Nicaragua case*, above n 255, at [115].

²⁵⁸ *Bosnia case*, above n 256, at [420].

29. For the moment, the threshold for State liability through complicity is an exacting one. Under accepted international law principles it can conservatively be stated as requiring:²⁵⁹
- actual, as opposed to constructive, knowledge of the circumstances of the intentionally wrongful act; and
 - the aid or assistance must be given with a view to facilitating, and must in fact facilitate, the commission of the act of torture.

Individual criminal liability for complicity in torture

30. The ICC has jurisdiction over individuals who commit a crime within the jurisdiction of the Court (including torture, as a ‘crime against humanity’)²⁶⁰ but the primary responsibility for dealing with crimes within the jurisdiction of the ICC rests with individual States parties,²⁶¹ under their domestic law. Only where the relevant State is unwilling or unable to properly investigate an allegation does the matter become admissible for the ICC. This means that both international cases and commentary on the meaning of complicity and domestic New Zealand law on secondary liability are relevant.

Under international law

31. The ICC’s Rome Statute provides for aiding and abetting as a basis for individual criminal responsibility.²⁶² Article 25(3)(c) provides:
- “In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;”
32. Two aspects of Article 25(3)(c) are of particular relevance. First, the mental elements necessary to find someone guilty of aiding and abetting a crime; second, the material elements of ‘aiding’ and ‘abetting’.
33. As to the mental elements, Article 25(3)(c) requires purpose - “the purpose of facilitating the commission of such a crime, [that person] aids, abets, or otherwise assists ...” (emphasis added). In addition, Article 30 of the Rome Statute imposes an intent and knowledge requirement – “... a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and

²⁵⁹ I have adopted the statement of the current position on State responsibility for complicity in torture articulated by international law expert Dr Melissa Perry QC (now a Judge of the Federal Court of Australia) and accepted by the Australian Inspector-General of Intelligence and Security, Australia Inquiry into the actions of Australian government agencies in relation to the arrest and detention overseas of Mr Mamdouh Habib from 2001 to 2005 (December 2011) at 109 - 110. Dr Perry’s advice and the Australian Inspector-General’s conclusion was in relation to Australia’s legal obligations. For the purposes of this Inquiry, and in the absence of an official government position, I adopt this conservative standard.

²⁶⁰ Rome Statute, arts 7(1)(f) and 25(1).

²⁶¹ Rome Statute, art 17(1)(a).

²⁶² Rome Statute, art 25(3)(c).

knowledge” (emphasis added). That is, the accessory must have lent his or her assistance with the aim of facilitating the offence.

34. The commentary from Olasolo and Rojo²⁶³ emphasises this point:

“In addition to the generally applicable intent and knowledge provided for in Article 30 of the ICC Statute, Article 25(3)(c) of the ICC statute expressly requires the ‘purpose of facilitating the commission of such a crime’ by the perpetrator. Accordingly, an aider and abettor under the ICC Statute **must have a purposeful will to bring about the crime, or at least the will to assist in the commission of the crime.** As a result, mere awareness that assistance in a crime will be the necessary outcome of one’s conduct ... **does not suffice** for responsibility to arise as an aider and abettor under Article 25(3)(c) of the ICC Statute. Any lower mental element, such as conditional intent ... or negligence, is not sufficient either.” (emphasis added)

35. Olasolo and Rojo go on to note: ²⁶⁴

“The intent required by Article 25(3)(c) of the ICC Statute marks an important difference with the case law of the ad hoc and hybrid tribunals on aiding and abetting.”

36. In addition to the difference between the ICC and the ad hoc tribunals as to the mental elements necessary to establish accessorial liability, there is no consistency on what material elements – what kind of support or assistance – will be necessary to amount to ‘aiding’ and ‘abetting’. Within the ICTY Appeals Chamber²⁶⁵ there have been sharply divided views on the exact nature of the material elements necessary to constitute aiding and abetting, which have not been resolved.²⁶⁶ In *Perisic*, the Appeals Chamber concluded that the provision of aid “specifically directed” to the commission of the crime by the perpetrator was required to prove accessorial liability. The effect of *Perisic* is to require evidence establishing a direct link between the aid provided by an accused and the crime committed by the perpetrator.
37. In *Sainovic* a differently constituted Appeals Chamber reached the opposite view, stating that it: “[u]nequivocally rejects the approach adopted in the *Perisic* Appeal Judgment as it is in direct and material conflict with the prevailing jurisprudence on the *actus reus* of aiding and abetting liability and with customary international law in this regard.” This divergence of view at the highest level of the Court has not yet been resolved.

²⁶³ Hector Olasolo and Enrique Carnero Rojo, “Forms of Accessorial Liability under Article 25(3)(b) and (c)” in Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press, USA, 2015) at 584.

²⁶⁴ Hector Olasolo and Enrique Carnero Rojo, “Forms of Accessorial Liability under Article 25(3)(b) and (c)”, above n 263, at 586.

²⁶⁵ The Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute) provides that the Tribunal has power to prosecute persons responsible for torture, when committed in armed conflict, whether international or internal in character, and directed against any civilian population (Article 5(f)); and for the individual criminal responsibility of a person who “planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution” of the torture (article 7(1)).

²⁶⁶ *Prosecutor v Momcilo Perisic (Judgment)* ICTY Appeals Chamber IT-04-81-A, 28 February 2013 at [36] and [41]; *Prosecutor v Nikola Sainovic et al (Judgment)* ICTY Appeals Chamber IT-05-87-A, 23 January 2014 at [1650].

Under New Zealand law

38. In New Zealand the Article 4 UNCAT obligation to ensure that acts of complicity or participation in torture is a criminal offence is given effect principally by s 3 of the Crimes of Torture Act. The Crimes Act is also generally relevant.²⁶⁷
39. Section 3(1) of the Crimes of Torture Act 1989 (see earlier in this section) creates criminal liability for those who carry out the acts which constitute the offence of torture (ie the principal), and also criminalises the conduct of any party who intentionally aids, abets or encourages the principal in that offence. Section 3(1) of the Crimes of Torture Act directly imports from s 66(1) of the Crimes Act all the forms of intentional “party” participation present in New Zealand’s general criminal law. The manner and extent of criminalisation is thus consistent with New Zealand’s general approach to party liability: s 3(1) has the effect in law that a person convicted of “party” participation is just as guilty of the substantive offence committed as the “principal” who in fact carried out the criminal act; any differences in culpability are relevant only to sentencing.
40. Unlike the position at international law, the elements necessary for party liability to arise under s 66(1), and thus equally under s 3(1) of the Crimes of Torture Act which mirrors it, are reasonably settled. Case law, including the leading and recent New Zealand case of *Ahsin v R*, identifies the nuances and elements of party liability under s 66(1)(b)-(d) as being:²⁶⁸

Proof of an action that aids, abets or encourages another to commit the offence. The action must be deliberately taken, with the intention that the conduct will aid the principal offender in his or her particular criminal actions.

The “essential aspects” of the principal’s criminal actions must be known to the assisting person.

The “essential aspects” include both physical and mental aspects of the principal’s conduct – that is, the assisting person must know both the actions to be taken by the principal and the intention with which they are to be done.

There must be conduct from the assisting party that in fact assists or encourages the principal in the commission of the offence.

Under s 66(1) there is no need for the assisting party to be present at the time of the offence, and the assistance or encouragement need not remain operative at the time the offence is committed by the principal.²⁶⁹ However, where the allegation of a defendant’s involvement as a party is founded upon aiding and abetting, the act relied upon must occur prior to or contemporaneous with the commission of the offence.²⁷⁰

²⁶⁷ Crimes of Torture Act 1989, s 14.

²⁶⁸ *Ahsin v R* [2015] 1 NZLR 493 at [82] to [83].

²⁶⁹ *Ahsin*, above n 268, at [208] and [116].

²⁷⁰ *R v Samuels* [1995] 1 NZLR 350 (CA) at 356.

New Zealand law has addressed the position of parties who are present or very proximate to the offence but not physically involved. Criminal liability under s 66(1) will not arise from “mere presence” at the scene of the crime, or being a “mere bystander” to the offence. However, in certain circumstances the element of “encouragement” may be established where the “mere bystander” has a duty to act or where the circumstances establish that the omission to act was for the purpose of encouraging and did encourage the principal to commit the offence. Exceptionally, given the specificity of intention required under s 66(1), an intention to encourage may not always be necessary for liability if there is a duty on the bystander to act.²⁷¹

It is not necessary for the prosecution to prove that there was a causal connection between the aiding or abetting or inciting and the commission of the offence.²⁷²

41. I observe, without discussion, that there may be additional routes in domestic law to party or secondary liability, beyond s 3(1), given that the Crimes of Torture Act expressly preserves the general effect of the Crimes Act 1961.²⁷³

Areas of uncertainty and possible development in the international law of complicity

42. The current status of international law must, as discussed above, be gleaned from the relevant international instruments, as interpreted by the relevant international courts and tribunals and having regard to, for example, legal principles codified in the International Law Commission’s draft Articles, as well as New Zealand domestic law.
43. What is plain from the brief summary above is that the international law on complicity is not settled, especially on issues concerning the specificity of intent required by the secondary party; the standard of knowledge that torture is likely to occur; and the nature of assistance that will suffice. There is also an important debate on whether, and in what factual circumstances, “complicity” might be established on the basis of regular or systematic receipt of unsolicited information obtained from torture. Different tribunals have taken different views on some of these issues and international law experts and expert (non-UN and non-judicial) bodies at times disagree. It is important not to lose sight of those debates, some of which squarely pose the question how the law relating to complicity might or should apply in the context of intelligence sharing and cooperation arrangements.
44. Among those contributions are:

²⁷¹ *Charnley v R* (2013) 26 CRNZ 264 at [45] (CA) and *R v Brough* CA507/96, 27 February 1997 (CA).

²⁷² *Ahsin*, above n 268, at [46] and *R v Calhaem* [1985] QB 808.

²⁷³ Crimes of Torture Act, s 14(2). In particular, s 66(2) Crimes Act 1961 (common purpose party liability) is theoretically available. On the right facts it could give rise to party liability under New Zealand law if a New Zealand official was party to a “common intention to prosecute any unlawful purpose”, and one of the group, in pursuit of that purpose, committed an act of torture.

- report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism;²⁷⁴
 - the UK Joint Committee on Human Rights Report on *Allegations of UK Complicity in Torture*;²⁷⁵
 - Sir Peter Gibson, *The Report of the Detainee Inquiry*;²⁷⁶ and
 - report of the Australian Inspector-General of Intelligence and Security into the detention of Mr Habib.²⁷⁷
45. While these reports have no formal status at international law, they must be accorded considerable weight as statements of the critical issues that arise in relation to the law of complicity and as representing the directions in which the law may evolve.

UN Special Rapporteur

46. The Special Rapporteur's February 2009 report noted the US government's "comprehensive system of extraordinary renditions, prolonged and secret detention, and practices that violate the prohibition against torture and other forms of ill-treatment".²⁷⁸ He reminded States that they "are responsible where they knowingly engage in, render aid to or assist in the commission of internationally wrongful acts, including violations of human rights".²⁷⁹ Furthermore, he said "States must not aid or assist in the commission of acts of torture, recognize such practices as lawful, including by relying on intelligence information obtained through torture. States must introduce safeguards preventing intelligence agencies from making use of such intelligence."²⁸⁰
47. He went on to say: "[a]t a minimum, States which know or ought to know that they are receiving intelligence from torture or other inhuman treatment, or arbitrary detention, and are either creating a demand for such information or elevating its operational use to a policy, are complicit in the human rights violations in question".²⁸¹

²⁷⁴ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin *Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism*, above n 85.

²⁷⁵ UK Joint Committee on Human Rights (JCHR) *Allegations of UK Complicity in Torture* (Twenty-third Report of Sessions 2008-09 HL Paper 152 HC 230, August 2009).

²⁷⁶ Sir Peter Gibson *The Report of the Detainee Inquiry*, above n 144.

²⁷⁷ *Inspector-General of Intelligence and Security, Australia Inquiry into the actions of Australian government agencies in relation to the arrest and detention overseas of Mr Mamdouh Habib from 2001 to 2005 (December 2011)*, above n 259.

²⁷⁸ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin *Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism*, above n 274, at [51].

²⁷⁹ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin *Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism*, above n 274, at [53].

²⁸⁰ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin *Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism*, above n 274, at [53].

²⁸¹ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin *Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism*, above n 274, at [55].

48. The UK Court of Appeal in the *Ahmed* case²⁸² noted that the Special Rapporteur's recommendations ought to be accorded great respect "given the source of his mandate and his international perspective" but described them as "significantly aspirational rather than declaratory of existing law".

UK Joint Committee on Human Rights

49. The Joint Committee reported in August 2009 on the UK Government's obligation to refrain from acts of torture and protect against acts of torture by others, both within and outside the jurisdiction, following media reports that members of the security services had been complicit in the torture or mistreatment of UK nationals in detention facilities in Pakistan. The Committee was assisted by expert evidence from international law expert Professor Philippe Sands QC.
50. The Joint Committee made 21 conclusions and recommendations. On State responsibility for complicity in torture, it said 'complicity' "means simply one State giving assistance to another State in the commission of torture, or acquiescing in such torture, in the knowledge, including constructive knowledge, of the circumstances of the torture which is or has been taking place".²⁸³
51. It went on to say "We agree ... that 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, systematically receiving and/or relying on the information but not physically participating in the torture, that might well cross the line into complicity".²⁸⁴
52. "Systematic, regular receipt of information obtained under torture is in our view capable of amounting to 'aid or assistance' in maintaining the situation created by other States' serious breaches of the peremptory norm prohibiting torture. We therefore consider that, if the UK is demonstrated to have a general practice of passively receiving intelligence information which has or may have been obtained under torture, that practice is likely to be in breach of the UK's international law obligation not to render aid or assistance to other States which are in serious breach of their obligation not to torture."²⁸⁵
53. "It follows from the above that, in our view, the following situations would all amount to complicity in torture, for which the State would be responsible, if the relevant facts were proved:
- A request to a foreign intelligence service, known for its systemic use of torture, to detain and question a terrorism suspect.
 - The provision of information to such a foreign intelligence service enabling them to apprehend a terrorism suspect.

²⁸² *Ahmed and another v R* [2011] EWCA Crim 184; [2011] Crim LR 734; [2011] All ER (D) 277 at [44] (*Ahmed*).

²⁸³ UK JCHR *Allegations of UK Complicity in Torture*, above n 275, at [35].

²⁸⁴ UK JCHR *Allegations of UK Complicity in Torture*, above n 275, at [41].

²⁸⁵ UK JCHR *Allegations of UK Complicity in Torture*, above n 275, at [42].

- The provision of questions to such a foreign intelligence service to be put to a detainee who has been, is being, or is likely to be tortured.
 - The sending of interrogators to question a detainee who is known to have been tortured by those detaining and interrogating them.
 - The presence of intelligence personnel at an interview with a detainee being held in a place where he is, or might be, being tortured.
 - The systematic receipt of information known or thought likely to have been obtained from detainees subjected to torture.”²⁸⁶
54. In its response to the Report, the UK Government acknowledged²⁸⁷ that States have an obligation not to ‘aid or assist’ the commission of an internationally wrongful act by another, relying on Article 16 of the ILC Articles. The Government unreservedly condemned the use of torture but went on to say: “[i]t would not be appropriate for the Government to comment on whether hypothetical examples would amount to complicity in torture or the provision of aid or assistance to the commission of torture. ... such hypothetical examples are generally not amenable to a straight yes or no answer in the abstract. [They] need to be considered in light of all the facts and circumstances.”

Detainee Inquiry

55. In 2010 the then UK Prime Minister, David Cameron, commissioned the Detainee Inquiry, chaired by Sir Peter Gibson, to investigate allegations that members of the British intelligence agencies were involved in ‘improper’ treatment of detainees by other countries. The work of the Detainee Inquiry was concluded prematurely, with responsibility for the inquiry subsequently given to the UK ISC.²⁸⁸ However the Detainee Inquiry did release a report in December 2013 which summarised the Inquiry’s preparatory work and highlighted the particular themes and issues which the Inquiry believed might be the subject of further examination.
56. As part of its preliminary work for the Detainee Inquiry, the UK ISC convened a seminar of distinguished legal experts to discuss international and UK domestic law on torture, other ill treatment, and complicity. The transcript of that seminar was published.²⁸⁹ The speakers included four acknowledged experts in the area of public international law: Professor James Crawford SC, Professor Philippe Sands QC, Professor Sir Nigel Rodley and Professor Malcolm Shaw QC. A summary of the legal discussions was included as Annex B to the Detainee Inquiry Report.
57. The international law experts expressed their views on what is required at international law to meet the threshold required to demonstrate complicity in torture. While there were areas of

²⁸⁶ UK JCHR *Allegations of UK Complicity in Torture*, above n 275, at [43].

²⁸⁷ The Government Reply to the Twenty Third Report from the Joint Committee on Human Rights (Session 2008-09 HL Paper 152, HC 230, October 2009) at 3.

²⁸⁸ UK ISC *Detainee Mistreatment and Rendition: 2001 - 2010* and UK ISC *Detainee Mistreatment and Rendition: Current Issues*, above n 14.

²⁸⁹ UK ISC “Legal seminar for Detainee Inquiry 8 June 2011 including speaker transcripts”.

overlap in their views, there was not unanimity of opinion. Nevertheless the discussion remains relevant to consideration of how the law might develop and to identifying the questions and risks that should inform best practice in New Zealand.

