Request for an Own-Motion Inquiry into Possible New Zealand Engagement with Actions Contributing to Israel's Activities in the Gaza Strip in 2023-2024

1. Introduction

1.1 This opinion is split into four parts. We begin, first, with the legal framework of the Inspector-General of Intelligence and Security (IGIS)'s power to conduct own-motion inquiries. We turn, second, to past reports giving effect to relevant legislation. Third, we address the relevant background for the inquiry we propose: the background to Israel's actions in the Gaza Strip in 2023-2024, United Kingdom/United States involvement in those actions, and the sufficient proximity between possible New Zealand intelligence and security agencies' actions and actions by Israel, the United Kingdom, and United States. Fourth, we address the public interest in an inquiry being undertaken and the possible terms of reference of such an inquiry.

2. The legal framework governing the Inspector-General's power to conduct inquiries into compliance with New Zealand law and standards of propriety

2.1 You will be well aware of the scope of your own powers. We recapitulate the scope of your powers in this section to set the foundation for the later analysis we provide on why the legal preconditions of an inquiry are met in this case.

2.2 Like all legislation, the meaning of the Intelligence and Security Act 2017 is to be ascertained from its text and in light of its purpose and context.[1] Like all legislation, it should generally be read in a way that ensures consistency with fundamental human rights and New Zealand's commitments under international law.[2]

2.3 The purpose of the Act is listed at section three. It refers to the need to "protect New Zealand as a free, open, and democratic society" through enumerated channels. These channels are: the establishment of intelligence and security agencies that will "effectively contribute to" listed goals (including "the [...] well-being of New Zealand); the giving of "adequate and appropriate functions, powers, and duties" to intelligence and security agencies; ensuring that the functions of the intelligence and security agencies are performed "in accordance with New Zealand law and all human rights obligations recognised by New Zealand law", "with integrity and professionalism", and "in a manner that facilitates effective democratic oversight"; and ensuring

[1] Legislation Act 2019, s 10.
[2] See, for example *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [250] per Glazebrook J.

that the powers of these agencies "are subject to institutional oversight and appropriate safeguards".[3]

2.4 This purpose provision gives some direction to the activities of the Inspector-General of Intelligence and Security. The Inspector-General must not just endeavour to uphold human rights; the standard set out is that the law must *ensure* that functions are performed in accordance with human rights obligations and other standards. It is not just human rights in general that are to be protected, but all human rights obligations *recognised* by New Zealand law: an especially wide and generous formulation.[4] New Zealand's democratic qualities are mentioned twice in section three: first, in reference to New Zealand's status as a "free, open, and democratic society", and second, in the reference to the need for "effective democratic oversight".

2.5 The objectives of the intelligence and security agencies are listed in section nine, and repeat the wording of section three, which notably includes the "well-being of New Zealand". The general duties for an intelligence and security agency are in section 17, and repeat some of the wording of section three, referring to the need for action in accordance with New Zealand law and all human rights obligations *recognised* by New Zealand law; independence and impartiality; integrity and professionalism; and the facilitation of effective democratic oversight.

2.6 Part 6 of the Act deals with oversight. Section 156(1) says the purpose of the Part is to provide for independent oversight of intelligence and security agencies "to ensure those agencies act with propriety and operate lawfully and effectively". The reference to lawfulness and propriety, as well as independence, is repeated in section 156(2)(a). It is clear that the Inspector-General acts alongside, but independently of, the Intelligence and Security Committee.

2.7 Section 158 sets out broad functions of the Inspector-General. Two of these functions are to conduct an inquiry into "any matter relating to an intelligence and security agency's compliance with New Zealand law, including human rights law"[5] and to conduct an inquiry into "the propriety of particular activities of an intelligence and security agency".[6] Such inquiries can

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[3] Intelligence and Security Act 2017, s 3.
[4] s 3(c)(i).
[5] s 158(1)(a).
[6] s 158(1)(c).

be commenced on the Inspector-General's own initiative.[7] The breadth of this language is noteworthy. "Any matter relating to ... compliance with New Zealand law" can be inquired into, which includes an allegation of non-compliance.[8] In conducting any inquiry or review, the Inspector-General must take into account any relevant ministerial policy statement and the extent to which an agency has had regard to that statement.[9]

2.8 Section 175 onwards sets out the procedure for inquiries (including the requirement that they be conducted in private) and gives broad powers for such inquiries. A written report must be prepared on the completion of the inquiry under section 185. The report must generally be made public under section 188.

2.9 The word "propriety" is not defined in the Act.

3. Past inquiries conducted by the Inspector-General

3.1 The approach taken by the Inspector-General in past inquiries sheds some light on the potential approaches and relevant touchstones for future work. We acknowledge that past reports are not to be treated in the same way as legal precedents, but their interpretation of the relevant legal provisions provides some guidance as to the correct approach in this case.

(a) The Report on Possible Engagement with CIA Detention and Interrogation

3.2 We address a sample of Inspector-General reports, beginning with the inquiry into "possible New Zealand intelligence and security agencies' engagement with the CIA detention and interrogation programme 2001-2009".[10] The title of that report is significant, as the mere *possibility* of New Zealand agencies' engagement with the CIA detention and interrogation programme over this period was the basis for the report. Cheryl Gwyn, then Inspector-General, started the report by describing the role of New Zealand agencies in supporting New Zealand military involvement and explaining "how that gave rise to a risk of involvement in the CIA programme."[11] She went on to consider how the agencies "had regard to that risk, in light of their

[7] s 158(1)(d).
[8] s 158(1)(a).
[9] s 158(2).
[10] Cheryl Gwyn *Inquiry into possible New Zealand intelligence and security agencies' engagement with the CIA detention and interrogation programme 2001-2009* (Inspector-General of Intelligence and Security, July 2019).
[11] At [4].

legal obligations under New Zealand law and New Zealand's international human rights obligations".[12] The report was focused on how risks are best anticipated and mitigated.[13]

3.3 A US Senate report "raised questions" for the Inspector-General's 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".[14] The Senate Report had provided "considerable and disturbing evidence about the torture and other cruel, inhuman, degrading treatment or punishment (CIDTP) of CIA detainees".[15] For Inspector-General Gwyn, the Senate Report 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."[16]

3.4 The inquiry was commenced under the previous 1996 statute, the Inspector-General of Intelligence and Security Act. While that legislative framework differs from the 2017 Act in several respects, it also listed inquiry into any matter relating to compliance by agencies with New Zealand law and inquiry into the propriety of particular activities as functions of the Inspector-General.[17] These provisions were relied on by the Inspector-General and she was "satisfied that there was sufficient public interest justifying the commencement of an own-motion Inquiry".[18] The Inspector-General described the inquiry as being an investigation 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)", which the Inspector-General said "goes to the heart of whether New Zealanders can have confidence that the Government Communications Security Bureau and the New Zealand Security Intelligence Service act lawfully and properly".[19] Sufficient public interest was the touchstone for an inquiry, and public confidence in lawful and proper action was regarded as sound justification for it.