58. In relation to State responsibility, Professor Crawford suggested that there could be circumstances in which a pattern of repetitive unlawful behaviour by State B could give rise to a finding of complicity against State A where State A continued to engage with State B in the knowledge of State B's ongoing conduct (for example, by requesting information that could have been obtained by torture). His comments were given with careful qualification and dealt with hypothetical situations of general application. In addition, Professor Rodley warned that international law imposes a high threshold before attributing responsibility to a State for the acts of its officials.
59. In relation to individual responsibility for complicity, Professor Sands and Professor Shaw were agreed that three core elements could be identified:
- knowledge²⁹⁰ (but not necessarily intent) that torture is taking place;
 - a contribution, either tangible or moral, by way of assistance;
 - that has a substantial (but not necessarily causal) effect on the perpetration of the torture.
60. But there was not agreement on whether Person X could be liable for an act of torture performed by Person Y where the former gave tacit consent to the latter, for example by receiving information that was obtained as a result of the act, and did not take steps to prevent it from occurring or continuing. Professor Sands thought Person X could be liable for such tacit support; Professor Shaw disagreed – in his view, individual complicity required a positive act.

Habib Inquiry

61. In her report on the actions of relevant Australian agencies in relation to the arrest and detention overseas of Mr Habib, the then Australian Inspector-General of Intelligence and Security accepted and relied on the advice of Dr Melissa Perry QC (now Justice Perry of the Federal Court of Australia), whose legal advice to the Inquiry was that “the position outlined by the UK Joint Parliamentary Committee with respect to the circumstances in which a State will be responsible for complicity in torture departs from the current state of international law in material respects”.²⁹¹

²⁹⁰ UK ISC “Legal seminar for Detainee Inquiry”, above n 289, at 45 defines his use of the word “knowledge” by taking the “international approach, ‘knew or should have known’”. The point is that individual liability is broader and can include constructive knowledge.

²⁹¹ *Inspector-General of Intelligence and Security, Australia Inquiry into the actions of Australian government agencies in relation to the arrest and detention overseas of Mr Mamdouh Habib from 2001 to 2005 (December 2011)*, above n 259, at 109.

Questions about the application of the law relating to complicity in torture in the context of the work of the intelligence and security agencies

62. In addition to the inquiries and statements referred to above, the issue of complicity in torture by intelligence services has been the subject of scrutiny in Canada²⁹² and in many cases brought by victims of the CIA programme to the European Court of Human Rights.²⁹³ In two UK cases, the courts made obiter comments concerning the application of the prohibition against torture in the UK context.²⁹⁴
63. *A and others v Secretary of State for the Home Department (No. 2)* did not make a determination on a factual issue of complicity.²⁹⁵ It concerned the reach of article 15 of UNCAT,²⁹⁶ specifically whether an English court could “receive evidence which has or may have been procured by torture, inflicted in order to obtain evidence, by officials of a foreign State, without the complicity of British authorities.”²⁹⁷ The House of Lords unanimously agreed such information could not be admitted as evidence in judicial or administrative proceedings.
64. In addition to discussing whether the common law (there being no statutory law applicable) could extend the exclusionary principle, as set out in article 15 of UNCAT, to evidence which has or may have been procured by torture inflicted by foreign officials, the Lords considered the application of international obligations relating to torture to UK domestic law and, in particular, what use the UK could make of information known or suspected to be ‘tainted’. In this regard they variously made the following points:
- A primary State responsibility is to safeguard the security of the State.²⁹⁸
 - Fragments of information are important in countering international terrorism – if information that is known or suspected to be tainted might save lives, provide information about a “ticking time bomb,” or, in certain circumstances, point a finger of suspicion at a particular individual it would be “ludicrous” for the executive branch (police, intelligence agencies) to disregard it.²⁹⁹

²⁹² Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar *Report of the Events Relating to Maher Arar: Analysis and Recommendations*, above n 89.

²⁹³ For example, *Al Nashiri v Romania* (Application no 33234/12) ECHR, 31 May 2018; *Abu Zubaydah v Lithuania* (Application no 46454/11) ECHR, 31 May 2018, above n 43.

²⁹⁴ *A and others v Secretary of State for the Home Department (No 2)* [2005] UKHL 71; [2006] 2 AC 221; [2006] 1 All ER 575 (*A (No 2)*). *Ahmed*, above n 282. In *A (No 2)* the House of Lords considered whether evidence obtained by torture could be used in judicial proceedings of an administrative nature. In the course of deciding that such evidence could not be used, it expressed the view that the Executive, acting under the legislation applicable in the case, could, however, use such evidence in making operational decisions. In *Ahmed* (at [44]) the Court of Appeal expressed its view that the breadth of conduct captured by the UN Special Rapporteur’s and the UK Joint Committee’s definitions of complicity in torture was “significantly aspirational rather than declaratory of existing law”.

²⁹⁵ *A (No 2)*, above n 84. In this case the evidence had been received and the issue to be decided was whether it could be used in proceedings. It was not concerned with a factual question of whether the information had been obtained through complicity in torture.

²⁹⁶ UNCAT, art 15 states that: “Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”

²⁹⁷ *A (No 2)*, above n 84, at [1].

²⁹⁸ *A (No 2)*, above n 84, at [132] and [161].

²⁹⁹ *A (No 2)*, above n 84, at [67] to [68].

- The State could be said to be condoning torture when using this information but it cannot be expected to close its eyes to this information at the price of endangering the lives of its own citizens. “Moral repugnance to torture does not require this.”³⁰⁰
 - The Secretary of State, under Part 4 of the Anti-terrorism, Crime and Security Act 2001, does not act unlawfully in providing a certificate that he reasonably believes a person to be a risk to national security, if he relies on information which has or may have been obtained by torture in a foreign country without British complicity.³⁰¹
 - Lord Bingham explained,³⁰² using a “ticking bomb” scenario, that even if the torture had been “officially-authorized British torture”, it would not be unlawful for authorities to remove the source of the threat to national security (in the exercise of their lawful powers) but he went on to acknowledge that “there would be a flagrant breach of art 3 [of UNCAT]³⁰³ for which the United Kingdom would be answerable, but no breach of art 5(4) or 6 [of UNCAT].”³⁰⁴
 - Tainted information can be used by the executive when making operational decisions or by the police when exercising their investigatory powers including powers of arrest. Their Lordships explain that these steps are essentially operational or of a short-term interim character in contrast to judicial decisions on criminal charges.³⁰⁵
65. In *Ahmed*³⁰⁶ the UK Court of Appeal (on an application to stay criminal proceedings for abuse of process) decided the case on the straightforward point that there was no connection between the alleged act of torture and the circumstances giving rise to the prosecution in England, i.e. the alleged wrongdoing and the trial. The necessary connection would only be established if the act of torture had an impact on the trial. Accordingly, the appeal was dismissed.
66. In respect of one of the two appellants (Rangzieb Ahmed), the Court of Appeal was considering an antecedent crime committed by him in England before he was allegedly tortured in Pakistan. The alleged torture occurred after the appellant left England and was detained by Pakistani authorities. While in Pakistani detention, he was questioned by UK officials. When he returned to England, he was tried and convicted of terrorist offences (relating to acts committed in England) along with the other defendant. The appellant, at trial, had applied for a stay of the criminal proceedings on the basis that in regularly receiving intelligence information from Pakistan (including information about the appellant), the UK was complicit in Pakistan’s known or believed use of torture and therefore continuing the prosecution was an affront to the

³⁰⁰ *A (No 2)*, above n 84, at [69].

³⁰¹ *A (No 2)*, above n 84, at [46], [47], [68], [131] to [133], [161] and [171].

³⁰² *A (No 2)*, above n 84, at [47].

³⁰³ The European Convention on Human Rights, art 3, – right not to be subjected to torture or to CIDTP.

³⁰⁴ The European Convention on Human Rights, art 5(4) – right to take proceedings to determine lawfulness of deprivation of liberty by arrest or detention; art 6 – right to a fair trial.

³⁰⁵ *A (No 2)*, above n 84, at [70].

³⁰⁶ *Ahmed*, above n 282.

fundamental principle of international law which outlaws torture.³⁰⁷ This proposition was also before the Court of Appeal.

67. Because it was an essential part of the appellant’s argument, the Court of Appeal did discuss whether the “extended” concept of complicity in torture, in so far as it relates to receipt of information, was established law.
68. The Court of Appeal regarded the statements by the UN Special Rapporteur and the Joint Committee as “significantly aspirational rather than declaratory of existing law”³⁰⁸ and would not adopt them to the extent they extended:

“... guilt of torture by secondary participation or complicity to passive receipt of information even where it was not the product of torture, if there was a real risk that the detainee *might* be tortured, and it would also extend it to information derived from someone arbitrarily detained, without recourse to judicial review, even where there was no question of torture.”³⁰⁹

69. The Court also said, in relation to the Special Rapporteur’s statement that “States must introduce safeguards preventing intelligence agencies from making use of [intelligence information obtained through torture]”, that “it is unlikely that he can have meant [this] to be a statement of existing law and it is clear that it does not.”³¹⁰

New Zealand

70. New Zealand has not had any comparable examination of the question of what complicity in torture might look like in practice. However, the Supreme Court in *Zaoui*³¹¹ did uphold the obligation on the New Zealand Government not to expose an individual to risk of breaches of ss 8 and 9 of NZBORA. Obvious questions arise in the context of intelligence-sharing and cooperation arrangements with the intelligence services of other countries – for New Zealand, those are primarily, but not solely, New Zealand’s Five Eyes partners.
71. New Zealand intelligence agencies operate within a legal framework which includes the express obligation under ISA to act “in accordance with New Zealand law and all human rights obligations recognised by New Zealand law”. This includes NZBORA, and the law as it applies to the definition of torture in the Crimes of Torture Act and UNCAT. Given the complexity of this legislative framework, and the continuing interpretative development of international rules regarding complicity, I welcome the production by central Government agencies of a consolidated statement of the law relating to torture and complicity in torture as it applies to New Zealand government officials. This should provide a valuable guide against which the intelligence agencies can assess their processes for avoiding any risk of complicity in torture.

³⁰⁷ *Ahmed*, above n 282, at [4].

³⁰⁸ *Ahmed*, above n 282, at [44].

³⁰⁹ *Ahmed*, above n 282, at [46].

³¹⁰ *Ahmed*, above n 282, at [45].

³¹¹ *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289 (SC).

Precautionary approach

72. While international law experts and courts have not universally agreed with the answers the Joint Committee gave to the questions before it, as discussed above, or with the statements of the UN Special Rapporteur, those questions (and related questions) remain relevant for New Zealand and others.
73. For New Zealand, the question is not simply what are the current, narrowly agreed parameters of what is required to establish complicity in torture – whether State responsibility or individual criminal liability – but to what standard *should* we hold our government agencies, specifically our intelligence and security agencies? This report suggests a precautionary approach.
74. What would a precautionary approach require? I address that question in various parts of this Report and most comprehensively in the Best Practice section at F2. Key sources and influences for that section include:
- the Canadian Ministerial Direction to CSIS
 - the UK Consolidated Guidance
 - the New Zealand Ministerial Policy Statement on Cooperation with Overseas authorities.

Other relevant statutory obligations

State Sector Act 1988

75. In contrast to specific legal obligations concerning particular operational activities, such as information sharing, the intelligence agencies and their chief executives are subject to more general expectations and responsibilities that arise from the agencies' status as part of the State. The State Sector Act 1988 (State Sector Act) defines the Public service,³¹² sets out the role, functions, duties and powers of the State Services Commissioner;³¹³ and sets out the functions, responsibilities, duties and powers of chief executives of departments and departmental agencies.
76. The principal responsibilities of chief executives to the appropriate Minister are set out in some detail.³¹⁴ They include:

The chief executive of a department or departmental agency is responsible to the appropriate Minister for –

- (a) the department's or departmental agency's carrying out the purpose of this Act;
and

³¹² State Sector Act, s 27 and Schedules 1 and 1A.

³¹³ State Sector Act, Part 1.

³¹⁴ State Sector Act, s 32.

- (b) the department's or departmental agency's responsiveness on matters relating to the collective interests of government; and
- (c) the stewardship of the department or departmental agency, including of its medium and long-term sustainability, organisational health, capability, and capacity to offer free and frank advice to successive governments; and
- (d) the stewardship of –
 - (i) assets and liabilities on behalf of the Crown that are used by or relate to (as applicable) the department or departmental agency; and
 - (ii) The legislation administered by the department or departmental agency;

77. The Code of Conduct for the State Services applies to public sector agencies, their chief executives and their employees.³¹⁵ The current Code has applied since November 2007 and was preceded by the Public Service Code of Conduct which was first issued in 1990. The Code provides minimum standards for the conduct and behaviour of chief executives and all employees.
78. Aspects of the Code of particular relevance include the requirements to be:

Impartial: Respect the authority of the government of the day. Chief executives are responsible to their Ministers pursuant to s 32 of the State Sector Act. Specifically, they are responsible for “the department's ... responsiveness on matters relating to the collective interests of government”. It is also expected that chief executives ensure that their organisations observe the principle of “no surprises” with their Minister, advising them of any issues that may impact on Government strategic interests or attract public interest or political comment, as outlined in the Cabinet Manual at paragraph 3.22.

79. In the State Services Commissioner's (Commissioner) response on the draft of this Report he noted:

“These aspects of the Code are ... particularly relevant to issues where a greater degree of inter-departmental understanding is desirable to ensure efficient operations and accurate management of potential legal risk. Where agencies achieve a joined-up approach on matters involving common interests, more accurate and efficient identification of potential legal risk for Government is enabled.”

Responsible: Act lawfully and objectively. Chief executives and their departments are required to comply with the law.

³¹⁵ State Sector Act, s 57.

80. As the Commissioner noted, “this aspect of the Code includes any legal obligations arising from both domestic and international law commitments”.

Responsible: Work to improve the performance and efficiency of our organisation.

81. The Commissioner noted:

“Departments of the public service are required to meet the Government’s expectations of delivering quality services and are responsible for improving the effectiveness of the organisation. Collaborative work between departments on matters with shared interests enhances the performance of each organisation and improves effectiveness, not only of the agencies, but also from a whole of government perspective.”

Application of the State Sector Act and Code of Conduct to the GCSB and NZSIS

82. The State Sector Act and the Code of Conduct clearly apply to both the GCSB and the NZSIS now, but that was not the case for the whole of the period the subject of this Inquiry. The GCSB has been a Public Service department since 2003. Prior to being put on a statutory footing for the first time, the GCSB was an “instrument of the Executive Government of New Zealand”.³¹⁶ The NZSIS became a Public Service department in 2017.

83. While neither agency was explicitly subject to the State Sector Act or bound by the Code for the whole period covered by my Inquiry,³¹⁷ the Directors of both agencies had analogous obligations. In addition to their specific statutory operational responsibilities, chief executives now and then, have and had broader responsibilities. These include authorisation of agency activities;³¹⁸ responsibility to the Minister;³¹⁹ a whole of government approach;³²⁰ and managing legal risk.³²¹

84. As to legal risk:

“The nature of the authority relied on by the department should be commensurate with the risk profile of their proposed activities. I consider that identifying and managing the risk profile of proposed activities of a department is the responsibility of all chief executives.”³²²

85. The State Services Commissioner also said:

³¹⁶ GCSB Act (as enacted), s 6(1).

³¹⁷ See [89] below.

³¹⁸ GCSB Act (as enacted), ss 16(2)(c), 17, 19 and 20; NZSIS Act, ss 4(1)(a) and 4A(4).

³¹⁹ GCSB Act (as enacted), s 8(3); NZSIS Act, ss 4(1)(b) and 5(3).

³²⁰ GCSB Act (as enacted), ss 7(1)(c) and 8(1)(e). NZSIS Act, ss 4(1)(c) and 4(1)(d).

³²¹ With regard to the compliance of agency policy and practice with legal obligations such as: under NZSIS Act s 2(2), not surveilling lawful advocacy, protest or dissent; under NZBORA s 27(1), observing relevant principles of natural justice in decision-making processes; and, under GCSB Act s 8(1)(a)(iii), collecting information in any other “lawful manner”.

³²² Response from the State Services Commissioner to draft report, dated 28 February 2019.

“Managing legal risk, across all areas of compliance, is expected of a public service chief executive. Identifying risk thresholds, and determining the response are matters for each chief executive to undertake.”

New Zealand Security Intelligence Service Act 1969 (NZSIS Act)

86. The NZSIS Act applied to the actions of the Service and of the Director of Security over the period of this Inquiry.³²³ The relevant provisions of the NZSIS Act were unchanged during that time.
87. Under the NZSIS Act, one of the Service’s functions was to “obtain, correlate, and evaluate intelligence relevant to security, and to communicate any such intelligence to such persons, and in such manner, as the Director considers to be in the interests of security”.³²⁴ This was raised with the Inquiry in interviews with the former Directors (see Part D2). It was also a specific function to “advise Ministers of the Crown, where the Director is satisfied that it is necessary or desirable to do so, in respect of matters relevant to security, so far as those matters relate to [Departments or branches of the State Services of which they are in charge].”
88. The NZSIS Act was amended in 2011 to include principles underpinning the Service’s performance of its functions.³²⁵ The principles include acting “in accordance with New Zealand law and all human rights standards recognised by New Zealand law, except to the extent that they are, in relation to national security, modified by an enactment”.³²⁶
89. This amendment to the NZSIS Act is outside the time period of my Inquiry, but the discussion in the House at the time³²⁷ clarified that the new section was declaratory of existing law and did not create new duties or powers. The then Attorney-General, the Hon Christopher Finlayson, stated in the Committee of the Whole House that the new provision “does not impose new duties or give new powers to the Security Intelligence Service, but it provides explicit recognition of those matters that should guide the working of the Security Intelligence Service”. The Bills Digest records that the principles inserted were intended to be “purely declaratory in nature”.³²⁸

Government Communications Security Bureau Act 2003 (GCSB Act)

90. Legislation governing the objectives and functions of the GCSB was enacted in 2003, during the period covered by my Inquiry. The GCSB Act recorded:³²⁹ “[t]here continues to be an instrument of the Executive Government of New Zealand known as the Government Communications Security Bureau.” On and from commencement of the GCSB Act, the Bureau became a department of State.³³⁰

³²³ The NZSIS Act was repealed in September 2017.

³²⁴ ‘Security’ as defined in NZSIS Act, s 2.

³²⁵ NZSIS Act, s 4AAA.

³²⁶ NZSIS Act, s 4AAA(1)(c)(i).

³²⁷ (22 June 2011) 673 NZPD 19624.

³²⁸ Bills Digest 1876.

³²⁹ GCSB Act, s 6(1).

³³⁰ GCSB Act, s 6(2).

91. Under the GCSB Act as enacted, the Bureau's objective included to:³³¹

"...contribute to the national security of New Zealand by providing –

- (a) foreign intelligence that the Government of New Zealand requires to protect an advance –
 - (i) the security or defence of New Zealand; or
 - (ii) the international relations of the Government of New Zealand; or
 - (iii) New Zealand's international well-being or economic well-being;..."

92. GCSB's functions included to gather foreign intelligence, in accordance with the New Zealand Government's foreign intelligence requirements;³³² provide reports on foreign intelligence to the Minister and any person or office holder authorised by the Minister;³³³ cooperate with, or provide advice and assistance to, any public authority or other entity, in New Zealand or abroad, including on "any matter that is relevant to the functions of the public authority or other entity";³³⁴ The performance of the Bureau's functions was subject to the control of the Minister.³³⁵

93. In 2013 the GCSB Act was amended to include principles underpinning the performance of the Bureau's functions.³³⁶ The principles include acting "in accordance with New Zealand law and all human rights standards recognised by New Zealand law".³³⁷

94. The Hon Christopher Finlayson noted that the GCSB, in addition to being subject to the *Public Service Code of Conduct*, was now subject to these explicit principles underpinning the Bureau's performance, "modelled on the principles inserted in the New Zealand Security Intelligence Service Act 1969".³³⁸

Intelligence and Security Act 2017 (ISA)

95. Since September 2017 the ISA has been the primary legislation governing the GCSB and NZSIS. ISA requires the agencies to act in accordance with "New Zealand law and all human rights obligations recognised by New Zealand law" and provides that the responsible Minister must be satisfied that the agencies will so act when providing intelligence and analysis, or information obtained by carrying out information assurance and cyber security activity, to others, including to overseas parties.³³⁹

³³¹ GCSB Act, s 7.

³³² GCSB Act, s 8(1)(a).

³³³ GCSB Act, s 8(1)(d).

³³⁴ GCSB Act, s 8(1)(e)(ii)(A).

³³⁵ GCSB Act, s 8(3).

³³⁶ Government Communications Security Bureau and Related Legislation Amendment Bill (GCSB Amendment Bill).

³³⁷ GCSB Act, s 8D(1)(a). This clause was added to the GCSB Amendment Bill at Select Committee.

³³⁸ (6 August 2013) 692 NZPD 12346.

³³⁹ ISA, ss 3,10,12,17 and 18. I mention, for completeness, ISA s 230 which refers to information "obtained through the use of torture", but note it is not relevant to this Report.

APPENDIX E: GLOSSARY*A*

Absolute human right – a human right is considered as absolute if, under normal circumstances, no limitations are permitted [Manfred Nowak and Elizabeth McArthur *The United Nations Convention Against Torture: A Commentary*, above n 237, at [60]]

ASIO – Australian Security Intelligence Organisation

ADD/DDSMO – Assistant Director Defence/Deputy Director Support to Military Operations

Articles on State Responsibility – UN Articles on the Responsibility of States for Internationally Wrongful Acts (2001)

B

BORA – New Zealand Bill of Rights Act 1990

BSIS – British Security Intelligence Service (aka MI6)

C

Caveats – conditions placed on the dissemination and use of intelligence by the providing party

CBSA – Canadian Border Services Agencies

CDF – Chief of Defence Force (New Zealand)

CIA – Central Intelligence Agency (USA)

CIDTP – cruel, inhuman, degrading treatment or punishment

CIL – customary international law

Consolidated Guidance - *Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees* (2010, United Kingdom)

CSIS – Canada's Security Intelligence Services

CTIVD – Netherlands Review Committee on the Intelligence and Security Services

CUSOMOD - is a border management database used by New Zealand Customs Service.

D

Dynamic Targeting - the process of tracking an HVT in "relative" real time

E

EAB – External Assessments Bureau (NZ) (became NAB – the National Assessments Bureau)

ECHR – European Court of Human Rights

EIT – Enhanced Interrogation Techniques (CIA) These were coercive interrogation techniques adopted by the CIA on US Department of Justice legal advice that the then current circumstances of necessity or self-defence (from terrorist attacks) may justify interrogation methods that might violate the criminal prohibition against torture. The first set of legal advice (Bybee Memos/Torture Memos) narrowed the definition of “torture” so that the list of “enhanced interrogation techniques” could be viewed as falling below the threshold required for torture. These Memos provided legal authorisation to the CIA to inflict pain and suffering on detainees during interrogations, up to the level caused by “organ failure, impairment of bodily function, or even death.”

European Convention – Convention for the Protection of Human Rights and Fundamental Freedoms (1950)

Extraordinary rendition – the extra-judicial transfer of an individual from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there is a real risk of torture or cruel, inhuman or degrading treatment.

F

FBI – Federal Bureau of Investigation (US)

Five Eyes – a global intelligence-sharing alliance between Australia, Canada, US, UK and New Zealand

G

GA – UN General Assembly

GCHQ – Government Communications Head Quarters (UK)

GCSB – Government Communications Security Bureau (New Zealand)

GCSB Act – Government Communications Security Bureau Act 2003

GISS – Dutch General Intelligence and Security Service

H

HVT – High Value Target

I

ICC – International Criminal Court

ICCPR – UN International Covenant on Civil and Political Rights

ICJ – International Court of Justice

ICTR – International Criminal Tribunal for Rwanda

ICTY – International Criminal Tribunal for the Former Yugoslavia

IGIS – Inspector-General of Intelligence and Security (New Zealand)

IHL – International Humanitarian Law (aka Law of Armed Conflict)

ILC – International Law Commission

ISEC – Information Sharing Evaluation Committee (Canada)

ISA – Intelligence and Security Act 2017 (New Zealand)

ISAF – International Security Assistance Force – led by NATO

ISC – the Intelligence and Security Committee of Parliament (UK)

J

JCHR – Parliamentary Joint Committee on Human Rights (UK)

JPEL – Joint Prioritised Effects List

K

Kinetic targeting – the physical strike on a target such as a drone/missile attack

L

LOAC – Law of Armed Conflict (aka LOIAC – Law of International Armed Conflict); now commonly referred to as IHL – International Humanitarian Law

M

MD – Ministerial Direction

MPS – Ministerial Policy Statement (New Zealand)

MSO – Military Support Officer (GCSB)

N

National caveats – these restrict the scope of delegated authority by limiting what military forces can do on behalf of the nation

NATO – North Atlantic Treaty Organisation (an intergovernmental military alliance between 29 North American and European countries)

NDS – National Directorate of Security (Afghanistan)

Non-derogable human right – a human right is considered non-derogable if States, under exceptional circumstances, are not permitted to derogate from their respective treaty obligations in relation to this right. These rights include: the right to life; the right to be free from torture and other cruel, inhuman, degrading treatment or punishment; the right to be free from slavery or servitude;

the right to be free from retroactive application of penal laws; and from medical scientific experimentation without free consent

Non-kinetic targeting (in Afghanistan) – the targeting of individuals for the purpose of providing environmental awareness for force protection and for counter-narcotics teams,³⁴⁰ and strategic intelligence about national and local governance

NSA – National Security Agency (US)

NZDF – New Zealand Defence Force

NZSID – New Zealand Signals Intelligence Directions

NZSAS – New Zealand Special Air Services

NZSIS – New Zealand Security Intelligence Service

NZSIS Act – New Zealand Security Intelligence Service Act 1969

O

OEF – Operation Enduring Freedom

OIC – officer in charge

Overseas public authority – a foreign person or body that performs or exercises any public function, duty, or power conferred on that person or body by or under law

P

PF – Personal file

PP – Policy Procedure

PS – Policy Statement

PRT – Provincial Reconstruction Team (NZDF)

Q

R

RCMP – Royal Canadian Mounted Police

ROE – Rules of engagement - refers to the orders issued by a competent military authority that delineate when, where, how, and against whom military force may be used, and they have implications for what actions soldiers may take on their own authority and what directions may be issued by a commanding officer

³⁴⁰ NZ NCR weekly reports, nos. 8 and 9.

S

Selector – identifier of data sought from collection, eg, a telephone number or email address associated with a target of intelligence interest

Senate Report - the United States Senate Committee on Intelligence redacted Executive Summary of its report on the CIA's detention and interrogation of detainees in the period between 17 September 2001 and 22 January 2009

SIGINT – Signals intelligence: Signals intelligence refers to intercepted electronic transmissions that can be collected by ships, planes, ground sites or satellites.

SIRC – Security Intelligence Review Committee (Canada)

T

Torture Memo – see EIT

U

UNAMA – United Nations Assistance Mission to Afghanistan

UNCAT – United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment



Office of the Inspector-General of Intelligence and Security

Best Practice Approaches To Information Sharing and Cooperation: Ensuring Lawful Action (from the Inquiry's classified Report)

Supplementary Paper

To the Inquiry into possible New Zealand intelligence and security agencies' engagement with the CIA detention and interrogation programme 2001-2009

Cheryl Gwyn
Inspector-General of Intelligence and Security
31 July 2019

BEST PRACTICE APPROACHES TO INFORMATION SHARING AND COOPERATION: ENSURING LAWFUL ACTION

Introduction

1. The classified version of the Inquiry Report contained an extensive survey and analysis of the elements of best practice in the field of information sharing with foreign partners. In comparison, the Public Report of the Inquiry (Public Inquiry Report) contained a brief discussion of that material and a summary of the principal elements of best practice. For those who have a deeper interest in the issues relevant to best practice, this supplementary paper makes available the full section on best practices from the classified Inquiry Report.

Benefits from observing best practice

2. As identified in the Inquiry Report, some difficult practical questions arise in the context of intelligence-sharing arrangements, particularly in routine and reciprocal relationships between intelligence and security agencies, given that the law relating to complicity in torture is complex and far from settled.¹ The likelihood of States being held responsible for the actions of officials sharing or using information obtained by torture as part of systematic and mutual information sharing arrangements between States is relatively untested. What is clear, however, is that no part of that exchange process can properly be described as “passive.” In effect, the exchange of information is the currency of the relationship.
3. New Zealand intelligence and security agencies are net beneficiaries of information sharing and co-operation with foreign partners, and with the Five Eyes partners in particular.² These relationships are highly valued and New Zealand is keen to preserve them, alongside developing other connections. However, New Zealand and overseas experience to date demonstrates that relying on relationships of trust, and personal assurances provided at high level by foreign States and agencies, are not sufficient to guarantee compliance with international and domestic law.
4. The Inquiry Report demonstrates the various legal, political and practical complexities that New Zealand’s intelligence and security agencies have to navigate, in sharing information and cooperating with foreign States and agencies, to ensure the actions of New Zealand agencies are legally compliant. This best practice section (drawn from the classified Inquiry Report) proposes that the prudent and precautionary approach is to observe requirements to exercise due diligence³ and adopt a best practice approach to both policy and operational practice. Measures must provide a margin of safety, be effective and apply across agency functions. They need to be relevant to instances where there is an established intelligence relationship as well as where the connection with the foreign authority is ad hoc, one off, or infrequent.

¹ See Appendix D of the Public Inquiry Report.

² Sir Michael Cullen and Dame Patsy Reddy *Intelligence and Security in a Free Society* (9.24a, February 2016) (Cullen and Reddy) at [3.43] and [3.47].

³ See the discussion of due diligence in Anja Seibert-Fohr “From Complicity to Due Diligence: When do States Incur Responsibility for Their Involvement in Serious International Wrongdoing?” *German Yearbook of International Law*, (2018) (60) (Forthcoming) at 11 - 19.

5. A key purpose of best practice requirements is to achieve greater consistency among States and agencies that cooperate on intelligence and security matters, to ensure human rights obligations are engaged and respected as part of everyday practice.⁴ The following paragraphs survey what are commonly recognised as, and what I consider to be, the best practice requirements for a sound policy and legal framework for information sharing and cooperation by intelligence and security agencies. A summary of the elements of best practice is included at the end of this Part of the Report.⁵

ELEMENTS OF BEST PRACTICE

Ministerial Directions: Provide high-level regulation and guidance

New Zealand: 2017 Ministerial Policy Statement

6. The ISA in 2017 established Ministerial Policy Statements (MPSs) as:
- “a mechanism to enable the responsible Minister to regulate the lawful activities of the agencies”;
 - “to enhance oversight and compliance”; and
 - “to ensure the agencies have clear and objective guidance about how they are to carry out their lawful activities”.⁶
7. The MPSs provide guidance to the intelligence and security agencies in relation to ten stated areas.⁷ Relevant to this Inquiry, the Ministerial Policy Statement on *Cooperation of New Zealand intelligence and security agencies (GCSB and NZSIS) with overseas public authorities* (MPS Overseas Cooperation) sets out procedures to authorise intelligence cooperation, assistance and sharing, and the protections and restrictions that need apply. The MPS Overseas Cooperation took effect from 28 September 2017 for three years, unless amended, revoked or replaced sooner. It makes reference to this Inquiry, and notes “when completed, the conclusions from that Inquiry may give cause for the issuing Minister to review and reissue this MPS”.⁸

Canada: 2017 Ministerial Directions

8. In 2017 the Canadian Minister of Public Safety and Emergency Preparedness issued Ministerial Directions on Avoiding Complicity in Mistreatment by Foreign Entities (CSIS MD), issued to

⁴ *R (on the application of Campaign Against Arms Trade) v The Secretary of State for International Trade and Intervenors* [2019] EWCA Civ 1020 20 June 2019 at [20], regarding “Criteria Guidance” on best practice in Chapter 2 of the EU “User’s Guide to the European Code of Conduct on Exports of Military Equipment” (20 July 2015).

⁵ By letter of 10 June 2019, the NZSIS and GCSB responded to this Part in the draft report that “The agencies are bound by the law as set by Parliament and there is no legal requirement for the agencies to follow “best practice” – indeed, there would be many different interpretations of “best practice” and it would not be possible to identify which should be followed.”

⁶ DPMC Cabinet Paper 2 *Warranting and authorisation framework* at [99] and [101].

⁷ Available at: <https://www.nzic.govt.nz/legislation/>.

⁸ *Cooperation of New Zealand intelligence and security agencies (GCSB and NZSIS) with overseas public authorities* (September 2017) (MPS Overseas Cooperation) at [67].

agencies including the Canadian Security Intelligence Services (CSIS); Royal Canadian Mounted Police (RCMP) and the Canada Border Services Agencies (CBSA). The 2017 Directions replaced the 2011 Ministerial Directions on Information-Sharing with Foreign Entities, and more clearly state the Canadian Government's "values and principles against torture and mistreatment and commitment to the rule of law", by:

- condemning torture and mistreatment;
 - referring to relevant rights and protections in Canada's Charter of Rights and Freedoms;
 - promising commitment to the rule of law; and
 - compelling increased transparency and accountability through required reporting to review bodies, the relevant Parliamentary Committee, the Minister and the public.
9. The change in approach of Canada's 2017 MDs has been characterised as a "moral choice about the primacy given to the prohibition on torture" which, although it does not set an absolute bar in the use of torture-derived information, does represent an important shift in a contentious area where "people of utmost good faith may reasonably differ on the issue."⁹
10. The CSIS MD recognises that information-sharing with foreign entities is vital to CSIS' ability to maintain strong relationships and address threats to national security, while also recognising that torture or other CIDTP serve no legitimate military, law enforcement, or intelligence-gathering purpose, with any information yielded "very likely unreliable".¹⁰ The CSIS MD specifically:
- Prohibits the disclosure of information, and the making of requests for information, that would result in a substantial risk of mistreatment of an individual by a foreign entity;
 - Prohibits certain uses of information that was likely obtained through the mistreatment of an individual by a foreign entity;¹¹ and
 - Provides decision-making processes for these situations.¹²
11. The CSIS MD requires CSIS to publish information that explains how the MD is implemented, including how risk assessments are conducted, in line with Canadian values including those in the Canadian Charter of Rights and Freedoms.¹³ CSIS is also directed to produce a classified annual report for the Minister (and the oversight body, the Security Intelligence Review Committee (SIRC)) containing:

⁹ Craig Forcese "Touching Torture with a Ten Foot Pole" *Osgoode Hall Law Journal* 52.1 (2015) at 21.

¹⁰ Ministerial Direction to the Canadian Security Intelligence Service: *Avoiding Complicity in Mistreatment by Foreign Entities* (25 September 2017) (CSIS MD) at [13].

¹¹ CSIS MD, above n 10, at [3], [13], [15] - [19].

¹² CSIS MD, above n 10, at Appendices A, B and C.

¹³ CSIS MD, above n 10, at [19].

- details on ‘substantial risk’ cases where the MD was engaged, including the number of cases; and
 - the restriction of any arrangements due to concerns related to mistreatment.¹⁴
12. Further, I note that aspects of the 2017 MDs have now been added to Bill C-59, a bill which includes significant reform of national security matters in Canada. The addition, entitled The Avoiding Complicity in Mistreatment by Foreign Entities Act, establishes a process by which written directions may be issued by the Governor in Council¹⁵ to specific agencies, and must be issued to some agencies, including CSIS, CSE and RCMP.¹⁶ The directions cover:
- the disclosure of information to any foreign entity that would result in a substantial risk of mistreatment¹⁷ of an individual;
 - making requests for information to any foreign entity that would result in a substantial risk of mistreatment of an individual; and
 - the use of information likely to have been obtained through the mistreatment of an individual by a foreign entity.
13. With regard to accountability and transparency, the proposed Act will require immediate publication of the written directions once received and reiterates the requirement in the MD for published annual reports on the implementation of directions. While the proposed Act would not codify the substance of the MDs, it would ensure the public in Canada is aware of how information connected with torture or CIDTP is dealt with by Government agencies.¹⁸
14. The CSIS MD provides a useful model for the New Zealand Government to consider in the forthcoming review of the New Zealand MPSs.