3.5 The report noted New Zealand intelligence and security agencies' assistance in military operations in Afghanistan and their participation in information-sharing with overseas

[12] At [4].
[13] At [5].
[14] At [8].
[15] At [7].
[16] At [7].
[17] Inspector-General of Intelligence and Security Act 1996, ss 11(a) and 11(ca).
[18] Above n 10, at [9].
[19] At [10].

intelligence agencies (including the CIA) to facilitate gathering information on known or suspected terrorists.[20] Its conclusions were that the agencies were not directly involved in the CIA's unlawful activities or complicit in unlawful conduct.[21] But the nature of signals intelligence (SIGINT) activity meant Government Communications Security Bureau (**"GCSB"**) involvement in contribution to decisions leading to capture and detention could not be completely ruled out.[22] There was information exchange relevant to detainee interrogations, but no direct participation in or presence at interrogations.[23] Intelligence-sharing and cooperation arrangements were maintained between the New Zealand Security Intelligence Service (**"NZSIS"**) and the CIA, as well as between the GCSB and the National Security Agency (NSA).[24]

3.6 The Inspector-General was of the opinion that there was insufficient support provided to staff engaged in intelligence activity in respect of their work related to Afghanistan, and no provision of policies or procedures on human rights obligations; NZSIS policies on human rights obligations were also insufficient.[25] These were later described as "systemic deficiencies",[26] and it was noted that the GCSB and NZSIS had limited oversight of their deployed and seconded staff.[27] According to the Inspector-General, the directors of the GCSB and NZSIS should have been on notice about the CIA programme and they did not adequately identify legal and reputational risks.[28] No concerns were raised with the CIA or the US administration.[29]

3.7 Statements were released by the heads of NZSIS and GCSB, acknowledging the importance of complying with New Zealand law and human rights obligations recognised by New Zealand law. It was noted that sometimes intelligence is only shared "with foreign agencies where specific caveats have been applied to ensure that human rights obligations are met".[30]

3.8 The Inspector-General stated that this whole series of events provided a lesson in warning signs indicating risks of non-compliance with international law.[31] Clearly stated

[20] At [16].
[21] At [17].
[22] At [18.2].
[23] At [18.3]. It was later noted that the NZSIS provided questions for the CIA to put to Khalid Sheikh Mohammed, who was detained at Guantanamo Bay; at [168].
[24] At [18.4].
[25] At [18.5].
[26] At [32].
[27] See [32].
[28] At [18.7] – [18.8].
[29] At [18.10].
[30] Above n 10, at 8.
[31] At [25].

principles and policy could provide "clarity particularly for those involved in operational decisions about the lines New Zealand will not cross."[32]

3.9 The Inspector-General concluded that the agencies' directors were on notice because the reports in the public domain about rendition and torture were "sufficient in number", "had sufficient credibility", and "carried enough weight".[33] The Inspector-General acknowledged that making their own inquiries could have jeopardised receipt of intelligence relevant to New Zealand security, but it was implicit in her statements that this was justified, given the overall legal framework.[34]

3.10 The Inspector-General found that 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."[35] No systematic process for evaluating partners' policies and actions existed, including to check whether partner practices accorded with New Zealand's legal obligations.[36] Advice on complicity in torture had been sought by the New Zealand Defence Force (NZDF) from Crown Law, but no such advice was sought by NZSIS or GCSB.[37] The advice sought by the NZDF set out a high threshold for complicity and noted best practice approaches to avoiding complicity: "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."[38] More coordinated consideration across government would have been desirable.[39] Confidence in internal policy and training was not "well-founded".[40] It was reiterated that the directors of the agencies, as chief executives, had "a fundamental obligation to monitor, assess and protect their organisation from legal and other risk".[41]

[32] At [26].
[33] At [27].
[34] At [27].
[35] At [132].
[36] At [134].
[37] At [137].
[38] At [137].
[39] At [138].
[40] At [140].
[41] At [143].

3.11 To undertake the inquiry, the Office of the Inspector-General developed an internal paper on complicity in torture.[42] The report goes on to explain what it considers to be best practice in relation to information-sharing and cooperation in the context of particular legal risk. Personal assurances are not sufficient to guarantee legal compliance.[43] Due diligence must be exercised.[44] Sufficient inquiry must be undertaken, including a “willingness to ask the difficult but essential questions”.[45] Caveats can be used in the provision of information, assurances can be received (but must be treated with care), legal initiatives can be initiated to build shared understanding, and segmented cooperation is possible.[46] Where there is a real risk of torture, exchange or cooperation should not proceed.[47] Robust monitoring is needed, and if there are “serious concerns about the compatibility of the actions of the recipient State or agency with the international law”, the agency should make appropriate inquiries.[48]

(b) The Afghanistan Inquiry

3.12 The public report on the Afghanistan inquiry, published in 2020, focused on the role of the GCSB and NZSIS in the Afghanistan military deployment from 2009 to 2013, and the adequacy and nature of the agencies’ internal processes.[49] It was prompted by a book published about New Zealand’s activities in Afghanistan, which raised questions thought to be deserving of further inquiry.[50] The report considered it “important to form a view on certain suggestions in the book”, including on how New Zealand intelligence agencies responded to their mission and human rights issues, especially in light of “authoritative public reports and determinations announcing widespread abuse and torture of detainees by Afghan authorities”, with whom some New Zealand agencies had some contact.[51] It was said to be “in the public interest” to have “a reasonable sense” of the “nature of the cooperation” with Afghan security agencies and of “our intelligence agencies’ response to human rights risks confirmed by official public reports”.[52]

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[42] As noted at [187].
[43] At [191].
[44] At [192].
[45] At [220].
[46] At [226] – [239].
[47] At [242]. The heading of this section says “substantial/real”: these words arguably have quite different meanings.
[48] At [246]. A full summary of best practice is provided at 59–60.
[49] Madeleine Laracy *Report of Inquiry into the role of the GCSB and the NZSIS in relation to certain specific events in Afghanistan* (Inspector-General of Intelligence and Security, June 2020) at [1].
[50] Nicky Hager and Jon Stephenson *Hit & Run: The New Zealand SAS in Afghanistan and the Meaning of Honour* (Potton & Burton, Nelson, 2017).
[51] Above n 49, at [3].
[52] At [3].