Need for clarity and controls if information derived from torture is used in “exceptional circumstances”

15. UNCAT states that no exceptional circumstances or public emergency may be invoked as a justification of torture.¹⁹ A distinction is made between committing acts of torture (which is prohibited), and using information likely obtained by torture (ie, viewed by some as permitted in “exceptional circumstances”, or if received “passively”). Governments which decide to allow such use must ensure clear and strict controls exist.

¹⁴ CSIS MD, above n 10, at [24] and [25].

¹⁵ A process by which the Governor-General approves a decision of the Prime Minister and Cabinet.

¹⁶ On 20 June 2018, Bill C-59 was introduced to the Senate with a First Reading; The ‘Avoiding Complicity’ text was added in April 2018 by Canada’s Standing Committee on Public Safety and National Security; The written directions are issued by the Governor-in-council to the deputy heads of the specified agencies.

¹⁷ Mistreatment is defined as torture or CIDTP as defined in UNCAT.

¹⁸ Bill C-59 received Royal Assent in June 2019.

¹⁹ UNCAT, Article 2(2).

16. The UN Special Rapporteur on torture recently stated the view that “intelligence exchanges, particularly in the context of counter-terrorism, continue to undermine the prohibition [on torture]”:²⁰

“Just as is the case for judicial and administrative proceedings, the gathering and exchange of intelligence are conducted to establish the basis for potentially significant decisions by State authorities and, therefore, trigger due diligence obligations with regard to the prevention of torture and ill-treatment. ... [A]ny good faith interpretation of the exclusionary rule [UNCAT, Article 15 which requires States to ensure that any statement made as a result of torture is not used as evidence in any proceeding, except against a person accused of torture] in line with its object and purpose must entail its applicability not only to judicial and administrative proceedings, but also to intelligence and executive decisions of any kind.

Define with care “exceptional circumstances” and/or “public emergency”

17. If a State considers information likely obtained by torture can be used by intelligence agencies, the exceptional circumstances or public emergency where this may occur must be clearly and appropriately defined. Such exceptional situations are colloquially described as ‘ticking bomb’ scenarios. The Canadian CSIS MD defines an exceptional circumstance as one where use of the information is “necessary to prevent loss of life or significant personal injury”.²¹ It omits the reference from the 2011 MDs to the justification of preventing “substantial damage or destruction of property”.²²
18. The House of Lords in *A and others v Secretary of State for the Home Department (No. 1)*²³ considered the nature of “a public emergency threatening the life of the nation” sufficient to derogate from the right to liberty and security in Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Court identified that such derogations are intended to be temporary, listing the characteristics of a public emergency as:
- “it must be actual or imminent;
 - its effects must involve the whole nation;
 - the continuance of the organised life of the community must be threatened;
 - and
 - the crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate”.²⁴
19. The Dutch intelligence oversight body, the Netherlands Review Committee on the Intelligence and Security Services (CTIVD) reports that the Dutch General Intelligence and Security Service (GISS) observes the principle that information may not be shared if there are indications that

²⁰ UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer *Interim Report: Seventieth anniversary of the Universal Declaration of Human Rights: reaffirming and strengthening the prohibition of torture and other cruel, inhuman or degrading treatment or punishment (A/73/207, July 2018)* at [57].

²¹ CSIS MD, above n 10, at Appendix C, 1c.

²² I note this is not the approach taken in the New Zealand MPS Overseas Cooperation, above n **Error! Bookmark not defined.**8 at [28] and [46], where damage to property is included. See further section XI of the Public Inquiry Report.

²³ *A and others v Secretary of State for the Home Department (No 1) (A (No 1))* [2004] UKHL 56.

²⁴ *A (No 1)*, above n 23, at [23], citing *Greek Case (1969) 12 YB 1* at [153].

providing personal data may lead to the violation of human rights.²⁵ In GISS policy, this principle:²⁶

“may only be set aside *by way of rare exception*. This requires the existence of an unacceptable risk to society and its citizens that calls for prompt action. And it requires an *urgent necessity* to provide the personal data to the foreign service in question”.

20. The UK Joint Committee on Human Rights described exceptional circumstances in the following terms:²⁷

“We accept that UNCAT and other provisions of human rights law do not prohibit the use of information from foreign intelligence sources, which may have been obtained under torture, to avert imminent loss of life by searches, arrests or other similar measures. We cannot accept the absolutist position on this subject advanced by some NGOs when human life, possibly many hundreds of lives, may be at stake. Indeed, where information as to an imminent attack becomes available to the UK authorities, their positive obligation to protect against loss of life under Article 2 ECHR may require them to take preventative action, even when they suspect the information may have been obtained by use of torture.

However great care must be taken to ensure that use of such information is only made in cases of imminent threat to life. Care must also be taken to ensure that the use of information in this way, and in particular any regular or repeated use of such information, especially from the same source or sources, does not render the UK authorities complicit in torture by lending tacit support or agreement to the use of torture or inhuman treatment as a means of obtaining information which might be useful to the UK in preventing terrorist attacks. Ways need to be found to reduce and, we would hope, eliminate dependence on such information”.

21. Lastly, it is useful to note that the ‘ticking bomb’ scenarios assume:²⁸

“that you always have the right suspect in custody, the bomb is always real, the suspect always has the information you need, the suspect always talks when tortured, and the information the suspect then provides is always sufficiently accurate and detailed to avert the looming catastrophe”.

22. As Brecher points out in *Torture and the Ticking Bomb*, “in the real world none of these variables is quite so assured”.²⁹

Place explicit limits on permissible use of torture-derived information in emergencies

23. Canada’s CSIS MD for sets out the following limits:

- Information likely obtained through mistreatment may not be used:
 - in a way that creates a substantial risk of further mistreatment;
 - as evidence in any judicial, administrative or other proceedings; or

²⁵ CTIVD Review Report 22a on the cooperation by GISS with foreign intelligence and security services (2009) at 24.

²⁶ CTIVD Review Report 22a, above n 25, at 24 (emphasis as per original).

²⁷ UK JCHR *The UN Convention Against Torture* (Session 2005-6 HL Paper 185-1, HC 701-1) at [55].

²⁸ Richard Barrett and Tom Parker “Acting ethically in the shadows: Intelligence gathering and human rights” 236 to 264, at 250; in Manfred Nowak and Anne Charbord (eds) *Using Human Rights to Counter Terrorism* (Edward Elgar Publishing, United Kingdom, 2018).

²⁹ Bob Brecher *Torture and the Ticking Bomb* (Blackwell Publishing, Oxford, 2007).

- to deprive someone of their rights or freedoms, except where the Director of CSIS or senior official designated by the Director authorises such use because it is necessary to prevent loss of life or significant personal injury;
 - Where such exceptional circumstances exist, “[t]he information must be accurately described, and its reliability properly characterized using caveats making clear that the use of this information has been authorized for a clearly defined and limited purpose”;
 - The Minister, the oversight body SIRC, and the relevant Parliamentary Committees must be informed as soon as feasible and provided with the relevant contextual information.³⁰
24. The *Ottawa Principles on Anti-terrorism and Human Rights*, formulated in 2006 by Canadian civil society and academics, recommend similar but more broadly-framed limits to maintain and respect the non-derogable nature of UNCAT:³¹

“Information, data or intelligence that has been obtained through torture or cruel, inhuman or degrading treatment or punishment may not be used as a basis for:

- the deprivation of liberty;
- the transfer, through any means, of an individual from the custody of one State to another;
- the designation of an individual as a person of interest, a security threat or a terrorist or by any other description purporting to link that individual to terrorist activities; or
- the deprivation of any other internationally protected human right.”

Ensure realistic assessments of the reliability and credibility of torture-derived information

25. The CSIS MD states that torture and CIDPT serve no legitimate intelligence-gathering purpose with any information yielded “very likely unreliable”.³²
26. Further, the use of such information by government may potentially affect public perceptions around the integrity and credibility of executive decision-making. Courts in relevant jurisdictions have noted the negative effect admitting evidence obtained by torture would have on perceptions of the integrity of the courts and systems of justice.³³ But to date the same attention and analysis has not been applied to the use of torture-derived information in executive and operational decision-making.
27. The Report of the Association for the Prevention of Torture summarises those wider effects as follows:
- Using the spoils of torture encourages it, and gives torture an ill-defined credibility;

³⁰ CSIS MD, above n 10, at Appendix C.

³¹ University of Ottawa Faculty of Law *Principles on Anti-terrorism and Human Rights* (2006) Principle 4.3.2.

³² CSIS MD, above n 10, at [13].

³³ See, for example, *A and others v Secretary of State for the Home Department (No 2)* [2005] UKHL 71; [2006] 2 AC 221; [2006] 1 All ER 575 (*A (No 2)*), at [52].

- Torture-tainted information is inherently unreliable;³⁴
 - Relying on tainted information wastes resource;
 - It raises questions around the propriety of agency action, given torture is immoral and unethical.³⁵
28. Applying this, if a New Zealand Minister were to direct that torture-derived information could be used by intelligence and security agencies in exceptional circumstances, at a minimum that information should, on a best practice approach, be accurately labelled; its reliability properly characterised; employing caveats to make clear that its use is authorised for the clearly defined and constrained purpose; with retention periods identified and followed by a presumption of destruction.
29. An evaluative committee on information sharing in the Canadian context³⁶ considers relevant contextual aspects drawn from Canadian case law³⁷ and UN Committee interpretations.³⁸ These practical aspects are instructive and can contribute to any assessment of the reliability of information received:
- Persons most targeted by torture are political detainees and perceived terrorists;
 - The more self-inculpatory the nature of the information provided by an individual, the less likely it was provided voluntarily;
 - Corroborated intelligence does not mean that it has not been derived from torture; the level of detail or the reliability of the information are not, on their own, useful factors in assessing whether there are reasonable grounds to believe that information was obtained by torture; the issue is not whether it is true or false, or corroborated or not but whether it is obtained by torture;
 - It is widely accepted that reports from Amnesty International, Human Rights Watch and the UN Committee Against Torture represent the best evidence available since there is very little direct evidence of torture;
 - CSIS cannot simply rely upon anecdotal information or personal relationships that may exist between special liaison officers and security officials in foreign countries (as those with poor human rights records may be more interested in maintaining a relationship with the Service than actually providing truthful information on human rights conditions);

³⁴ See further references on the reliability of information obtained by torture in Part D3 and Part F4.1.

³⁵ Association for the Prevention of Torture *Beware the gift of poison fruit: Sharing information with States that torture* (2012) at 17 and 18. See also Sarah Fulton “Cooperating with the enemy of mankind: Can States simply turn a blind eye to torture” (2012) 16(5) International Journal of Human Rights at 773 - 795.

³⁶ As discussed further below.

³⁷ *In relation to Mahjoub’s Security Certificate* (2010) FC 787 at [196] - [204] and [206] - [207] per Blanchard J.

³⁸ Referenced to UNCAT.

- To establish that information was obtained by the use of torture requires more than simply pointing to the poor human rights records of a given country.

Define the applicable law in a guide

30. Prudent practice is to provide a standalone guide to the applicable law, both domestic and international, to inform staff (including if in-theatre) and which can then be referenced by other related policies and procedures. Setting out the legal standards can act as a quick reference to existing benchmarks, which will be relevant if, for example, another State appears to be relying on a different interpretation of the law or signals that it has or will cease to apply relevant legal obligations.
31. The UN Special Rapporteur's *Compilation of good practices* assumes that intelligence services have this understanding of the applicable law firmly in place. For example, Practice 35 recommends that:³⁹

“Intelligence services are explicitly prohibited from employing the assistance of foreign intelligence services in any way that results in the circumvention of national legal standards and institutional controls on their own activities. If States request foreign intelligence services to undertake activities on their behalf, they require these services to comply with the same legal standards that would apply if the activities were undertaken by their own intelligence services.”

Create agreements between States/agencies outlining provision of assistance and information sharing

32. We acknowledge that there are overarching and more formal arrangements already in place, some long-standing, some as written agreements, between the GCSB or the NZSIS and their foreign intelligence partners. These high-level arrangements⁴⁰ deal with information sharing and the necessity for the partner agencies to comply not only with their own domestic law and policies but also that of their partners. However, access to the terms of these arrangements has not proved possible so we are unable to assess whether they adequately address best practice including human rights compliance. What is set out below should be read in that light. We also suggest that the NZSIS and GCSB review information sharing agreements, where they do or should exist, with these elements in mind.
33. To address the requirements for transparency and accountability of actions, best practice for information sharing arrangements between States (or between their agencies) directs that such agreements or MOUs must:
 - be in writing;
 - be signed off by Directors and/or Ministers;
 - set out rules (ie mutually agreed standards and expectations) governing the use of shared information, not least to “reduce the scope for informal

³⁹ UN Special Rapporteur Martin Scheinin *Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism* A/HRC/14/46 (2010) at [49].

⁴⁰ These are separate from specific Ministerial Authorisations under ISA (eg, under s 10(1)(b)(iii)). See Cullen and Reddy, above n 2, at [3.44] and [3.47].

intelligence-sharing which cannot be easily reviewed by oversight institutions”;⁴¹

- include a statement of parties’ compliance with human rights and data protection requirements;
- include a requirement to observe in practice the ‘third party rule’ or where more appropriate, the ‘third country rule’ (ie where information obtained may only be provided to others if the service/country from which the information originates has given permission to do so);⁴²
- address the situation where the NZSIS or GCSB receives information at third hand (ie where the information is disclosed to New Zealand by a liaison service not suspected of mistreatment of individuals but which obtained that information indirectly from a third party which is);⁴³
- make provision for the sending service to request feedback on the use of the shared information;⁴⁴
- be regularly reviewed;⁴⁵
- when concluded or revised, be provided to independent oversight institutions for review.⁴⁶

34. Canada provides an example of oversight of such arrangements. As with the New Zealand intelligence and security agencies,⁴⁷ CSIS is required by statute to have Ministerial approval for information sharing arrangements with foreign intelligence agencies.⁴⁸ CSIS is also required by statute⁴⁹ to provide the oversight body, SIRC, with a copy of any written arrangement that CSIS enters into with the government of a foreign State; any institution therein; or any international organisation of States or an institution of such a body.⁵⁰ SIRC must “carefully examine these arrangements and monitor the exchange of information to ensure that the terms of the arrangements are upheld”.⁵¹

⁴¹ Martin Scheinin *Compilation of good practices*, above n 39, at [45].

⁴² CTIVD *Review Report 22a*, above n 25, at 22 and 23.

⁴³ UK Intelligence Services Commissioner Rt Hon Sir Mark Waller *Supplementary to the Annual Report for 2015* (House of Commons, HC 458, 2016) identifying this as a gap in the *Consolidated Guidance*.

⁴⁴ Martin Scheinin *Compilation of good practices*, above n 39, at [45].

⁴⁵ Canada Commission of Inquiry *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (Canada Privy Council) Ottawa: Public Works and Government Services Canada, Volume 3, 2006 at 321.

⁴⁶ Privacy International Report *Secret Global Surveillance Networks: Intelligence Sharing Between Governments and the Need for Safeguards* April 2018, at 44, 47 to 48; Martin Scheinin *Compilation of good practices*, above n 39, at [48] - [49].

⁴⁷ Intelligence and Security Act 2017 (ISA) ss 10 and 12.

⁴⁸ Canada Security and Intelligence Service Act 2002, ss 13 and 16.

⁴⁹ Canada Security and Intelligence Service Act, s 17.

⁵⁰ Privacy International Report *Secret Global Surveillance Networks*, above n 46, at 34.

⁵¹ CSIS ‘Sharing Intelligence Internationally’, accessed at <https://csis.gc.ca//bts//shrng-en.php>.

Have a policy to guide informed assessments of State/agency human rights records and accurately identify risks around engagement

35. To properly manage uncertainty and legal risk around engaging with the activities of foreign intelligence and security agencies, including any potential differences in approach to international legal obligations, information sharing and cooperation must proceed on a fully informed basis. The UN Special Rapporteur, recommended that, before either entering into an intelligence-sharing agreement or sharing intelligence on an *ad hoc* basis, intelligence services undertake an assessment of the counterpart's record on human rights and data protection, as well as the legal safeguards and institutional controls that govern the counterpart (and whether there is independent oversight). Before handing over information, intelligence services should make sure that any shared intelligence is relevant to the recipient's mandate, will be used in accordance with the conditions attached and will not be used for purposes that violate human rights.⁵²
36. Sections 3, 17 and 18 of the ISA require the GCSB and the NZSIS to act in accordance with New Zealand law and all human rights obligations recognised by New Zealand law. Implicit in those obligations is a need to be actively thinking, asking questions and assessing where and how risks of being implicated in acts of torture or CIDTP by other States and agencies with whom they engage or with whom they are establishing relationships might arise.⁵³

Policy to establish an appropriate overall framework and process

37. Policies in partner jurisdictions outline the scheme of inquiry to be followed. The UK *Consolidated Guidance* applies in particular to the detention and interviewing of detainees overseas, and the passing and receipt of intelligence relating to detainees. It states that when working with foreign authorities:
- UK agency personnel must follow the letter and the spirit of the *Guidance*, which accords with the UK's own international and domestic legal obligations;
 - great care must be taken to assess whether there is a real risk that a detainee will be subjected to: unlawful killing; torture; CIDT; extraordinary rendition or rendition; or unacceptable standards of arrest and detention;
 - the UK will investigate whether it is possible to mitigate any such risk;
 - When, despite efforts to mitigate the risk, there are grounds to believe there is a real risk of torture, unlawful killing or rendition, the presumption is that the UK agencies will not proceed.⁵⁴

⁵² Martin Scheinin *Compilation of good practices*, above n 39, at [47].

⁵³ As reflected in the MPS Overseas Cooperation (2017), above n 8 which refers to "a duty to apply due diligence" at [36].

⁵⁴ UK Government *The Principles relating to the detention and interviewing of detainees overseas and the passing and receipt of intelligence relating to detainees* (referred to as the *Consolidated Guidance*) (July 2019) at [2] and [3]. The *Consolidated Guidance* requires each agency to whom these Principles apply to provide more detailed advice and guidance (including legal) to their personnel (at page 1).

38. *Human Rights Guidance*, by the UK's Overseas Security and Justice Assistance (OSJA), addresses a wider range of activities overseas than the *Consolidated Guidance* (and the *Guidance* directs UK personnel to also consider OSJA). It sets out a four-step inquiry, called AIMS:
- **Assess** the internal situation in the host country (eg, stability, practice towards human rights and IHL);
 - **Identify** the human rights, IHL, political and reputational risks associated with the proposed assistance;
 - **Mitigate** the identified risks, if possible (including considering when/how to stop providing assistance if there is a significant change); and
 - **Strengthen** compliance with human rights and IHL in the host country through the assistance (ie, make an overall assessment of whether there is a *serious risk* that the assistance might *directly or significantly contribute* to a violation of human rights, IHL or lead to political or reputational risk).⁵⁵
39. The provision of comprehensive templates and checklists can inform and greatly assist staff in making these sometimes complex assessments, and ensure appropriate sign-off for any further action taken.

Policy to inform assessment of State/agency human rights records

40. The Netherland's CTIVD, noting the difficulty in the GISS finding out whether information from a foreign agency has been obtained by torture, stated that:⁵⁶
- “This makes it all the more important that the GISS, before and while it cooperates with a foreign intelligence or security service, assesses carefully to what extent the human rights situation in a country constitutes an obstacle to cooperation with the relevant service of that country.”
41. An assessment of the current level of risk of human rights breaches by the State itself is an indicative starting point, before scrutinising specific State agencies.⁵⁷ For some country assessments, it may be appropriate to require cross-government input, for example, from the Ministry of Foreign Affairs and Trade, perhaps accommodated through ODESC.
42. Policy guidance for making these assessments must include the range of credible sources for officials to consult. There are many reliable and accessible sources that provide information about a State's human rights record, including (in no specific order):
- discussions with State authorities (including at diplomatic and ministerial levels);

⁵⁵ UK Government *Overseas Security and Justice Assistance Human Rights Guidance* (2017) at [21] (emphasis as per original).

⁵⁶ CTIVD *Review Report 22a*, above n 25, at [14.2].

⁵⁷ CTIVD *Review Report 22a*, above n 25, at [24]; “Merely the country to which the foreign service concerned belongs may already constitute an indication.”

- Governmental reports and published Government legal opinions;⁵⁸
- Ministerial directives;
- reports of Parliamentary committees;⁵⁹
- Presidential orders;⁶⁰
- public statements and official policies of the foreign agency or State;⁶¹
- reports of fact-finding commissions and independent monitors;
- reports from States' independent oversight agencies (eg oversight of human rights or intelligence and security matters);
- country profiles drawn up by the Ministry of Foreign Affairs and Trade, and reports from embassies;
- UN reports (eg, country visits by Special Rapporteurs; Concluding Observations by the Committee Against Torture, on State compliance with UNCAT; Concluding Observations by the UN Human Rights Committee, on State compliance with ICCPR; Reports from UN Assistance Mission in Afghanistan (UNAMA));
- Council of Europe reports;
- US State Department country reports;
- International Committee of Red Cross (ICRC) reports;
- relevant caselaw (eg, European Court of Human Rights; UK, Canadian and NZ Supreme Courts);
- recent reports from civil society and independent international human rights protection organisations (eg NGOs such as Amnesty International and Human Rights Watch);⁶²
- information from partner agencies and other States; and

⁵⁸ For example, Office of Legal Counsel in US Department of Justice; selected opinions are published on DoJ's website.

⁵⁹ For example, the UK Parliament's Joint Committee on Human Rights.

⁶⁰ A recent example is US President Trump's Executive Order 13823 of 30 January 2018 *Protecting America Through Lawful Detention of Terrorists* in which it is ordered at 1.(d) that "[t]he detention operations at the U.S. Naval Station Guantanamo Bay are legal, safe, humane, and conducted consistent with United States and International law".

⁶¹ See Erika de Wet "Complicity in the Violations of Human Rights and Humanitarian Law by Incumbent Governments through Direct Military Assistance on Request" (2018) 67 ICLQ at 18, citing *V Lanovoy Complicity and its Limits in the Law of International Responsibility* (Hart Publishing, Oxford, 2016) at 101 and 238.

⁶² When considering potential breaches of IHL by a trading partner, Saudi Arabia, the UK Foreign Office reported in October 2015 that "we have taken into account recent NGO reports in our assessment and we are ensuring that we are meeting our responsibility to avoid any risk of "wilful blindness"; as referenced by the High Court in *Campaign Against the Arms Trade v Secretary of State for International Trade* [2017] EWHC 1754 (Admin) at [154].

- media reports.
43. In addition, knowledge of wrongful conduct and its duration may be gained through long-standing prior cooperation with a foreign agency, or from geographical proximity.
44. In short, to ensure a current and reliable assessment of a country’s human rights record, there is no one source of truth. To adequately reflect this, the relevant policy must provide comprehensive guidance as to useful sources (eg with links on an online appendix). What is required is:⁶³

“... a classic ‘risk assessment’. This involves looking at all the information in the round, of which the recipient’s ‘past and present record’ is part. Past and present conduct is one indicator as to future behaviour ...”

Policy to require assessments that include the treatment of detainees

45. To assess the treatment of detained individuals, the policy must guide officials to consult reports on conditions in a State’s detention facilities, for example, reports from a National Preventive Mechanism established under the Optional Protocol to UNCAT. The UK Government’s *Consolidated Guidance*⁶⁴ requires an assessment of whether there is real risk of torture, before, for example:
- Passing intelligence to a foreign authority concerning an individual detained by that authority or likely to be detained by that authority as a result of that intelligence; and
 - Receiving unsolicited intelligence that has been obtained from a detainee in the custody of a foreign authority.
46. When CSIS is considering using information received from or sent to a foreign entity, risk assessment criteria include asking questions about the detention status of the individual, plus whether the information comes from a self-incriminating confession and if there is other information indicating potential mistreatment, such as a poor human rights record or a practice of extraordinary rendition.⁶⁵

⁶³ *Campaign Against the Arms Trade v Secretary of State for International Trade*, above n 62, at [181.iii]. This view was reiterated by the Court of Appeal “[T]he User’s Guide calls specific attention to the question of past violation as a relevant consideration when assessing whether there is a real risk of future violation. In our view that is obviously correct. How could it reasonably be otherwise?” The Court of Appeal held that the Secretary of State had erred in law by making no assessment of whether Saudi Arabia (leading the Coalition in the Yemen conflict) had committed past violations of IHL, and so whether there was a “real risk” for the future, and whether Saudi Arabia had “genuine intent” and “capacity to live up to the commitments made”. The Court’s decision resulted in the UK International Trade Secretary having to review past decisions on arms sales to Saudi Arabia and temporarily suspend any new ones. *R (on the application of Campaign Against Arms Trade) v The Secretary of State for International Trade and Intervenors* [2019] EWCA Civ 1020 20 June 2019 at [138] to [144].

⁶⁴ UK *Consolidated Guidance*, above n 54, at [6].

⁶⁵ Canadian Security Intelligence Service, Deputy Director Operations’ Directive *Information sharing with foreign entities* (issued under the 2011 Ministerial Direction; released under the Access to Information Act).

Policy to provide links to sources – Library of previous country assessments

47. Both a policy with links to the sources as listed above, and a library of the agency’s previous country assessments, provide sound reference points for operational staff. For example, after some seven years of recommendations to establish such a point of reference, the UK Cabinet Office in 2017 told the Intelligence and Security Committee that it was establishing a team in early 2018:⁶⁶

“to create a central SIA [Security and Intelligence Agencies] reference point collating risk assessments, submissions, assurances, mistreatment reporting, OSJAs, and open source assessments, to ensure that SIA risk assessments are made on a consistent basis, or at least with a consistent reference base”.

Ask the hard questions to inform assessments

48. A key element of best practice is an agency’s willingness to ask the difficult but essential questions, to assess the level of risk involved in engaging with activities of a foreign agency. This is particularly the case when specific indications of human rights breaches necessitate questions to an agency with which there is a long-standing relationship. Various jurisdictions have considered this broad question, in different contexts and provide useful guidance. In *Chahal v United Kingdom*⁶⁷ the ECHR identified the need for States to make a “rigorous examination” and exercise “close scrutiny” with regard to potential evidence of torture.⁶⁸ The recent report of the UK House of Lords Select Committee on International Relations, “Yemen: giving peace a chance”, regarding the sale of arms to Saudi Arabia in light of the war in Yemen, stated that “Relying on assurances by Saudi Arabia and Saudi-led review processes is not an adequate way of implementing the obligations for a risk-based assessment set out in the Arms Trade Treaty”.⁶⁹
49. The ECHR has held that “the existence of the alleged risk must be assessed primarily with reference to those facts which were known or ought to have been known” to the State at the time”.⁷⁰ For focused inquiries around a State’s human rights practices, the Council of the European Union *User’s Guide* on the export of military equipment is instructive. Initial questions can include whether there are “consistent reports of concern from local or international NGOs and the media”. Further, inquiries are made about indicators of human rights practices, such as:
- The degree of cooperation with international and regional human rights mechanisms (eg, UN treaty bodies and special procedures); and

⁶⁶ UK ISC *Detainee Mistreatment and Renditions: Current Issues* (HL 1114, 28 June 2018)(UK ISC *Current Issues*) at [129].

⁶⁷ *Chahal v United Kingdom* (1996) 23 EHRR 413.

⁶⁸ For accepted standards of investigation into acts of torture in a State’s territory, see the UN *Manual on the Effective Investigation and Documentation of Torture and Other Cruel Inhuman or Degrading Treatment or Punishment* (The Istanbul Protocol), Professional Training Series (No 8/Rev 1) 2004; The fundamental principles of any viable investigation into alleged incidents of torture are competence, impartiality, independence, promptness and thoroughness.

⁶⁹ UK House of Lords Select Committee on International Relations, *6th Report of Session 2017 – 19* (16 February 2019) at [72].

⁷⁰ *Abu Zubaydah v Lithuania* (application no 46454/11) ECHR 31 May 2018, at [585].

- The political will to discuss domestic human rights issues in a transparent manner, for instance in the form of bilateral or multilateral dialogues, with the EU or other partners including civil society.⁷¹
50. A decision-maker should be able to satisfactorily explain why it was not considered necessary to have regard to credibly-sourced reports of State or agency involvement in acts of torture, and adjust the intelligence exchanges or cooperation accordingly, if that was the case.
51. An appropriate level of government inquiry into a risk of torture and ill-treatment was addressed in the June 2006 Report by the Council of Europe Committee on Legal Affairs and Human Rights. The Report addressed the abuse of detainees through extraordinary rendition and secret detention sites run by the CIA in Europe, and held authorities in the relevant States:
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- “... responsible for failing to comply with the positive obligation to diligently investigate any serious allegation of fundamental human rights violations”.
52. That Report, in a chapter “Attitude of governments”, stated that:⁷³
- “[I]t has to be said that most governments did not seem particularly eager to establish the alleged facts. The body of information gathered makes it unlikely that European States were completely unaware of what, in the context of the fight against international terrorism, was happening at some of their airports, in their airspace or at American bases located on their territory. Insofar as they did not know, they did not want to know. It is inconceivable that certain operations conducted by American services could have taken place without the active participation, or at least the collusion, of national intelligence services. If this were the case, one would be justified in seriously questioning the effectiveness, and therefore the legitimacy, of such services. The main concern of some governments was clearly to avoid disturbing their relationships with the United States, a crucial partner and ally. Other governments apparently work on the assumption that any information learned via their intelligence services is not supposed to be known”.
53. In 2007 the European Parliament passed a Resolution that “Deplores the fact that the governments of European countries did not feel the need to ask the US Government for clarifications regarding the existence of secret prisons outside US territory”.⁷⁴

Require assessment of all unsolicited information received by agencies

54. In the context of information sharing relationships between States, information that is received unsolicited by intelligence and security agencies must nevertheless be subject to

⁷¹ Council of the European Union *User’s Guide to Council Common Position 2008/944/CFSP* defining common rules governing the control of exports of military technology and equipment, see *Section 2: Best practice for the interpretation of Criterion Two* at 38 to 54, and factors relevant to serious human rights violations at 40 to 41; UK High Court and Court of Appeal referenced the *User’s Guide* in *Campaign Against Arms Trade*, above n 62 and n 63.

⁷² Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, Report of investigation into CIA secret detention sites by Senator Dick Marty (7 June 2006) at [287]; cited in *Abu Zubaydah v Lithuania*, above n 70, at [273].

⁷³ Parliamentary Assembly of the Council of Europe, Report of investigation into CIA secret detention sites, above n 72, at [230]; cited in *Abu Zubaydah v Lithuania*, above n 70 at [272].

⁷⁴ European Parliament *Resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners* (2006/22009INI, 14 February 2007) at [9]; cited in *Abu Zubaydah v Lithuania*, above n 70, at [286].

comparable legal constraints, inquiry, analysis and rigour as all other information sought or sent.

55. The UK *Consolidated Guidance*, which defines ‘unsolicited’ as intelligence not requested or otherwise sought, including intelligence received as part of general intelligence sharing, states that:⁷⁵

“where personnel receive unsolicited intelligence from a foreign authority that they know or believe has originated from a detainee, and there is a real risk the detainee has been or will be subject to relevant conduct, senior personnel must be informed. In all cases where the senior personnel believe the concerns to be valid, Ministers must be notified of the concerns. ...

In such instances, the relevant authorities will consider whether action is required to avoid the foreign authority believing that HMG’s continued receipt of intelligence is an encouragement of the methods used to obtain it or adversely affects the conditions under which the detainee is held. Such action could, for example, include obtaining assurances, or demarches on intelligence and/or diplomatic channels. They will also consider whether the concerns were such that this would have an impact on engagement with that foreign authority in relation to other detainees”.

Mitigate risks of torture or cruel, inhuman or degrading treatment or punishment

56. States have a range of measures at their disposal which, depending on the circumstances, may serve to mitigate the risk that their actions are associated with torture or cruel, inhuman or degrading treatment or punishment. Reliance on one measure alone will seldom provide sufficient mitigation or reduction of risk. Nor will a substantial reliance on caveats and assurances without accompanying comprehensive assessments and monitoring of the human rights record and practices of the country/agency. On the other hand, mitigation of risk may be achieved simply by editing the information to omit identifying information of individuals.⁷⁶
57. Another approach when real risk exists is to make assistance conditional. Although not in the context of intelligence sharing the 2015 UNAMA report on the treatment of detainees in Afghanistan recommended that Donor States and those contributing troops should:⁷⁷

“Ensure that torture and ill-treatment of detainees by the National Directorate of Security, Ministry of Interior/Afghanistan National Police and Afghanistan National Army and implementation of effective remedial measures including legal obligations to hold perpetrators of torture accountable, are considered as key progress and conditionality indicators in making determinations on ... overall provision of technical support, advice, assistance and training to implicated Afghan institutions and ministries.”

58. The main tools used by intelligence and security agencies to mitigate identified risk are caveats, assurances and legal initiatives.

⁷⁵ UK *Consolidated Guidance* (2019) above n 54, at [11] and [12].

⁷⁶ Canada Communications Security Establishment, Operational Policy OPS-6, *Policy on Mistreatment Risk Management* (2 August 2016) at [3.6].

⁷⁷ UN Office of High Commissioner for Human Rights and UN Assistance Mission in Afghanistan *Update on the Treatment of Conflict-Related Detainees in Afghan Custody: Accountability and Implementation of Presidential Decree 129* February 2015, Kabul, Afghanistan at 113 and 114.

Mitigation tool: Caveats

59. The caveat system is widely used and based on trust. In essence it describes directions on permissible use, attached to information when dispatched. Caveats do not guarantee that a recipient of information to which a caveat is attached will honour that caveat. The system is primarily about source protection. Caveats are not legally enforceable.⁷⁸ However, the ability and willingness of agencies to respect caveats and seek consent before using information will affect the willingness of others to provide information in the future – a significant incentive for agencies to respect caveats. “Common sense tells us the incentive is greater when caveats are clear and in writing.”⁷⁹
60. The Arar Commission Report included the following recommendations, which emphasise the limitations of lawful reliance on caveats:⁸⁰
- “Never share information in a national security investigation without attaching written caveats in accordance with an existing policy stating:
- which institutions are entitled to have access to the information subject to the caveat;
 - what use the institution may make of that information; and
 - a clear process (and contact person) for recipients to follow to seek changes to the permitted distribution and use of the information”.
61. The Arar Report states that implied caveats (ie, unwritten understandings) are not an adequate substitute. It further identifies issues with the ability of a State to control out-bound information once conveyed to a foreign agency. The attachment of caveats, such as originator control and limits on use, are obviously “effective only where foreign agencies choose to abide by them”, with accompanying difficulties of detecting tacit information sharing done in violation.⁸¹ Therefore, agencies should as far as practicable establish procedures to monitor adherence to caveats when sharing information, and consider reporting breaches to independent oversight bodies.⁸²

Mitigation tool: Assurances

62. Diplomatic assurances take a variety of forms, ranging from oral to written documents signed by officials from both governments. Assurances may restate commitment to the state’s international law obligations or more specifically address what it will do or not do in a particular situation, such as intelligence sharing or deportation.⁸³ There is no general rule or practice at international law preventing a state from seeking and obtaining assurances where

⁷⁸ UK ISC *Detainee Mistreatment and Rendition: Current Issues*, above n 66, at [143].