3.13 The report reiterated that the Inspector-General had jurisdiction to "ensure the legality and propriety of GCSB and NZSIS activity".[53] The Inspector-General was not concerned with assessing the success of agencies in meeting intelligence objectives. She was instead concerned with "whether the intelligence agencies were sufficiently alive to, and prepared for, the risks involved" when supplying support for the New Zealand Government's role in Afghanistan.[54] The report expressed the "consistently" held view of the Inspector-General's office that the Inspector-General's report-publishing duty envisaged a report "that will enhance the accountability of the agencies to the New Zealand public by describing in a concrete way (so far as possible) what they do."[55]

3.14 The first part of the terms of reference examined the "knowledge, awareness and contribution" of the GCSB and NZSIS to the NZDF operations in Afghanistan in relation to specific events in August 2010.[56] The NZSIS and GCSB were involved with supporting NZDF work, including through the GCSB's Intelligence Directorate, which provided "reach-back intelligence support" from Wellington.[57] The inquiry asked "what the intelligence agencies did with their knowledge of the allegations of civilian casualties" in which there may have been some New Zealand involvement, including whether this "triggered any responsibilities" beyond accurate reporting.[58] The Inspector-General was not persuaded that the GCSB's role was limited to conveying facts accurately, even if the facts related to another New Zealand agency's role (the NZDF's): the report said "the humanitarian significance of the matter" meant "something more ought to have been done to highlight [the matter], such as a separate briefing, or covering note".[59] The Inspector-General stated that doubts about the reliability of reports of civilian casualties should have prompted more action by agencies, not less, at least in making an assessment "at the level of propriety".[60] The "reasonable possibility" that innocent civilians were killed should have led to the asking of targeted questions.[61]

3.15 Next, the report considered the agencies' approach to New Zealand's human rights obligations, including after there were allegations of torture about a detainee with whom the

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[53] At [7].
[54] At [7].
[55] At [9].
[56] See [10].
[57] At [19].
[58] At [38].
[59] At [43].
[60] At [48].
[61] At [50].

NZSIS had had some contact.[62] There was no follow-up by the NZSIS after an allegation of torture was flagged.[63] There was no guidance about what to do when such information was received by the GCSB.[64] There was no proper legal analysis highlighting the legal risk of continued detention of the person about whom the allegation of torture had been made.[65]

3.16 The report then addressed how the GCSB and NZSIS in general considered and applied New Zealand's human rights obligations to relationships with detaining authorities in Afghanistan. In particular, the report was interested in the response of the agencies once detainee abuse by the Afghan security agency had been publicly highlighted.[66] It is noted that the GCSB had a "restriction on sharing 'actionable' intelligence where that might engage certain human rights risks."[67] The IGIS report criticised the GCSB for taking too narrow a view of when intelligence should not be shared. The GCSB was too narrow in only refusing to share actionable intelligence where this could lead to direct adverse action. The report said there should be more caution where "New Zealand intelligence provides one of the prerequisites for action, or significantly contributes to it, and not just situations where it is the definitive piece of a puzzle".[68] Relevant risks are "ethical, reputational and/or legal."[69]

3.17 The report noted that policies on human rights risk assessments "were not adequately embedded and operationalised".[70] Credible reports of torture put New Zealand agencies on notice, which should have led to reassessment of risk, among other things.[71] A "precautionary approach" should have been adopted, "which affords genuine protection to the human rights of individuals."[72] Critically, the report said: "intelligence agencies do not operate in a legal or moral vacuum."[73] Their actions are attributable to the state. Security objectives are never an excuse to discard human rights obligations, especially where there is foreseeable or probably wrongful conduct by another state.[74] The report noted that where the agencies engage with "foreign authorities with known practices which breach customary international and domestic law",

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[62] At [68].
[63] At [72].
[64] At [77].
[65] At [100].
[66] See [107].
[67] At [111].
[68] At [111].
[69] At [112].
[70] At [171].
[71] At [175].
[72] At [188].
[73] At [188].
[74] At [188].

there is a need for "heightened monitoring and awareness", "ongoing documented risk assessments and legal analysis", a willingness to have difficult discussions with foreign partners and to cease exchanges, and protection through "best practice approaches to intelligence activities and exchanges" (including, through use of caveats, assurances, and operationalised policies).[75]

3.18 The two recommendations of the report were for interagency planning for anticipated human rights risks where agencies are providing support to military operations, and for the agencies' review of the Joint Policy Statement on Human Rights Risk Management to be expedited, particular attention paid to the threshold "applied by the agencies to make decisions on sharing intelligence where there is a risk of human rights abuse".[76]

(c) The Human Rights Risk Assessments Report

3.19 In June 2024, as you will be well aware, the report on human rights risk assessments ("**HRRAs**") was published, reviewing assessments since December 2021. It specifically responded to the challenge that "[c]ooperation with foreign partners can pose a risk of the agencies acting unlawfully under domestic or international legal obligations, including the risk of New Zealand becoming complicit in unlawful conduct by another country."[77]

3.20 Beginning with the relevant law, the report noted that where a Minister authorises cooperation with overseas parties, "the Minister must be satisfied that the agencies will be acting in accordance with New Zealand law and all human rights obligations recognised by New Zealand law".[78] The Ministerial Policy Statement on cooperating with overseas public authorities requires assessment of general risk, assessment of specific risk from proposed cooperation, and opportunities for risk mitigation; cooperation must be refused where the proposed cooperation will significantly contribute to, or amount to complicity in, "a real risk of a human rights breach".[79]

3.21 The "third party rule" was noted as being in use by Five Eyes countries. It is a caveat on information sharing requiring a Five Eyes partner receiving New Zealand intelligence to obtain the consent of the NZSIS or GCSB before that overseas partner may on-share the intelligence to an

[75] At [189].
[76] At 51.
[77] Brendan Horsley *Review of NZSIS and GCSB Human Rights Risk Assessments: Public report* (Inspector-General of Intelligence and Security, July 2024 at [1].
[78] At [4].
[79] At [7].

agency in another country.[80] The agencies consider no further ministerial authorisation is needed for third party on-sharing. The IGIS report considered "that a Ministerial authorisation should exist for the third party" and noted this was consistent with the legislation.[81] A human rights risk assessment will sometimes be required under the Joint Policy Statement on Management of Human Rights Risks in Overseas Cooperation in relation to on-sharing with third parties.[82]

3.22 The report considered a sample of HRRAs that NZSIS carried out under the Joint Policy Statement and that were carried out by the GCSB. The report recommended, among other things, that a standing (ongoing) HRRA should include plans for monitoring changes over time and that HRRAs be reviewed regularly.

(d) Summary

3.23 Drawing the threads together, some common concepts and approaches can be gleaned from past IGIS reports relevant to our analysis here:

- An inquiry will be initiated when there is sufficient public interest in opening an inquiry;
- It is relevant that an agency may be put on notice of significant human rights risks to its operations;
- Where the agencies are brought into proximity with credible breaches of human rights and/or international law, heightened obligations apply;
- The agencies should use a precautionary approach and should consider best practice;
- Processes, policies, and training need to be adequately designed and operationalised;
- A range of tools are available to intelligence agencies in the exercise of due diligence when receiving or sharing intelligence with foreign partners (where there is a risk of a breach of human rights obligations), including the use of caveats, seeking assurances, deploying legal initiatives, and applying segmented cooperation;
- Ultimately it is for the Inspector-General to *ensure* propriety and legality in the activities of the agencies.

[80] At [17].
[81] At [20].
[82] At [22].

4. The Background to, and Basis for, the Inquiry Proposed Here

4.1 We turn from the general approach to inquiries undertaken by the Inspector-General to why an inquiry should be undertaken into the response of New Zealand's intelligence and security agencies to recent particular actions of Israel in Gaza. The Inspector-General and his office have more significant resources than the lawyers who have worked pro bono to compile this document. It is therefore open to the Inspector-General to use his resources to review background information more comprehensively, to investigate legal standards in more depth, and to adjust aspects of what is proposed below. It is also, of course, open to the Inspector-General not to disclose the results of the inquiry if to do so would prejudice New Zealand's security and international relations. We set out below a basic case for why an inquiry is justified and set out some proposals for the scope and focus of that inquiry.

(a) Background to Israel's recent actions in Gaza, including judgments of the International Court of Justice and authoritative reports

4.2 Israel has had a longstanding presence as an occupying power in Palestine. The International Court of Justice ("**ICJ**") has noted that the expansion of Israeli settlements, Israel's exploitation of natural resources in Palestine, the extension of Israeli law, the forced displacement of the Palestinian people, and annexation by Israel are all (among other things) in violation of international law. Prolonged unlawful practices by Israel were also found to violate the right of the Palestinian people to self-determination.[83]

4.3 On 7 October 2023, Hamas and other Palestinian groups launched armed incursions into Israel from Gaza, leading to significant loss of civilian life. Israel responded with large-scale, sustained bombardments of the Gaza Strip and ongoing attacks that continue until the present day.

4.4 On 26 January 2024, the ICJ issued its order in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)*, responding to South Africa's request for the indication of provisional measures in relation to Israel's actions in Gaza. The Court found plausible rights asserted under the Genocide Convention[84] and that some of the measures sought by South Africa were aimed at preserving

[83] See *Legal Consequences Arising From the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem (Advisory Opinion)*, 19 July 2024.

[84] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel) (Provisional Measures)*, 26 January 2024 at [58]–[59].

the plausible rights asserted under the Convention, including the right of the Palestinians to be protected from acts of genocide.[85] Prejudice to these rights was capable of causing irreparable harm.[86]

4.5 The Court ordered (in a 15-2 majority) that Israel should take all measures within its power to prevent the commission of acts within the scope of Article II of the Genocide Convention, including ensuring that its military forces did not commit these acts.[87] The Court ordered Israel, among other things, to take all measures to prevent and punish incitement to genocide (16-1 majority), and (by a 16-1 majority) to take measures to enable provision of basic services and humanitarian assistance in Gaza.[88]

4.6 The Court received a request from South Africa to modify its decision concerning provisional measures and made further orders on 28 March 2024. The Court ordered (unanimously) for Israel to make provision of urgently needed basic services and humanitarian assistance, and (by a 15-1 majority) to ensure with immediate effect that its military does not commit acts in violation of the rights of the Palestinians in the Gaza Strip under the Genocide Convention.[89]

4.7 On 24 May 2024, the Court made further comments about its grave concern over the position of Palestinians in Rafah. It found (by a 13-2 majority) that Israel's military offensive in Rafah entailed "a further risk of irreparable prejudice to the plausible rights claimed [under the Genocide Convention]".[90]

4.8 In the 19 July 2024 advisory opinion of the ICJ on Israel's internationally wrongful acts in the Occupied Palestinian Territory – which made the findings noted above – some comments were made about the obligations of other states.[91] The Court cited favourably the call by the United Nations General Assembly on "all States [...] not to recognize, or cooperate with or assist in any manner in, any measures undertaken by Israel to exploit the resources of the occupied

[85] At [59].
[86] At [66].
[87] At [78].
[88] At [79] – [80].
[89] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel) (Provisional Measures)*, 28 March 2024.
[90] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel) (Provisional Measures)*, 24 May 2024 at [47].
[91] Above n 83, at [273]-[279].

territories or to effect any changes in the demographic composition or geographic character or institutional structure of those territories".[92] Moreover, the Court said "all States are under an obligation not to recognize as legal the situation arising from the unlawful presence of Israel in the Occupied Palestinian Territory" and "are also under an obligation not to render aid or assistance in maintaining the situation created by Israel's illegal presence in the Occupied Palestinian Territory".[93] It added that all parties to the Fourth Geneva Convention "have the obligation [...] to ensure compliance by Israel with international humanitarian law as embodied in that Convention."[94]

4.9 In addition to these rulings of the ICJ, the actions of the Prosecutor of the International Criminal Court (ICC) pointed to serious breaches of the law by Israel. The request by the Prosecutor of the International Criminal Court to the Pre-Trial Chamber of the ICC for the issuance of arrest warrants for Benjamin Netanyahu (the Prime Minister of Israel) and Yoav Gallant (the Minister of Defence of Israel) for various war crimes and crimes against humanity is another indication from a senior international authority of the criminality of Israeli actions in Gaza.

4.10 On 24 May 2024, the Prosecutor asserted that he had reasonable grounds to believe that these two individuals bore individual criminal responsibility for war crimes and crimes against humanity committed in the Gaza Strip from at least 8 October 2023. The crimes against humanity included extermination and/or murder, persecution, and other inhumane acts. The war crimes included starvation of civilians, wilfully causing great suffering or serious injury to body or health, wilful killing or murder, and initially directing attacks against a civilian population.[95] The standard necessary for the issue of an arrest warrant is "reasonable grounds to believe".[96] However, in an interview, the Prosecutor indicated that since he has assumed office, he has used the higher standard of "realistic prospect of conviction", which, in his view, is a standard that has been met in this case.[97]

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[92] At [277].
[93] At [279].
[94] At [279].
[95] "Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine" (20 May 2024) International Criminal Court <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state>.
[96] Rome Statute of the International Criminal Court 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002), art 58.
[97] CNN "EXCLUSIVE: ICC prosecutor seeks arrest warrants against Sinwar and Netanyahu for war crimes" (21 May 2024) YouTube <https://www.youtube.com/watch?v=6BquEw4kNNE> at 14 min.

4.11 While not a direct pronouncement on the commission of international crimes by Israel, the application represents the Prosecutor's understanding that the crimes enumerated have a realistic prospect of being successfully proven to the criminal standard. In coming to this determination, the Office of the Prosecutor was assisted by a panel of experts in international law, including a previous ICC judge, various King's Counsel, and leading international criminal and human rights law academics. The panel unanimously agreed with the Prosecutor's determination.[98]

4.12 Further, a series of credible reports by numerous NGOs have pointed to evidence of genocide in Gaza, breaches of international humanitarian law, and other grave violations of international law. We offer just three examples below.

4.13 Oxfam International has asserted that Israel's self-declared "total siege" on the Gaza Strip constitutes collective punishment,[99] which is a grave breach of the Fourth Geneva Convention. Oxfam has also observed Israel's "targeted and indiscriminate bombing of civilian objects"[100] and "use of starvation as a weapon of war".[101] Both acts constitute war crimes.[102] The NGO noted Israel's weaponisation of water infrastructure resulting in the "deprivation and denial" of water to Palestinians, which is a violation of international humanitarian law.[103] It has also held that an Israeli evacuation order calling for 250,000 people to leave Eastern Khan Younis violated the Geneva Conventions and international humanitarian law more generally. This is because the order "failed to provide safe passage, or a safe final destination where basic humanitarian needs can be met", effectively forcing internally displaced people into a "death trap".[104]

4.14 Amnesty International has found Israeli forces to be in breach of core rules of international humanitarian law and as such, responsible for war crimes. In an analysis of five Israeli attacks on the Gaza Strip between 7 and 12 October, Amnesty International found that

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[98] Adrian Fulford and others *Report of the Panel of Experts in International Law* (20 May 2024) at [34].
[99] Oxfam International *Inflicting Unprecedented Suffering and Destruction: Briefing* (March 2024) at 5.
[100] At 9.
[101] At 9.
[102] Above n 96, arts 8(2)(b)(ii) and 8(2)(b)(xxv).
[103] Oxfam International Water *War Crimes: How Israel has weaponised water in its military campaign in Gaza* (July 2024) at 6.
[104] Oxfam International "Israel breaches International Humanitarian Law by forcing 250,000 Palestinians in Gaza into 'death trap' without food, water, shelter: Oxfam" (4 July 2024) < https://www.oxfam.org/en/press-releases/israel-breaches-international-humanitarian-law-forcing-250000-palestinians-gaza>.