⁷⁹ Canada Commission of Inquiry *Report of the Events Relating to Maher Arar: Analysis and Recommendations*, above n 45, at 106 and 107.

⁸⁰ Canada Commission of Inquiry *Report of the Events Relating to Maher Arar: Analysis and Recommendations*, above n 45, at Recommendation 9.

⁸¹ Craig Forcese “Touching Torture with a Ten-Foot Pole” *Osgoode Hall Law Journal*, 52.1 (2015) at 270.

⁸² Privacy International Report *Secret Global Surveillance Networks*, above n 46, at 45.

⁸³ In a paper on “International Legal Issues Relating to Detention”, presented to the Government Inquiry into Operation Burnham, on 30 July 2019, Dr Penny Ridings noted safeguards to assist compliance with non-refoulement obligations relating to deportation, including assurances: “Additional safeguards that assist with complying with the non-refoulement obligation are the obtaining of formal assurances that a detainee will be treated in accordance with international human rights standards. Assurances are usually considered in combination with complementary mechanisms, such as monitoring of detainees, ... efforts to gather and maintain knowledge about law enforcement and detention facilities”.

a risk of torture is at issue, although such assurances are not legally enforceable and will not absolve a state of its duty to comply with its international law obligations.

63. Assurances must be practical and meaningful, with regard to the actions a State will take on receiving the information in question, or upon receiving the transferred/deported individual. Obvious considerations relate to whether an individual to be deported or identified in the information will be detained and the State's record of treatment of detainees. Mere assurances that the activities of foreign agents will comply with international and national law, although frequently seen, may not be considered sufficient to ensure adequate protection against the risk of torture or ill treatment.
64. Assurances have, in some circumstances, proved unreliable. With regard to the CIA's extraordinary rendition of detainees from CIA-run 'black sites' in European States, it was submitted to the ECHR that by 2005:⁸⁴
- “any Contracting Party would or should have known that any US assurances that a detainee previously subjected to the US programme would be treated in a manner consistent with international law, in the case of further transfer, lacked credibility”.
65. The House of Lords in *RB and U (Algeria) and OO (Jordan) v Secretary of State for the Home Department*⁸⁵ held that such assurances need to provide a reliable guarantee; the absence or otherwise of torture or ill-treatment in a country is a question of fact; and, should reliable sources point to a real risk of torture or ill-treatment in that country, it will not matter what assurances have been given. Further, UN experts have observed that:
- “[i]t is therefore unclear why States that violate obligations under treaty and customary international law should comply with non-binding assurances”.⁸⁶
66. The Afghanistan Government's Ministry of Foreign Affairs in 2009 provided an assurance to the NZDF, set out in an “Arrangement” for “the transfer of persons between the New Zealand Defence Force and the Afghan Authorities” with regard to observing human rights obligations for the treatment of detainees. The Arrangement states *inter alia* that both participants will “observe applicable international and domestic law”.⁸⁷ While further detail on the applicable legal obligations would have been preferable, I note this Arrangement was not the only mechanism NZDF relied upon to monitor the treatment of any detainees.
67. The subsequent decision of the High Court of England and Wales in *R (on application of Maya Evans) v Secretary of State for Defence*⁸⁸ considered the nature and effectiveness of formal assurances made to the UK forces by the Afghanistan Government, to similarly observe human rights in the treatment of transferred detainees. The Court concluded that, despite genuine

⁸⁴ *Abu Zubaydah v Lithuania*, above n 70, at [471]; submissions by the International Commission of Jurists and Amnesty International.

⁸⁵ *RB and U (Algeria) and OO (Jordan) v Secretary of State for the Home Department* [2009] UKHL 1.

⁸⁶ Statement by UN Special Rapporteur on torture, Juan Mendez and Special Rapporteur on Human Rights and Counter-Terrorism, Ben Emmerson “UN rights experts concerned about fate of Guantanamo detainee deported to Algeria” *UN News* (10 December 2013).

⁸⁷ *Arrangement Between the Ministry of Foreign Affairs of the Islamic Republic of Afghanistan and the New Zealand Defence Force Concerning the Transfer of Persons Between the New Zealand Defence Force and the Afghan Authorities* 12 August 2009.

⁸⁸ *R (on application of Maya Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin).

efforts by UK forces to ensure the arrangements were accepted by relevant Afghanistan authorities, reliance on such assurances was misplaced given the public record of mistreatment of detainees by several Afghanistan authorities.⁸⁹ Instead, the critical question was how those arrangements operated in practice.

68. The comprehensive 2017 UK report *Deportation with assurances* by David Anderson QC and Professor Clive Walker QC observed, “deportation with assurances is not at all realistic for chronically ‘problematic’ countries or ‘countries of concern’”.⁹⁰ That report concludes:⁹¹

“The key consideration to be taken into account in developing safety on return processes is whether compliance with assurances can be objectively verified through diplomatic or other monitoring mechanisms”.

69. The UN Committee Against Torture has also expressed concern about State party reliance on assurances or other kinds of guarantees, assumptions that a person will not be tortured if transferred to another State, the secrecy of such procedures including the absence of judicial scrutiny, and lack of monitoring mechanisms put in place to assess if the assurances have been honoured.⁹² Further, monitoring regimes associated with assurances cannot prevent torture, they can only detect acts of torture after they occur.⁹³

70. Experience demonstrates that assurances should be established in writing. But the 2018 UK ISC Report on *Detainee Mistreatment and Rendition: Current Issues* identified that obtaining assurances in writing can be problematic, as “it can be taken to imply suspicion”, “undermine trust and jeopardise future cooperation”.⁹⁴ The Committee recommended that:⁹⁵

“where it is not possible to obtain a written assurance from a liaison partner, a written record of the oral assurance should be produced and sent to the liaison partner so that there is a shared understanding of expectations”.

The New Zealand position on assurances

71. The New Zealand Government’s official stance on assurances, to mitigate an identified risk of torture or other mistreatment, was articulated to the Committee Against Torture in March 2017.⁹⁶ New Zealand’s position was that, while it shared the Committee’s view that diplomatic assurances should not be used to undermine the principle of non-refoulement, the practice

⁸⁹ *R (on application of Maya Evans)*, above n 88.

⁹⁰ David Anderson QC and Professor Clive Walker QC *Deportation with assurances* ((House of Commons, CM 9462, July 2017) at [7.6].

⁹¹ Anderson and Walker *Deportation with assurances*, above n 90, at [3.36] - [3.42].

⁹² Committee Against Torture *Concluding Observations Periodic Report of United States of America* CAT/C/USA/CO/2 (25 July 2006) at [21]; See also Committee Against Torture *Concluding Observations Periodic Report of United States of America* CAT/C/USA/CO/3-5 (19 December 2014) at [16]; *Agiza v Sweden* Committee Against Torture CAT/C/34/D/233/2003 (20 May 2003) at [13.4].

⁹³ Omar Sabry *Torture of Afghan Detainees* (Canadian Centre for Policy Alternatives, 2015).

⁹⁴ UK ISC *Current Issues*, above n 66, at [62] Recommendation V.

⁹⁵ UK ISC *Current Issues*, above n 66, at [62] Recommendation V.

⁹⁶ New Zealand Government “Observations of New Zealand on the Committee Against Torture’s draft revised General Comment No.1 (2017) on the Implementation of Article 3 of the Convention on the Context of Article 22” (24 March 2017); Responding to the Committee’s *Draft General Comment No 1 (2017) on the implementation of Article 3 of the Convention in the context of Article 22*, Committee Against Torture 60th session CAT/C/60/R.2 (2 February 2017); Now confirmed as *General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22* (Advance unedited version, 9 February 2018).

of such assurances is well-established internationally and there can be circumstances in which assurances meet certain minimum quality and reliability thresholds, so it is possible for a State to take diplomatic assurances into account consistent with the principle of non-refoulement. It will depend on all the factors of a case, including the human rights situation in the receiving State, the risk factors associated with the individual, and the quality and practical enforceability of the assurances.

72. Recently the New Zealand Court of Appeal reviewed a decision by the (former) Minister of Justice to allow the extradition of a Mr Kim to the People's Republic of China (PRC).⁹⁷ The High Court had held that the Minister of Justice was entitled in principle to rely on the nature and quality of Chinese Government's assurances.⁹⁸ The Court of Appeal quashed the decision, with the current Minister of Justice to reconsider whether Mr Kim is to be surrendered. The Court of Appeal confirmed that New Zealand is not prohibited from accepting or relying on diplomatic assurances when assessing whether there is a substantial risk that a person will be tortured or otherwise subjected to breaches of human rights.⁹⁹ However, the Court held that consideration of the preliminary question, whether the general human rights situation in China is such that assurances should not be sought or accepted, was not sufficient.¹⁰⁰ Further, relevant evidence asserting that murder-accused were at high-risk of torture could not reasonably be put to one side.¹⁰¹ The Court held that the Minister erred in failing to address inadequacies in the assurances and how they could protect against torture in China when:¹⁰²

- Torture is already against the law, yet persists;
- The practice of torture is concealed by the State and its use can be difficult to detect;
- Torture often occurs outside the videotaped interrogation;
- Evidence obtained by torture is frequently admitted in court; and
- There are substantial disincentives for anyone, including the detained person, reporting the practice of torture.

Practical factors for considering assurances

73. Practical factors to take into account, in evaluating the appropriate use of assurances and whether received assurances can be relied upon, are broadly instructive and applicable across a number of areas, such as information sharing. These factors include:

For assurances developed with regard to deportation:

- a preliminary question of whether the general human rights situation in the receiving State excludes accepting any assurances whatsoever (eg, including

⁹⁷ *Kyung Yup Kim v Minister of Justice and the Attorney-General* [2019] NZCA 2019, 11 June 2019.

⁹⁸ *Kyung Yup Kim v Minister of Justice and the Attorney-General*, above n 97, at [39], [45] and [56] to [67].

⁹⁹ *Kyung Yup Kim v Minister of Justice and the Attorney-General*, above n 97, at [70].

¹⁰⁰ *Kyung Yup Kim v Minister of Justice and the Attorney-General*, above n 97, at [275.b].

¹⁰¹ *Kyung Yup Kim v Minister of Justice and the Attorney-General*, above n 97, at [275.d].

¹⁰² *Kyung Yup Kim v Minister of Justice and the Attorney-General*, above n 97, at [275.f(i) to (v)].

consideration of any actions by the country taken in response to previously critical external reports);¹⁰³

- whether the assurances are specific or are general and vague;¹⁰⁴
- who has given the assurances and whether that person can bind the receiving State;¹⁰⁵
- if the assurances have been issued by the central government of the receiving State, whether regional authorities can be expected to abide by them;¹⁰⁶
- whether the assurances concern treatment which is legal or illegal in the receiving State;¹⁰⁷
- the length and strength of bilateral relations between the sending and receiving States, including the receiving State's record in abiding by similar assurances;¹⁰⁸
- whether the individual has previously been ill-treated in the receiving State;¹⁰⁹
- whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms;¹¹⁰ including providing unfettered access to the individual's lawyer,¹¹¹ and to the individual themselves;
- whether there is an effective system of protection against torture in the receiving State, including a willingness to cooperate with international monitoring mechanisms (including UN special procedures and international human rights NGOs);¹¹²
- whether the State is willing to investigate allegations of torture and to punish those responsible;¹¹³

¹⁰³ *Othman (Abu Qatada) v United Kingdom* (Application No. 8139/09) ECHR, 17 January 2012 (*Othman*) at [188]; Anderson and Walker *Deportation with assurances*, above n 90, at 49, noting this as "the key consideration to be taken into account when developing safety on return processes".

¹⁰⁴ *Othman*, above n 103, at [189(ii)] citing *Saadi v Italy* (GC) no 37201/06 ECHR 2008.

¹⁰⁵ *Othman*, above n 103, at [189(iii)] citing, *inter alia*, *Baysakov and Others v Ukraine* (54131/08) ECHR 18 February 2010 at [51]; *Soldatenko v Ukraine* (2440/07) ECHR 23 October 2008 at [73].

¹⁰⁶ *Othman*, above n 103, at [189(iv)] citing *Chahal v United Kingdom* 15 November 1996 *Reports of Judgments and Decisions 1996-V* at [105] to [107].

¹⁰⁷ *Othman*, above n 103, at [189(v)] citing, *inter alia*, *Cipriani v Italy* (221142/07) ECHR 30 March 2010; *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3.

¹⁰⁸ *Othman*, above n 103, at [189(vii)] citing, *inter alia*, *Al-Moayad v Germany* (35865/03) ECHR 20 February 2007 at [68].

¹⁰⁹ *Othman*, above n 103, at [189(ix)] citing, *inter alia*, *Koktysh v Ukraine* (43707/07) ECHR 10 December 2009 (*Koktysh v Ukraine*) at [64].

¹¹⁰ UK Intelligence Services Commissioner *Report of Intelligence Services Commissioner for 2015* (House of Commons, HC 459, 2016) at 43.

¹¹¹ *Othman*, above n 103, at [189(viii)] citing, *inter alia*, *Chentiev and Ibragimov v Slovakia* (21022/08 and 511946/08) ECHR 14 September 2010.

¹¹² *Othman*, above n 103, at [189(ix)] citing, *inter alia*, *Koktysh v Ukraine*, above n 109, at [63].

¹¹³ *Othman*, above n 103, at [189(ix)] citing, *inter alia*, *Koktysh v Ukraine*, above n 109, at [63].

- whether the reliability of the assurances has been examined by the domestic courts of the sending State;¹¹⁴

For assurances in general:

- whether the assurances are in writing or, at a minimum, a written record of an oral agreement;¹¹⁵
- whether a package of assurances can be delivered more satisfactorily through a collective MOU, than an individually tailored arrangement;¹¹⁶ and
- whether there are clear and effective steps in place to take in case of suspected breach of the assurance.

74. In Canada, SIRC's *2017-2018 Annual Report* notes results from a further review of CSIS information sharing with foreign entities, in cases where the potential for mistreatment existed.¹¹⁷ SIRC states that where mitigation measures were used (generally caveats and assurances), the associated risks should be appropriately assessed and documented.

"The reliability of assurances to mitigate the risk of torture or mistreatment depends on a number of contextual factors. SIRC considered the following to be the most important: (1) the human rights record of the state and agency in question; (2) the length and strength of bilateral relations between the two states; and (3) the other state's record in abiding by assurances in the past."¹¹⁸

75. SIRC found that in two of the four case studies reviewed in 2017 the risks of sharing or soliciting information, as well as the risk that caveats and assurances would not be respected, were not appropriately assessed or documented by operational managers. At the strategic level, emphasising the importance of established requirements for monitoring and review, SIRC found that:

"CSIS did not have any documented criteria or thresholds that would trigger a re-evaluation of the relationships with these countries in response to intelligence suggesting that assurances were not being adhered to."¹¹⁹

Mitigation tool: Legal initiatives

76. Legal initiatives can be engaged in order to understand a recipient State's interpretation of the law. This may seek to build a common understanding of international law and, where there are differences, to explore whether such interpretive differences can be bridged or managed,

¹¹⁴ MFAT *Expulsion with Diplomatic Assurances in the Context of Torture and Ill-Treatment* (DATE) citing *Othman*, above n 103, at [189(xi)] citing in turn, *inter alia*, *Babar Ahmad and Others v United Kingdom* (24027/07, 11949/08 and 36742/08) ECHR 6 July 2010 at [106].

¹¹⁵ UK Intelligence Services Commissioner *Report for 2015*, above n 110, at 43, regarding best practice for UK intelligence services when sharing intelligence with liaison partners and using assurances to mitigate against CIDT. Further, the UK Consolidated Guidance (2019) above n 54, at [21], requires that "[W]hen an assurance or caveat is not made in writing, personnel must keep an accurate record of any discussions and, whenever feasible, should share it with the foreign authority as a formal note as soon as is practicable."

¹¹⁶ Anderson and Walker *Deportation with assurances*, above n 90, at [7.5].

¹¹⁷ SIRC *2017-2018 Annual Report* (2018) at 15 to 17. This followed a first review by SIRC in 2015.

¹¹⁸ SIRC *2017-2018 Annual Report*, above n 117, at 16.

¹¹⁹ SIRC *2017-2018 Annual Report*, above n 117, at 17.

for example through the use of conditions, assurances and independent monitoring.¹²⁰ Where there are concerns about the recipient State's compliance with international law, it will be for the New Zealand government, as a matter of foreign policy, to decide how to respond.

Mitigation tool: Practising segmented cooperation or confining assistance to particular parts of a State

77. Where intelligence and security agencies hold concerns about particular agencies within a State, they may elect in future to share information only with specific parts of the State, or they may assess the risk to be lower if exchanging only specific types of information. This might comprise, for example, sharing 'building block intelligence' which contributes to a picture of a terrorist group over time, but not 'actionable intelligence' which may be more specific to individuals and thus more capable of giving rise to a breach of international law.¹²¹

Consider establishing a separate evaluative body

78. The practice of referring certain decisions on cooperation to an external or cross-government body for approval ensures transparent, robust and documented decision-making, and avoids the risk that agencies may conflate their operational or relationship objectives with the quite separate question of whether particular information sharing or cooperation is lawful or proper in any one case.
79. It can also afford some practical utility. A cross-government perspective can avoid inconsistencies (such as continuing cooperation in intelligence matters at a time when other cooperation is suspended). An external agency can bring a differently-informed perspective to an assessment of a receiving State or agency.
80. Under the CSIS MD, if there is a substantial risk of mistreatment in a given instance of information sharing and it is unclear whether that risk can be mitigated, the decision is referred to the Director of CSIS. This is automatically done via an Information Sharing Evaluation Committee (ISEC). Members of ISEC are senior CSIS officials and representatives from other government departments.¹²² Before making a decision, ISEC guidelines indicate it can request additional checks such as carrying out a specific interview, or asking the foreign entity for details regarding how the information was obtained, in addition to usual check on the entity's human rights records and so forth.¹²³
81. For the New Zealand Intelligence Community, the 'national security governance structures' outlined in Part 2 of the *National Security System Handbook*, suggest potential options for establishing a similar evaluative committee in New Zealand.