Israeli forces failed to "take feasible precautions to spare civilians", carried out "indiscriminate attacks that failed to distinguish between civilians and military objectives", and targeted civilian objects.[105]

4.15 Human Rights Watch has concluded that Israel is using starvation of civilians as a weapon of war in the Gaza Strip.[106] This is a war crime.[107] It also observed Israel's efforts to obstruct the entry and distribution of humanitarian aid is an act of collective punishment, which is a grave breach of the Fourth Geneva Convention.[108]

4.16 A plethora of United Nations special rapporteurs, Independent Experts, and Working Groups have alleged or held that Israel has and is committing international crimes in the Gaza Strip.[109] One such determination is from a report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967. The report found that there are reasonable grounds to believe genocidal acts are being carried out against Palestinians in the Gaza Strip by Israel. It determined that genocidal intent had been manifested through acts such as killing members of the Palestinian group, causing serious bodily or mental harm to the groups' members, and deliberately inflicting on the group conditions of life calculated to bring about their physical destruction in whole or in part.[110]

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[105] "Damming evidence of war crimes as Israeli attacks wipe out entire families in Gaza" (20 October 2023) Amnesty International <https://www.amnesty.org/en/latest/news/2023/10/damning-evidence-of-war-crimes-as-israeli-attacks-wipe-out-entire-families-in-gaza/>.
[106] "Israel: Starvation Used as Weapon of War in Gaza" (18 December 2023) Human Rights Watch <https://www.hrw.org/news/2023/12/18/israel-starvation-used-weapon-war-gaza>.
[107] Above n 96, arts 8(2)(b)(xxv).
[108] "Israel Not Complying with World Court Order in Genocide Case" (26 February 2024) Human Rights Watch <https://www.hrw.org/news/2024/02/26/israel-not-complying-world-court-order-genocide-case>.
[109] "Gaza: UN experts call on international community to prevent genocide against the Palestinian people" (16 November 2023) United Nations <https://www.ohchr.org/en/press-releases/2023/11/gaza-un-experts-call-international-community-prevent-genocide-against>; "Israel/oPt: UN experts appalled by reported human rights violations against Palestinian women and girls" (19 November 2024) <https://www.ohchr.org/en/press-releases/2024/02/israelopt-un-experts-appalled-reported-human-rights-violations-against>; "UN experts condemn outrageous disregard for Palestinian civilians during Israel's military operation in Nuseirat" (14 June 2024) <https://www.ohchr.org/en/press-releases/2024/06/un-experts-condemn-outrageous-disregard-palestinian-civilians-during-israels>; "UN experts declare famine has spread throughout Gaza strip" (9 July 2024) <https://www.ohchr.org/en/press-releases/2024/07/un-experts-declare-famine-has-spread-throughout-gaza-strip>; and "UN experts outraged by Israeli strikes on civilians sheltering in Rafah camps" (29 May 2024) <https://www.ohchr.org/en/press-releases/2024/05/un-experts-outraged-israeli-strikes-civilians-sheltering-rafah-camps>.
[110] *Anatomy of a Genocide: Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967* S-55 A/HRC/55/73 (25 March 2024) at [93].

4.17 In July 2024, the report of the United Nations Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel concluded that: "In relation to Israel's military operations in the Gaza Strip from 7 October, the Commission concludes that Israel has committed war crimes, crimes against humanity, and violations of IHL [international humanitarian law] and IHRL [international human rights law]".[111]

4.18 In our view, at least following the ICJ opinion in January 2024, the New Zealand government and intelligence and security agencies were on notice that rights of Palestinians to be protected from genocide were at risk. Following the ICJ advisory opinion in July, the New Zealand government and intelligence and security agencies were on notice of additional obligations under international law in relation to interactions with Israel.

(b) Background to US/UK cooperation with Israel in relation to recent actions in Gaza

4.19 It has been well-documented that the United States and United Kingdom, who are close military and intelligence partners of New Zealand (and members of the Five Eyes), were offering various forms of support and assistance to Israel.

4.20 The United Kingdom has not denied that it has approved arms sales to Israel, as well as providing military aid and sharing intelligence.[112]

4.21 On 2 September 2024, the United Kingdom's Foreign, Commonwealth and Development Office (FCDO) announced that following a review of Israel's compliance with international humanitarian law, it has immediately suspended 30 arms export licences to Israel.[113] The decision was taken following a "thorough review into Israel's compliance with International Humanitarian Law" including two visits by the Foreign Secretary since he has taken office.[114] He stated that following that review, "the government concluded that there was a clear risk that

[111] *Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel* S-55 A/HRC/56/26 (27 May 2024) at [97].
[112] See Sam Fowles "It seems clear the UK has assisted Israel's breaches of international law. Surely Labour can do better than deny it" The Guardian (26 August 2024) <https://www.theguardian.com/commentisfree/article/2024/aug/26/uk-assisted-israels-breaches-of-international-law-labour-better-than-deny-it>.
[113] Foreign, Commonwealth & Development Office "UK suspends around 30 arms export licences to Israel for use in Gaza over International Humanitarian Law concerns" (2 September 2024) <https://www.gov.uk/government/news/uk-suspends-around-30-arms-export-licences-to-israel-for-use-in-gaza-over-international-humanitarian-law-concerns>.
[114] Above.

items exported to Israel under these 30 licences might be used in serious violations of IHL”.[115] The concerns primarily concerned the treatment of Palestinian detainees and failure to provide humanitarian aid. The FCDO’s assessment into Israel’s compliance with International Humanitarian Law “concluded that Israel has not fulfilled its duty as Occupying Power to ensure - to the fullest extent of the means available to it - those supplies essential to the survival of the population of Gaza. It has concluded that the level of aid remains insufficient.”[116] Similarly, it concludes that “[t]here have been credible claims of the mistreatment of detainees. The volume and consistency of these allegations suggest at least some instances of mistreatment contrary to IHL.”[117]

4.22 Amnesty International, among others, noted that US-origin arms were used in war crimes and unlawful killings by the Israeli government.[118] There were also multiple statements of support made by US political leaders for actions undertaken by Israel.[119]

4.23 A report prepared by the US Secretaries of State and Defence reached the conclusion that Israeli forces have breached international humanitarian law in the course of the conflict.[120] Specifically, the report determined that Israeli forces had deployed American weapons in a manner that is “inconsistent” with international humanitarian law obligations or with “established best practices for mitigating civilian harm”.[121]

(c) New Zealand’s involvement in US/UK military operations against Houthis in the Red Sea

4.24 On 23 January 2024, New Zealand announced that it would commit six members of the NZDF to Operation Guardian Prosperity, a US-led military operation targeting Houthi rebels in the

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[115] Above.

[116] Foreign, Commonwealth & Development Office “Summary of the IHL process, decision and the factors taken into account” (2 September 2024) <https://www.gov.uk/government/publications/summary-of-the-international-humanitarian-law-ihl-process-decision-and-the-factors-taken-into-account/summary-of-the-ihl-process-decision-and-the-factors-taken-into-account>.

[117] Above.

[118] See “Amnesty International Warns of U.S. Complicity in War Crimes in Gaza” Amnesty International (23 July 2024) <https://www.amnestyusa.org/press-releases/amnesty-international-warns-of-u-s-complicity-in-war-crimes-in-gaza/>.

[119] See, for example, Ali Harb “Timeline: The Biden administration on Gaza, in its own words” Aljazeera (7 March 2024) <https://www.aljazeera.com/news/2024/3/7/timeline-the-biden-administration-on-gaza-in-its-own-words>.

[120] *Report to Congress under Section 2 of the National Security Memorandum on Safeguards and Accountability with Respect to Transferred Defense Articles and Defense Services (NSM-20)* (2024).

[121] *Report to Congress under Section 2 of the National Security Memorandum on Safeguards and Accountability with Respect to Transferred Defense Articles and Defense Services (NSM-20)* (2024) at 21-22.

Red Sea.[122] It was said that this was unconnected to events in Gaza, but it was also well-documented that the Houthis claimed they were attacking ships in the Red Sea until Israel's actions in the Gaza Strip ceased. In July, the deployment was extended for a further six months.

(d) There has been sufficient proximity between New Zealand intelligence and security agencies and Israel's actions in Gaza, which have been supported by the United Kingdom and United States

4.25 In the IGIS report on CIA detention and torture in Afghanistan, it was said that New Zealand intelligence and security agencies were "sufficiently proximate" to oblige the Directors of the agencies "to make a considered assessment of what risks (legal, moral, reputational) ... [the CIA activities] posed for their own agencies and the New Zealand government."[123]

4.26 New Zealand has not committed troops directly in the Gaza Strip or publicly acknowledged any direct assistance provided to Israel. However, there are at least three interlocking factors that create sufficient proximity between New Zealand intelligence and security agencies and Israel's actions in Gaza, to prompt a considered assessment of the risks posed for New Zealand intelligence and security agencies.

4.27 First, New Zealand is a member of the Five Eyes, of which the United Kingdom and United States are also members. Through membership in that grouping, there was likely to be some contact and exchanges concerning Israel's actions in Gaza.

4.28 Addressing the United States in particular: New Zealand is well-connected to the United States' intelligence apparatus. As Nicky Hager observes, the "GCSB communications and encryption systems are thoroughly integrated into the United States network."[124] Hager explains that New Zealand passes on "virtually everything" that its Five Eyes partners request and that "[i]n the United States, the NSA then distributes New Zealand reports through the rest of the American intelligence and military system, deciding where it should go and who should have access to it."[125] This includes on to third parties such as allies of the United States like Israel. Hager assesses that New Zealand intelligence is "perhaps" shared with close allies of the UKUSA

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[122] See "New Zealand deploying NZDF team to protect Red Sea shipping" The Beehive (23 January 2024) <https://www.beehive.govt.nz/release/new-zealand-deploying-nzdf-team-protect-red-sea-shipping>.
[123] See above [3.10].
[124] Nicky Hager *Secret Power: New Zealand's Role in the International Spy Network* (Potton & Burton, Nelson, 1996) at 123.
[125] At 203.

countries, such as NATO countries.[126] As you have recently observed and we have noted above, the on-sharing of intelligence within Five Eyes is subject to the "third party rule" such that a Five Eyes partner is required to obtain the consent of the GCSB before on-sharing intelligence to a third party.[127]

4.29 In our view, if the New Zealand intelligence and security agencies have produced intelligence relevant to the conflict, it is plausible to suggest that this intelligence has made its way to Israeli agencies through the United States due to the close intelligence relationship between the two countries. This view is based on the following facts:

- The United States and Israel have strong intelligence links dating back to the early 1960s when the CIA and FBI supplied Israel with SIGINT capability.[128]
- These links have been institutionalised through the US–Israel Agreement of 1999[129] and a 2009 intelligence memorandum.[130]
- American intelligence sharing with Israel was enhanced in the wake of the October 7 attacks on Israel. American President Joe Biden directed his officials to "work with their Israeli counterparts on every aspect of the hostage crisis, including sharing intelligence".[131] This was operationalised through, among other things, a "secret memorandum" on intelligence sharing by the White House shortly after the October 7 attacks.[132]
- An Israeli military spokesperson recently stated that "[w]e [Israel] are experiencing unprecedented levels of intelligence coordination".[133] Despite American officials denying intelligence-sharing intended for Israeli military use, or use that would cause

[126] At 203.
[127] Above n 77, at 3.
[128] Jeffrey Richelson *Foreign Intelligence Operations* (Ballinger Publishing Co, Pensacola, 1988) at 33.
[129] "Israel-US 1999 Agreement" (3 August 2014) The Intercept <https://theintercept.com/document/israel-us-1999-agreement/>.
[130] "NSA and Israeli intelligence: memorandum of understanding – full document" (11 September 2013) The Guardian <https://www.theguardian.com/world/interactive/2013/sep/11/nsa-israel-intelligence-memorandum-understanding-document>.
[131] "Statement from President Joe Biden on American Citizens Impacted in Israel" (9 October 2023) The White House <https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/09/statement-from-president-joe-biden-on-american-citizens-impacted-in-israel/>.
[132] Warren Strobel and Nancy Youssef "U.S. and Israel's 'Unprecedented' Intelligence Sharing Draws Criticism" (31 March 2024) Wall Street Journal <https://www.wsj.com/politics/national-security/u-s-and-israels-unprecedented-intelligence-sharing-draws-criticism-a85979b4>.
[133] Above.

unacceptable civilian casualties,[134] non-governmental commentators point to the lack of oversight of how this intelligence is being used.[135]

4.30 New Zealand-produced intelligence being on-shared is only one way that potential intelligence sharing that supports the commission of international crimes by Israel in the Gaza Strip may be undertaken. It is not outside the realm of possibility that the GCSB or NZSIS are hosting foreign capabilities (most likely from a member of the Five Eyes) which then inpunes the agencies if intelligence gathered from these foreign capabilities have been used to support the commission of international crimes by Israel in the Gaza Strip. This is because foreign capabilities, while servicing the intelligence needs of overseas counterparts, still need to comply with New Zealand law, including all human rights obligations *recognised* by New Zealand law. The GCSB has hosted foreign capabilities, including those which have enabled the targeting operations.[136]

4.31 Second, it is publicly known that the United Kingdom and United States have been offering forms of political, moral, military, and intelligence-based assistance to Israel in Gaza. Given the close relationship between the agencies of New Zealand, the United Kingdom, and the United States, this public knowledge of assistance should have prompted inquiries within the agencies about intelligence-sharing, and whether there was a need for further risk assessments, caveats, the seeking of assurances, or the asking of hard questions.