¹²⁰ Harriet Moynihan "Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism" (Research paper, International Law Programme, Chatham House 2016) citing Brian Egan "International Law, Legal Diplomacy, and the Counter-ISIL Campaign" (ASIL Conference, Washington DC, 1 April 2016) at 10 to 11.

¹²¹ On this distinction for sharing purposes, see Sir Peter Gibson *The Report of the Detainee Inquiry* (December 2013, at [4.15]; also UK Intelligence Services Commissioner *Supplementary to the Annual Report for 2015*, above n 43, at [21.3(2)], citing the approach taken in the OSJA *Human Rights Guidance*.

¹²² SIRC *Annual Report 2017-18*, above n 117, "Case Studies Regarding CSIS Information Sharing with Foreign Entities".

¹²³ Released under the Access to Information Act (to Craig Forceese; The Canadian Press).

Act lawfully and with propriety where a substantial/real risk of torture or CIDTP exists

82. Only after identifying likely or factual circumstances, assessing the risk, and, if necessary, considering options for mitigation, should a decision be taken on whether to proceed with the intelligence exchange or proposed assistance (eg at a detainee interview). If, despite taking appropriate steps in mitigation, there remains a real risk of torture, then best practice dictates that the exchange or cooperation should not proceed. The information sharing or participation in a detainee interview should be suspended, deferred or cease altogether.

“Quite apart from the political and reputational risks involved, to proceed with assistance in the knowledge of noncompliance with international law by the recipient State entails responsibility under international law for the assisting State.”¹²⁴

83. The UN Special Rapporteur’s Report on best practice states that “for sharing information about specific individuals, unsurprisingly the advice is to maintain an absolute prohibition on the sharing of any information if there is a reasonable belief that sharing information could lead to the violation of the rights of the individual(s) concerned”.¹²⁵ This stance reflects that the condemnation of torture does not simply operate as an exclusionary rule of evidence, but is more aptly categorised as a constitutional principle.¹²⁶
84. The UK’s updated *Consolidated Guidance* requires, in situations where a real risk of torture exists, that any incidence of failure to comply with the *Guidelines* be reported to the oversight body, the Investigatory Powers Commissioner as soon as reasonably practicable after the event.¹²⁷

Have in place robust monitoring, regular reviews and adequate record-keeping

Robust monitoring and regular review of State/agency actions

85. A country’s record on human rights requires regular as well as responsive review. Monitoring developments in other jurisdictions must include measuring the extent to which recipient States comply with caveats and assurances and, as necessary, access to detainees remains open. As noted above, SIRC’s review of information sharing arrangements found a State’s failure to adhere to assurances to be a trigger for review. Current litigation in the UK has identified a concern that the Government may have relied upon assurances, despite UK intelligence agencies having, but not disclosing, information that undermined those assurances.¹²⁸
86. If reviews, monitoring or other follow-up actions give rise to serious concerns about the compatibility of the actions of the recipient State or agency with the international law, best practice should dictate that the agency inquires into any alleged torture or ill-treatment of

¹²⁴ Harriet Moynihan “Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism”, above n 120.

¹²⁵ Martin Scheinin *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism A/HRC/10/3* (2009) at [47].

¹²⁶ *A (No 2)*, above n 33, at [12] per Lord Bingham.

¹²⁷ UK *Consolidated Guidance* (2019) above n 54 at [22] to [29]. The procedures set out in the *Guidance* apply notwithstanding an authorisation granted under section 7 of the Intelligence Service Act 1994.

¹²⁸ *Kamoka & Ors v Security Services & Ors* [2017] EWCA Civ 1665 at [99] and [115].

individuals. The results of these inquiries will contribute to the reassessment or final decision on whether it is lawful to exchange information.

Regular review of policy: Content and compliance

87. A process of regular review must include an agency’s own policy, to ensure it adequately equips staff to consider and respond to risk, and make certain it is being complied with. In the UK, the UK *Consolidated Guidance* was reviewed in 2016 by the (former) Intelligence Services Commissioner, Rt Hon Sir Mark Waller. In 2018 the ISC summarised current issues with its breadth of application and content, including that it actually provides little specific guidance and that in the seven years it has been in place:

“there appears to have been remarkably little attempt to evaluate or review its operation beyond ensuring compliance for oversight purposes. ... While the Investigatory Powers Commissioner considers compliance with the Guidance, it is not his responsibility to consider whether the Guidance is achieving its policy objectives”.¹²⁹

88. As a result, the UK Prime Minister instructed the Investigatory Powers Commissioner (IPCO) to undertake a review of the *Consolidated Guidance*. As part of that review IPCO commenced a consultation round with civil society on 20 August 2018 (with the updated *Consolidated Guidance* published in July 2019). The publication of the relevant Guidance and public consultation as to content is a model that New Zealand should consider. Such transparency serves to emphasise the need for regular review of keep an agency’s policy content fit for purpose.

Adequate record-keeping

89. The routine creation of an auditable trail of documents, recording the decisions and activities of intelligence services and their partners, is essential to both their internal operation and management and their external oversight.¹³⁰
90. The former UK Intelligence Services Commissioner recommended the establishment of a central record-keeping hub which tracks and monitors all relevant allegations of torture and cruel, inhuman or degrading treatment or punishment, unlawful arrest or detention and procedural unfairness, and the steps taken in response.¹³¹ In many respects this reflects the best practice noted above of a library of previous assessments and links to sources.

SUMMARY: THE ELEMENTS OF BEST PRACTICE

Clear Ministerial Directions:

- Set out the Minister’s expectations and guidance to staff so that information sharing and cooperation by the intelligence and security agencies avoids any connection with acts of torture or CIDTP by other States and agencies;

¹²⁹ UK ISC *Current Issues*, above n 66, at 1 and 2.

¹³⁰ UK Intelligence Services Commissioner *Supplementary to the Annual Report for 2015*, above n 43, at [22.1].

¹³¹ UK Intelligence Services Commissioner *Supplementary to the Annual Report for 2015*, above n 43, at [21.3(5)].

- Clarify the exceptional circumstances, if any, in which the Minister considers that information likely obtained by torture may be used by the agencies and, if so, the constraints around such use.

Applicable law in a standalone guide for staff:

- Provide relevant domestic and international law on human rights, data protection and IHL.

Written formal arrangements/agreements on information sharing between parties (ie, between States or State agencies):

- Have clear rules governing the use of shared information, signed off by the Director of the intelligence and security agency or Minister;
- Include statements of compliance with human rights law, data protection obligations, and with the third party rule;
- Address situations where receipt is at third hand, and allow for the sending party to request feedback on use of the information;
- Ensure regular review, including by oversight bodies when arrangements/agreements are concluded or revised.

Policy to inform the assessment of a State's human rights record and risks around engagement:

- Provide a range of sources for information about States' human rights records and practices, including the treatment of detainees, and require assessments to be comprehensive by drawing on multiple sources of information;
- Be clear that making such assessments can involve asking hard questions, and that best practice should dictate an inquiry into allegations of torture or ill-treatment;
- Consider the nature of the information to be sent or received and the particular circumstances;
- Assess the likelihood of a real/substantial risk of human rights breaches;
- Include templates to guide making these assessments; and
- Ensure that information received unsolicited or "passively" by agencies also undergoes the requisite risk assessment as to whether it has likely been obtained by torture.

Take action to mitigate the risk of contributing to acts of torture:

- Employ caveats to set conditions (originator control) on how information may be used by the receiving party (or parties): in writing; establish procedures to monitor adherence to caveats by the receiving party; not appropriate as a sole method to mitigate risk or for a State/agency where caveats previously breached or with a poor human rights record;
- Seek assurances: in writing or at least a written and shared record of an oral undertaking; of sufficient detail; able to be monitored for compliance (for example, through right of access to a detainee); not appropriate as a sole

method to mitigate risk or for a State/agency where assurances previously breached or with a poor human rights record;

- Use legal initiatives: to, for example, build a common understanding with partners of obligations under international law;
- Practise segmented cooperation or confine assistance to particular parts of a State; or distinguish between 'actionable' and 'building block' intelligence.

Where there is a real/substantial risk of torture, ensure agency responses are lawful and proper:

- Have a plan in place for, when necessary, the immediate cessation of information sharing and cooperation with a State/agency, pending further inquiry;
- The plan should include seeking legal advice, informing the relevant Minister and oversight body.

Establish regular and responsive monitoring and review:

- Regularly review a State or foreign agency's human rights record and practices (including a State's legal approach to prohibiting acts of torture); trigger reviews in response to indications of human rights breaches; practice due diligence;
- Periodically monitor State/agency compliance with caveats, assurances and other undertakings;
- Regularly review policy content and your own agency's compliance with policy.

Require adequate record-keeping:

- Ensure adequate and informative records are available if decisions, in particular any relating to torture-derived information, are to be revisited or reviewed, and to facilitate effective democratic oversight.



Office of the Inspector-General of Intelligence and Security

Selected References / Bibliography from the Inquiry's classified Report

Supplementary Paper

To the Inquiry into possible New Zealand intelligence and security agencies' engagement with the CIA detention and interrogation programme 2001-2009

Cheryl Gwyn
Inspector-General of Intelligence and Security
July 2019

SELECTED REFERENCES/BIBLIOGRAPHY

The following references are resources considered by the Office of the Inspector-General of Intelligence and Security during the Inspector-General's Inquiry into possible New Zealand intelligence and security agencies' engagement with the CIA detention and interrogation programme 2001-2009.' A report of the Inquiry is available at <http://www.igis.govt.nz>

CASES

International

- *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)* [1984] ICJ Rep 246
- *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 17
- *Prosecutor v Furundzija (Judgment)* ICTY Trial Chamber IT-95-17/1 (10 December 1998)
- *Prosecutor v Momcilo Perisic (Judgment)* ICTY Appeals Chamber IT-04-81-A (28 February 2013)
- *Prosecutor v Nikola Sainovic et al (Judgment)* ICTY Appeals Chamber IT-05-87-A (23 January 2014)
- *Prosecutor v Ramush Haradinaj* ICTY Trial Chamber IT-04-84-T (3 April 2008)
- *Prosecutor v Ratko Mladić (Judgment)* ICTY Trial Chamber IT-09-92-T (22 November 2017)

Europe

- *Abu Zubaydah v Lithuania* (Application No. 46454/11) ECHR, 31 May 2018
- *Al Nashiri v Poland (Judgment)* (Application No. 28761/11) 24 July 2014 (Former Fourth Section); [2014] ECHR 875
- *Al Nashiri v Romania* (Application No. 33234/12) ECHR, 31 May 2018
- *Chahal v United Kingdom* (1996) 23 EHRR 413
- *El-Masri v The Former Yugoslav Republic of Macedonia (Judgment)* (Application No. 39630/09) 13 December 2010 (Grand Chamber)
- *Husayn (Abu Zubaydah) v Poland (Judgment)* (Application No. 7511/13) 24 July 2014 (Former Fourth Section)
- *Jalloh v Germany* (2007) 44 EHRR 32
- *Keenan v United Kingdom* (2001) 33 EHRR 38
- *Khaled el-Masri v The Former Yugoslav Republic of Macedonia* (Application No. 39630/09) 13 December 2012
- *Labita v Italy* (2008) 46 EHRR 50
- *Nasr and Ghali v Italy* (Application No. 44883/09) ECHR, 23 February 2016
- *Othman (Abu Qatada) v United Kingdom* (Application No. 8139/09) ECHR, 17 January 2012
- *Pretty v United Kingdom* (2002) 35 EHRR 1
- *Saadi v Italy* [2008] ECHR 179
- *Soering v United Kingdom* (1989) 11 EHRR 439

New Zealand

- *Ahsin v R* [2015] 1 NZLR 493
- *Attorney-General (Minister of Immigration) v Tamil X* [2011] 1 NZLR 721
- *Kyung Yup Kim v The Minister of Justice and the Attorney-General* [2017] NZHC 2109, 31 August 2017

- *Charnley v R* (2013) 26 CRNZ 264 (CA)
- *Puli'uvea v Removal Review Authority* (1996) 2 HRNZ 51
- *R v Alsford* [2017] 1 NZLR 710
- *R v Brough* CA507/96, 27 February 1997 (CA)
- *R v Samuels* [1995] 1 NZLR 350 (CA)
- *Taunoa & Ors v Attorney-General & Ors* [2006] 2 NZLR 457
- *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289 (SC)

Canada

- *Charkaoui v Canada (Citizenship and Immigration)* (2007) SCC 9
- *In relation to Mahjoub's Security Certificate* (2010) FC 787
- *Suresh v Canada (Minister of Immigration and Citizenship)* [2002] 1 SCR 3

United Kingdom

- *A and others v Secretary of State for the Home Department (No 1)* [2004] UKHL 56
- *A and ors v Secretary of State for the Home Department (No 2)* [2005] UKHL 71; [2006] 2 AC 221; [2006] 1 All ER 575
- *Abd Ali Hameed Al-Waheed v Ministry of Defence and Serdar Mohammed v Ministry of Defence* [2017] UKSC 2
- *Ahmed and anor v R* [2011] EWCA Crim 184; [2011] Crim LR 734; [2011] All ER (D) 277
- *Belhaj & Anor v Straw & Ors, Rahmatullah v MOD & Anor* [2017] UKSC 3
- *Kamoka & Ors v Security Services & Ors* [2017] EWCA Civ 1665
- *R (Binyam Mohamed) v Secretary of State for Foreign & Commonwealth Affairs* [2009] EWHC 152 (Admin)
- *R (on the application of Campaign Against Arms Trade) v The Secretary of State for International Trade and Intervenors* [2017] EWHC 1754 (Admin)
- *R (on the application of Campaign Against Arms Trade) v The Secretary of State for International Trade and Intervenors* [2019] EWCA Civ 1020
- *R (on application of Maya Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin)
- *RB and U (Algeria) and OO (Jordan) v Secretary of State for the Home Department* [2009] UKHL 1
- *The Equality and Human Rights Commission v Prime Minister & ors, R (Al Bazzouni) v The Prime Minister & ors*, 3 October 2011, [2011] EWHC 2401 (Admin) [2012] 1 WLR 1389
- *Youssef (Appellant) v Secretary of State for Foreign and Commonwealth Affairs (Respondent)* [2016] UKSC 3

United States of America

- *Salim v Mitchell* 268 F.Supp.3d 1132 (2017) United States District Court E.D. Washington (7 August 2017)

LEGISLATION AND BILLS

New Zealand

- Abolition of Death Penalty Act 1989
- Crimes Act 1961
- Crimes of Torture Act 1989
- Extradition Act 1999

- Geneva Conventions Act 1958
- Government Communications Security Bureau Act 2003
- Immigration Act 2009
- Intelligence and Security Act 2017
- International Crimes and International Criminal Court Act 2000
- New Zealand Bill of Rights Act 1990
- New Zealand Security Intelligence Service Act 1969
- State Sector Act 1988
- New Zealand Security Intelligence Service Amendment Bill 2011 No 259-2

Canada

- Canadian Security and Intelligence Service Act 2002
- Bill C-59

United Kingdom

- Intelligence Services Act 1994
- Official Secrets Act 1911-1989

United States of America

- National Defense Authorization Act for the Fiscal Year 2016

LEGAL INSTRUMENTS

International

- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987)
- Geneva Conventions: Conventions for the Protection of War Victims 75 UNTS 287 (opened for signature 12 August 1949, entered into force 21 October 1950); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Victims of International Armed Conflict (Protocol I) 1977
- International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entry into force 23 March 1976).
- Rome Statute of the International Criminal Court (Rome, 17 July 1998; Treaty Series No 35 (2002); Cm 5590)
- Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia
- Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entry into force 27 January 1980)

Europe

- Convention for the Protection of Human Rights and Fundamental Freedoms (1950)
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ETS 126 (opened for signature 26 November 1987, entry into force 1 February 1989)

BOOKS AND CHAPTERS IN BOOKS

- Barrett, Richard and Parker, Tom “Acting ethically in the shadows: Intelligence gathering and human rights” in Nowak, Manfred and Charbord, Anne (eds) *Using Human Rights to Counter Terrorism* (Edward Elgar Publishing, United Kingdom, 2018)
- Brecher, Bob *Torture and the Ticking Bomb* (Blackwell Publishing, Oxford, 2007)
- Cole, Alan “Legal Issues in Forming the Coalition” in Schmitt, Michael (ed) *The War in Afghanistan: A Legal Analysis* (US Naval War College, Newport, 2009)
- Crosby, Ron *NZSAS The First Fifty Years* (Viking, Auckland, 2009)
- Dinstein, Yoram *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press, Cambridge, 2004)
- Hagar, Nicky *Other People’s Wars: New Zealand in Afghanistan, Iraq and the War on Terror* (Craig Potton Publishing, Wellington, 2011)
- Jorgensen, Nina H. B. “The Obligation of Cooperation” in Crawford, James, Pellet, Alain and Olleson, Simon (eds) *The Law of International Responsibility* (Oxford University Press, Oxford, 2015)
- Jorgensen, Nina H. B. “The Obligation of Non-Assistance to the Responsible State” in Crawford, James, Pellet, Alain and Olleson, Simon (eds) *The Law of International Responsibility* (Oxford University Press, Oxford, 2015)
- Marks, Susan and Azizi, Florentina “Responsibility for Violations of Human rights Obligations: International Mechanisms” in Crawford, James, Pellet, Alain and Olleson, Simon (eds) *The Law of International Responsibility* (Oxford University Press, Oxford, 2015)
- Nowak, Manfred and Charbord, Anne “Key trends in the fight against terrorism and key aspects of international human rights law” in Nowak, Manfred and Charbord, Anne (eds) *Using Human Rights to Counter Terrorism* (Edward Elgar Publishing, Cheltenham, 2018)
- Nowak, Manfred and McArthur, Elizabeth *The United Nations Convention Against Torture: A Commentary* (Oxford University Press, Oxford, 2008)
- Olasolo, Hector and Rojo, Enrique Carnero “Forms of Accessorial Liability under Article 25(3)(b) and (c)” in Stahn, Carsten (ed) *The Law and Practice of the International Criminal Court* (1st ed, Oxford University Press, USA, 2015)
- Shaw, Malcolm *International Law* (8th ed, Cambridge University Press, Cambridge, 2017)
- Stahn, Carsten (ed) *The Law and Practice of the International Criminal Court* (Oxford University Press, USA, 2015)