4.32 Third, from January 2024 and again from July 2024, New Zealand committed NZDF members to Operation Guardian Prosperity, and – despite political comments about the separation of that operation from events in the Gaza – there was clearly a foreseeable nexus, to an impartial and objective observer, between that operation and the removal of barriers to Israel's ongoing actions in Gaza. New Zealand's role in that operation has not been publicly discussed at any length. Agencies ought to have ensured there was no significant contribution to breaches of international law and human rights through New Zealand's participation in the operation, including through possible support provided by the agencies to the NZDF.

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[134] Above.

[135] Tyler McBrien "U.S. Intelligence Sharing With Israel Deserves the Same Scrutiny as Arms Transfers" (14 December 2023) Lawfare Media <https://www.lawfaremedia.org/article/u.s.-intelligence-sharing-with-israel-deserves-the-same-scrutiny-as-arms-transfers>.

[136] Brendan Horsley *Inquiry in GCSB's hosting of a foreign capability* (Inspector-General of Intelligence and Security, March 2024).

4.33 These factors, taken together, suggest there was a plausible basis for contact, exchange, and even assistance by New Zealand intelligence and security agencies, to Israel directly or to partners that were themselves offering significant assistance to Israel. The evidence of significant and grave breaches of international law should have put agencies on even higher alert of risks of complicity and contribution. In other words, it is submitted that the gravity of the breaches of international law and human rights should prompt greater care and caution from agencies about complicity where there is some plausible basis for complicity in or contribution to those breaches.

4.34 The potential for the GCSB to gather intelligence relevant to the commission of international crimes in the present conflict is moderated by the geographic limits of its intelligence collection. You made this observation recently albeit in a different context.[137] While New Zealand's area of responsibility for intelligence collection within the Five Eyes may appear not to extend to Israel and Gaza, there is a lack of clarity on the scope of the GCSB's intelligence collection. For example, our research has indicated that New Zealand's area of responsibility for intelligence covers the Western Pacific;[138] the South Pacific and Southeast Asia;[139] and the Pacific Islands and Asia-Pacific.[140] We also understand that historic intelligence collection by New Zealand intelligence agencies has covered the following jurisdictions/regions: Southeast Asia, Southwest Pacific, China, North Korea, Western Pacific, North Asia, Pakistan, India, Iran, Antarctica, French Polynesia (and the South Pacific more broadly), South America, Vietnam, Japan, Egypt, and East Germany.[141] If the geographic scope of GCSB intelligence collection is wide, then it could conceivably capture relevant material. However, even if the geographic scope is narrow, in the context of the present context, given the major powers involved and the globalisation of the conflict, it is at least plausible that relevant intelligence might flow through the parts of the world that the GCSB monitors. It also cannot be ruled out that while intelligence may not have been collected that is relevant to Israel's actions in Gaza, New Zealand agencies

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[137] Brendan Horsley *Inquiry in GCSB's hosting of a foreign capability* (Inspector-General of Intelligence and Security, March 2024) at [108].
[138] Jeffrey Richelson and Desmond Ball *The Ties That Bind: Intelligence Cooperation between the UKUSA Countries* (Allen and Unwin, Sydney, 1990) at 349.
[139] James Cox *Canada and the Five Eyes Intelligence Community* (Canadian Defence & Foreign Affairs Institute and Canadian International Council, December 2012) at 6; and Jim Rofle "Five eyes/five countries" (2021) 46(6) New Zealand International Review 2.
[140] Ryan Gallagher and Nicky Hager "Documents Shine Light on Shadowy New Zealand Surveillance Base" (7 March 2015) The Intercept <https://theintercept.com/2015/03/07/new-zealand-ironsand-waihopai-nsa-gcsb/>.
[141] John Battersby and Rhys Ball "The Phantom Eye: New Zealand and the Five Eyes" (2023) 38(6) Intell Natl Secur 920 at 923 and 929.

may have contributed to analysis of information collected by other agencies relevant to Israel's actions in Gaza.

4.35 We also note the distinction between intelligence collection and intelligence analysis. The geographical limits we discuss above only relate to intelligence collection. So, while New Zealand may not have intelligence collection responsibilities for the Middle East, it is not outside the realm of possibility that the GCSB has analysed relevant information collected by other intelligence agencies. It could then on-share this relevant information in a manner which supports the commission of international crimes by Israel in the present conflict.

4.36 We also cannot rule out the possibility that the GCSB and NZSIS might have shared intelligence in a manner which supports the commission of international crimes in the conflict by directly sharing it with Israeli agencies. As you have recently observed, 18 countries had "authorisations and approved party status" and five other countries had authorised party status with the GCSB. Similarly, the NZSIS had "authorisations and approved party status" for 27 countries and 40 had authorised party status with the Service.[142] The Inspector-General is in a better position than we are to rule out the possibility that Israel is one of these countries or whether it is a third party to whom the agencies have agreed intelligence sharing pursuant to five eyes protocols.

4.37 Intelligence is the cornerstone of military action; military determinations are executed on intelligence. As one scholar observes, "[t]he collection, pooling, and sharing of intelligence [...] is indispensable for [...] modern coalition warfare."[143] Intelligence assists military commanders in deciding resource deployment including artillery targeting, and when, how, and where to deploy resources – including in ways that result in the commission of international crimes. As you have recently observed, "[t]he New Zealand agencies can produce intelligence of value to participants in international armed conflicts".[144]

4.38 However, intelligence in war does far more than just assisting military targeting. Israel and its intelligence allies are, with Gaza, acutely concerned about government positions of

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[142] Above n 77, at 3.
[143] Marko Milanovic "Intelligence Sharing in Multinational Military Operations and Complicity under International Law" (2021) 97 Intl L Stud 1269 at 1271.
[144] Brendan Horsley *Work Programme 2024-25* (Inspector-General of Intelligence and Security, June 2024) at 2.

countries around the world and even more so the actions of countries in the United Nations (and other regional and international organisations). Such intelligence gathering, among other things, assists Israeli political and diplomatic activities that potentially support the continuation of the commission of international crimes by Israel in the present conflict.

(e) Possible departures from standards of propriety that the agencies are legally bound to uphold, and non-compliance with New Zealand law

4.39 The Afghanistan inquiry confirmed that it was for the Inspector-General to ensure the legality and propriety of activities of the GCSB and the NZSIS. In this section we set out concerns, at the level of propriety and legality, about New Zealand's possible engagement with Israel's actions in Gaza.

4.40 There have been multiple 'trigger points' or moments that might have offered 'warning signs' about any direct or indirect New Zealand involvement in Israel's actions in Gaza. In October, credible and authoritative reports pointed to breaches of international humanitarian law and a possible unfolding genocide.[145] On 23 January 2024, New Zealand became officially involved in the Red Sea military operation with foreseeable links to events in Gaza. On 26 January, the ICJ issued its opinion in relation to the Genocide Convention and Israel's actions in Gaza. Further orders were made by the Court in March and May, and on 19 July 2024, the Court issued a further advisory opinion on unlawful actions by Israel over a longer period, setting out obligations of other states with respect to those unlawful actions.