JOURNAL ARTICLES

- Asuncion, Amabelle C. “Pulling the Stops on Genocide: The State or the Individual?” *European Journal of International Law* 20(4) (2009)
- de Wet, Erika “Complicity in the Violations of Human Rights and Humanitarian Law by Incumbent Governments through Direct Military Assistance on Request” *International and Comparative Law Quarterly* (April 2018) 67
- Forcese, Craig “Touching Torture with a Ten-Foot Pole: The Legality of Canada’s Approach to National Security Information Sharing with Human Rights-Abusing States” (2015) 52.1 *Osgoode Hall Law Journal* 263
- Fulton, Sarah “Cooperating with the enemy of mankind: can states simply turn a blind eye to torture?” *The International Journal of Human Rights* (June 2012) 16(5) 773
- Gaskarth, Jamie “Entangling alliance: the UK’s complicity in torture in the global war on terrorism” *International Affairs* (2011) 87(4) 945

- Jackson, Miles “Freeing Soering: The ECHR, State Complicity in Torture, and Jurisdiction” *European Journal of International Law* (2016) 27(3) 817
- Jorgensen, Nina H. B. “Complicity in Torture in a Time of Terror: Interpreting the European Court of Human Rights Extraordinary Rendition Cases” *Chinese Journal of International Law* (10 April 2017) 16(1) 11
- Moynihan, Harriet “Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism Chatham House, Royal Institute of International Affairs” Research Paper (November 2016)
- Nolte, Georg and Aust, Helmut Philipp “Equivocal Helpers - Complicit States, Mixed Messages and International Law” *ICLQ* (January 2009) 58(1) 1
- Seibert-Fohr, Anja “From Complicity to Due Diligence: When do States Incur Responsibility for Their Involvement in Serious International Wrongdoing?” *German Yearbook of International Law* (2018) 60 (Forthcoming) 667

UNITED NATIONS MATERIALS

- *Agiza v Sweden Committee against Torture* CAT/C/34/D/233/2003 (20 May 2003)
- *Alzery v Sweden Human Rights Committee* CCPR/C/88/D/1416/2005 (25 October 2006)
- Committee against Torture *Concluding Observations Periodic Report of United States of America* CAT/C/USA/CO/2 (25 July 2006)
- Committee against Torture *Concluding Observations Periodic Report of United States of America* CAT/C/USA/CO/3-5 (19 December 2014)
- Committee against Torture *Concluding Observations: Denmark* CAT/C/DNK/CO/5 (2007), cited in Crown Law Office opinion to NZDF (2 November 2010)
- Committee against Torture *Fifth Periodic Report of New Zealand* CAT/C/NZL/5 (15 August 2007)
- Committee against Torture *General Comment 2 Implementation of article 2 by State Parties* CAT/C/GC/2 (24 January 2008)
- Committee against Torture *General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22* Advance unedited version (9 February 2018)
- Committee against Torture *Sixth Periodic Report of New Zealand* CAT/C/NZL/6 (20 December 2013)
- ECOSOC *Report of the working Group on Arbitrary Detention* E/CN.4/2006/7 (12 December 2005)
- *Hajirizi Dzemajl et al v Yugoslavia* No. 161/2000, CAT/C/29/D/16/2000
- International Law Commission *Articles on the Responsibility of States for Internationally Wrongful Acts* Annexed to UN GA Res 56/83 (12 December 2001)
- International Law Commission *Report to the General Assembly on the work of its fifty-third session* A/56/10, 2001, Vol II, Part Two, General Commentary
- International Law Commission *Yearbook of the International Law Commission* A/CN.4/SER.A/2001/Add.1 (Part 2) (United Nations, Geneva, 2007)
- *Manual on the Effective Investigation and Documentation of Torture and Other Cruel Inhuman or Degrading Treatment or Punishment* (‘The Istanbul Protocol’) Professional Training Series, No 8/Rev 1) (2004)
- Office of the UN High Commissioner for Human Rights and UN Assistance Mission in Afghanistan *Treatment of Conflict-Related Detainees in Afghan Custody: Implementation of Afghanistan’s National Plan on the Elimination of Torture* Kabul (April 2017)
- Office of the United Nations High Commissioner for Human Rights and UN Assistance Mission in Afghanistan *Update on the Treatment of Conflict-Related Detainees in Afghan Custody: Accountability and Implementation of Presidential Decree 129* Kabul (February 2015)

- Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin *Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism* A/HRC/14/46 (17 May 2010)
- Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak *Report of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment* E/CN.4/2006/6 (23 December 2005)
- Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer *Interim Report: Seventieth anniversary of the Universal Declaration of Human Rights: reaffirming and strengthening the prohibition of torture and other cruel, inhuman or degrading treatment or punishment* A/73/207 (July 2018)
- *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights Annex*, UN Doc E/CN.4/1984/4 (1984)

EUROPEAN MATERIALS

- Council of the European Union *User's Guide to Council Common Position 2008/944/CFSP*
- European Parliament *Resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners* ('the 2007 EP Resolution', 2006/22009INI, 14 February 2007)
- Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights *Report of investigation into CIA secret detention sites by Senator Dick Marty* ('the Marty Report', 7 June 2006)

PARLIAMENTARY AND GOVERNMENT MATERIALS

New Zealand

- *Arrangement Between the Ministry of Foreign Affairs of the Islamic Republic of Afghanistan and the New Zealand Defence Force Concerning the Transfer of Persons Between the New Zealand Defence Force and the Afghan Authorities* (12 August 2009)
- Department of Prime Minister and Cabinet, Intelligence and Security Act Cabinet Paper 2 *Warranting and authorisation framework* (2016)
- Department of Prime Minister and Cabinet, Intelligence and Security Act Cabinet Paper 6 *Activities of the intelligence agencies – Information sharing and arrangements with foreign partners*
- Ministerial Policy Statement *Cooperation of New Zealand intelligence and security agencies (GCSB and NZSIS) with overseas public authorities* (September 2017)
- Ministry of Foreign Affairs and Trade *Expulsion with Diplomatic Assurances in the Context of Torture and Ill-Treatment*
- Sir Michael Cullen and Dame Patsy Reddy *Intelligence and Security in a Free Society* (G24a, 29 February 2016)

Australia

- Inspector-General of Intelligence and Security, Australia *Inquiry into the actions of Australian government agencies in relation to the arrest and detention overseas of Mr Mamdouh Habib from 2001 to 2005* (December 2011)

Canada

- Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (Ottawa: Public Works and Government Services Canada, Volume 3, 2006)
- *Ministerial Directions on Avoiding Complicity in Mistreatment by Foreign Entities* (2017) (issued to agencies including: Canadian Security Intelligence Services; Royal Canadian Mounted Police; Canada Border Services Agencies)
- *Ministerial Directions on Information-Sharing with Foreign Entities* (2011)
- Security Intelligence Review Committee *2017-2018 Annual Report*
- Security Intelligence Review Committee *CSIS's Role in Interviewing Afghan Detainees* (SIRC Study 2010-01 July 4, 2011)

The Netherlands

- The Netherlands Review Committee on the Intelligence and Security Services (CTIVD) *Review Report 22a on the cooperation by GISS with foreign intelligence and security services* (2009)

United Kingdom

- *Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees* (July 2010)
- David Anderson QC *A Question of Trust: Report of the Investigatory Powers Review* (Cm 9462, Independent Reviewer of Terrorism Legislation, June 2015)
- David Anderson QC and Clive Walker QC *Deportation with assurances* (July 2017)
- Detainee Inquiry Seminar *Information including speaker transcripts on the Detainee Inquiry's seminar on 8 June 2011, on international and domestic law on torture, other ill treatment and complicity* (8 June 2011)
- *Government Response to the Intelligence and Security Committee's Report on the Handling of Detainees by UK Intelligence Personnel in Afghanistan, Guantanamo Bay and Iraq* (April 2005)
- Inquiry Panel *The Report of the Detainee Inquiry* ('Gibson Inquiry', Cabinet Office, December 2013)
- Intelligence and Security Committee *Detainee Mistreatment and Rendition: 2001-2010* (HC 1113, 28 June 2018)
- Intelligence and Security Committee *Detainee Mistreatment and Rendition: Current Issues* (HC 1114, 28 June 2018)
- Intelligence and Security Committee *Rendition* (July 2007)
- Intelligence and Security Committee *The Handling of Detainees by UK Intelligence Personnel in Afghanistan, Guantanamo Bay and Iraq* (March 2005)
- Intelligence Services Commissioner, Rt Hon Sir Mark Waller *Report of Intelligence Services Commissioner for 2015* HC 459 SG/2016/96
- Intelligence Services Commissioner, Rt Hon Sir Mark Waller *Supplementary to the Annual Report for 2015* (House of Commons, HC 458, 2016)
- Joint Committee on Human Rights *Allegations of UK Complicity in Torture* (Twenty-third Report of Session 2008-09 HL Paper 152 HC 230, August 2009).
- Joint Committee on Human Rights *Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In* (Sixteenth Report of Session 2009-10 HL Paper 86 HC 111, March 2010)
- Overseas Security and Justice Assistance *Human Rights Guidance* (2017)

- Select Committee on International Relations, House of Lords *6th Report of Session 2017 – 19* (16 February 2019)

United States of America

- Army Field Manual 2-22.3 *Human Intelligence Collector Operations* (2006)
- Bradbury, Steven *Memorandum for John Rizzo Re application of 18 U.S.C. 2340-2340 A: Certain Techniques That May Be Used in the Interrogation of a High Value of al Qaeda Detainees* Department of Justice, Office of Legal Counsel ('the torture memos', May 2005)
- Central Intelligence Agency Inspector-General *Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)* Special Review 2003-7123-IG (7 May 2004)
- CIA *Guidelines on Interrogations Conducted Pursuant to the Presidential Memorandum of Notification of 17 September 2001* (28 January 2003)
- Committee on Armed Services United States Senate *Inquiry Into The Treatment of Detainees in U.S. Custody* 110th Congress, 2nd Session (20 November 2008)
- Congressional Research Service, *Troop Levels in the Afghan and Iraq Wars, FY2001-FY2012, Cost and Other Potential Issues* (Congressional Research Service, 7-5700, July 2009)
- Department of Justice, Office of Legal Counsel *Memorandum for Alberto R. Gonzales* ('Torture Memo', 1 August 2002)
- Office of Professional Responsibility *Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's use of "Enhanced Interrogation Techniques" on Suspected Terrorists* (Department of Justice, 29 July 2009)
- President George W. Bush *Speech on Global War on Terror* Government Media Statements, The Whitehouse (6 September 2006)
- President Obama Executive Order 13491 *Ensuring Lawful Interrogations* (22 January 2009)
- President Trump Executive Order 13823 *Protecting America Through Lawful Detention of Terrorists* (30 January 2018)
- Senate Select Committee on Intelligence *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program* (Executive Summary, December 2014)

NON-GOVERNMENTAL ORGANISATIONS REPORTS

- Amnesty International *Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantanamo Bay* (14 April 2002)
- Amnesty International *Report 2003: United States of America* (28 May 2003)
- Amnesty International *Report United States of America: Human dignity denied: Torture and accountability in the "war on terror"* (26 October 2004)
- Association for the Prevention of Torture *Beware the gift of poison fruit: Sharing information with States that torture* (2012)
- Human Rights Watch *Getting Away With Torture? Command Responsibility for the U.S. Abuse of Detainees* (April 2005)
- Human Rights Watch *Enduring Freedom: Abuses by U.S. Forces in Afghanistan* (7 March 2004)
- Human Rights Watch *United States, Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees* (Vol 14. No.4 (G), August 2002)
- Human Rights Watch *United States: Reports of Torture of Al-Qaeda Suspects* (26 December 2002)
- Hungarian Helsinki Committee *The individualization of the risk of torture, inhuman or degrading treatment or punishment in the jurisprudence of the European Court of Human Rights* (2009)

- International Commission of Jurists *Assessing Damage: Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights* (Geneva, 2009)
- International Commission of Jurists *Legal Commentary to the ICJ Berlin Declaration: Counter-Terrorism, Human Rights and the Rule of Law* (Geneva, 2008)
- International Commission of Jurists *Transnational Injustices: National Security Transfers and International Law* (Geneva, 2017)
- International Committee of the Red Cross *People on War: Perspectives From 16 Countries* (December 2016)
- International Committee of the Red Cross: Statement “United States: ICRC President urges progress on detention-related issues” (4 March 2004)
- International Helsinki Federation for Human Rights *Anti-terrorism Measures, Security and Human Rights: Developments in Europe, Central Asia and North America in the Aftermath of September 11*
- Open Society Foundations: Open Society Justice Initiative (Singh, Amrit) *Globalising Torture: CIA Secret Detention and Extraordinary Rendition* (February 2013)
- Privacy International *Human Rights Implications of Intelligence Sharing* (Briefing to National Intelligence Bodies, September 2017)
- Privacy International *Newly Disclosed Documents on the Five Eyes Alliance and What They Tell us about Intelligence-Sharing Agreements* (April 2018)
- Privacy International *Secret Global Surveillance Networks: Intelligence Sharing Between Governments and the Need for Safeguards* (April 2018)
- Reprieve *Britain’s Torture Policy: the Consolidate Guidance on the detention and interviewing of detainees overseas* (December 2016)
- The Rendition Project and The Bureau of Investigative Journalism *CIA Torture Unredacted* (July 2019)

NEWSPAPER AND MAGAZINE ARTICLES

[See also the newspaper and magazine articles listed in the Inquiry Report at **Appendix 1: Chronology**. Those articles have not been duplicated below]

- Ackerman, Spencer “No looking back: The CIA torture report’s aftermath” *The Guardian* (onlined ed, 11 September 2016)
- Amsdorf, Dawsey and Kim “Trump’s flashy executive orders could run against lawmakers and federal agencies” *Politico* (onlined ed, 25 January 2017)
- Bowcott, Owen “Ministers accused of issuing ‘torture warrants’ to spies” *The Guardian* (onlined ed, 6 September 2018)
- Hansen, Thomas Obel and Nelson, Fiona “Liability of an Assisting Army for Detainee Abuse by Local Forces: The Danish High Court Judgment in Green Desert” *ejiltalk.org* (24 January 2019)
- Inskeep, Steve “Interview of Lawrence Wilkerson” *NPR* (onlined ed, 3 November 2005)
- Johnson, Douglas A., Mora, Alberto and Schmidt, Averell “The Strategic Cost of Torture: How “Enhanced Interrogation” Hurt America” *Foreign Affairs Magazine* (September/October 2016)
- Kirchgaessner, Stephanie “Ex-CIA officer pardoned for role in 2003 kidnapping of terrorism suspect” *The Guardian* (onlined ed, 28 February 2017)
- Kohse, Emma “Salim v Mitchell: ATS Suit Against CIA Contractors Survives Second Motion To Dismiss” *Lawfare* (3 February 2017)
- Ni Aolain, Fionnuala “My Priorities As UN Special Rapporteur on Counter-Terrorism: The Problem of Permanent Emergencies” *Just Security* (9 October 2017)

- Padeanu, Iulia “Why the ECHR Decided not to Revise its Judgment in the Ireland v. The United Kingdom Case” *ejiltalk.org* (5 April 2018)
- Redden, Molly “Trump powers ‘will not be questioned’ on immigration, senior official says” *The Guardian* (onlined ed, 12 February 2017)
- Rosenberg, Matthew “New C.I.A. Deputy Director, Gina Haspel, Had Leading Role in Torture” *The New York Times* (onlined ed, 2 February 2017)
- Shapira, Ian “Ex-CIA officer faces extradition from Portugal to Italy for alleged role in cleric’s rendition” *The Washington Post* (onlined ed, 21 April 2017)
- Shinkman, Paul D. “CIA Director Fires Back: ‘Torture Report’ Flawed” *UN News* (onlined ed, 11 December 2014)
- Stephenson, Jon “Eyes Wide Shut: The Government’s Guilty Secrets in Afghanistan” *Metro Magazine* (1 October 2015)
- Taub, Ben “The Prisoner of Echo Special” *The New Yorker* 22 April 2019
- Weaver, Matthew and Ackerman, Spencer “Trump claims torture works but experts warn of its ‘potentially existential’ costs” *The Guardian* (onlined ed, 26 January 2017)

ACADEMIC PAPERS

- Lanovoy, Vladyslav *Complicity in an Internationally Wrongful Act* University of Amsterdam, Amsterdam Center for International Law (2014) SHARES Research Paper 38
- Satterthwaite, Margaret L. and Zetes, Alexandra M. *Rendition in Extraordinary Times* New York University School of Law Public Law & Legal Theory Research Paper Series, Working Paper No. 18-15 (March 2018)
- University of Ottawa, Faculty of Law *Principles on Anti-terrorism and Human Rights* (2006)

INTERNET RESOURCES

- The Rendition Project, accessed at www.therenditionproject.org.uk
- The Torture Database, accessed at www.thetorturedatabase.org