4.41 It is for the Inspector-General to select the most important trigger points and warning signs. However, it would be consistent with past IGIS reports for the Inspector-General to inquire into what was done by the intelligence and security agencies with knowledge of possible breaches of international law and human rights (and New Zealand connections to such breaches) in October 2023, January 2024, and July 2024.

4.42 It would seem proper for the agencies to reconsider their approach to sharing actionable intelligence – either with Israel, and/or with the United Kingdom and the United States – at these points. It is not clear whether cooperation with Israel has been authorised. If so, it could be asked whether agencies have prompted the Minister to revisit whether Israeli agencies are acting in accordance with New Zealand law. It could be asked whether ministers sought specific

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[145] See above [4.2] - [4.18].

ministerial authorisation for third party on-sharing with Israel by the Five Eyes partners. Though ministerial authorisation for third party on-sharing has not been standard practice by the agencies, it represents best practice, and ought to have been sought in this case given the credible allegations against Israel.

4.43 There is also a question about more general processes and policies in relation to these trigger points. It should be known whether advice was sought by the agencies from Crown Law on their obligations, in particular after the opinions of the ICJ were released. The Inspector-General may seek to develop his own analysis of complicity in genocide and other breaches of international humanitarian law, as has been done (in relation to different breaches of international law) in past reports. The Inspector-General should inquire into whether the process for evaluating partners' policies and actions has improved since past reports; whether human rights risk assessments have been better embedded and operationalised; and whether human rights risks were well anticipated, at the very least in October 2023, in January 2024 (at two critical moments), and after July 2024.

4.44 There is, in sum, a clear basis on which to conduct an inquiry into the propriety of particular activities of both the NZSIS and GCSB on the Inspector-General's own initiative, under section 158(d).

4.45 We also consider there may be a case to conduct an inquiry into matters relating to agencies' compliance with New Zealand law, including human rights law. We address three matters of potential non-compliance with the law: (1) the breach of customary international obligations to ensure respect for international humanitarian law and the customary international law obligation to take all reasonable measures to prevent genocide; (2) a breach of the International Crimes and International Criminal Court Act 2000; and (3) a breach of the New Zealand Bill of Rights Act 1990.

4.46 Beginning with customary international law: it is well accepted that customary international law is part of the New Zealand common law. Common law systems have long taken

the position that customary international law is part of the common law.[146] In New Zealand, our courts have consistently confirmed this position.[147]

4.47 Common Article 1 to the four Geneva Conventions provides that States Parties undertake to "ensure respect" for the Conventions.[148] The International Committee of the Red Cross ("**ICRC**") has repeatedly stated that the obligation to ensure respect for international humanitarian law is not limited to parties to a conflict, but requires that all states do everything in their power to ensure that international humanitarian law is respected universally.[149] The jurist, Professor Jean Pictet, one of the architects of the contemporary international humanitarian legal framework, explained the significance of the term "ensure respect":[150]

> The Contracting Parties do not undertake merely to respect the Convention, but also to 'ensure respect' for it. [...] It follows, therefore, that in the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavor to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention

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[146] See Shaheed Fatima "Engagement of English Courts with International Law" in André Nollkaemper and others (eds) *The Engagement of Domestic Courts with International Law: Comparative Perspectives* (Oxford University Press, Oxford, 2024) at 227-244. A recent statement from the UK Court of Appeal is useful in explaining the common law position: "... in the case of a rule of customary international law the presumption is that it will be treated as incorporated into the common law unless there is some reason of constitutional principle why it should not be"; *R (Freedom & Justice Party) v Secretary of State for Foreign & Commonwealth Affairs* [2018] EWCA Civ 1719.

[147] See Treasa Dunworth, "Sources of International Law in Aotearoa New Zealand" in An Hertogen and Anna Hood (eds) *International Law in Aotearoa New Zealand* (Thomson Reuters, 2021) at 20. The earlier cases tended to concern the customary international law of sovereign immunity: *Buckingham v Hughes Helicopter* [1982] 2 NZLR 738; *Reef Shipping Co Ltd v The Ship "Fua Kavenga"* [1987] 1 NZLR 550; *Controller and Auditor-General v Davison* [1996] 2 NZLR 278. But more recently the senior courts have drawn on customary international law in a broader range of cases; see *Attorney-General v Zaoui* [2006] 1 NZLR 289 (SC) considering the customary international rules on the interpretation of treaties; *Zaoui v Attorney-General* (No 2) [2005] 1 NZLR 690 (CA) considering the customary international law prohibition against refoulement; and *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA) on the customary international law of freedom of the high seas.

[148] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (opened for signature 12 August 1949, entered into force 21 October 1950); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (opened for signature 12 August 1949, entered into force 21 October 1950); Geneva Convention relative to the Treatment of Prisoners of War (opened for signature 12 August 1949, entered into force 21 October 1950); Geneva Convention relative to the Protection of Civilian Persons in Time of War (opened for signature 12 August 1949, entered into force 21 October 1950) (collectively, "**the Four Geneva Conventions**").

[149] Jean Pictet (ed) *Commentary to the 1949 Geneva Convention VI* (International Committee of the Red Cross, Geneva, 1958) at 16.

[150] Jean Pictet (ed) *Commentary to the 1949 Geneva Convention IV* (International Committee of the Red Cross, Geneva, 1958) at 16.

> demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally.

4.48 The ICJ, in the *Construction of a Wall (Advisory Opinion)*, referring to Article 1, said: [151]

> It follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instrument in question are complied with.

4.49 Importantly for our purposes, the obligation to "ensure respect" for the Geneva Conventions also has force as an obligation of customary international law. Rule 144 of the ICRC's *Study of Customary International Humanitarian Law*,[152] provides that:

> States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law.

4.50 In the *Nicaragua Case (Merits)* in 1986, the ICJ held that the duty to ensure respect did not derive only from the Geneva Conventions but "from the general principles of humanitarian law to which the Conventions merely give specific expression".[153] The Trial Chamber of the International Tribunal for the Former Yugoslavia has confirmed in its judgments that norms of international humanitarian law are norms *erga omnes* and therefore all states have an interest in compliance with that body of law.[154]

4.51 Article 1 of the Genocide Convention provides that:[155]

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[151] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, 9 July 2004, [2004] ICJ Rep 136 at [158].
[152] Jean-Marie Henckaerts and Louise Doswald-Beck (eds) *Customary International Humanitarian Law: Volume 1: Rules* (Cambridge University Press, Cambridge, 2005).
[153] *Military and Paramilitary Activities in and against Nicaragua (Republic of Nicaragua v. the United States of America) (Merits)*, 27 June 1986, [1986] ICJ Rep 3 at [220].
[154] See, for example *Prosecutor v Kupreškić (Judgment)* Case No IT-95-16-T, Trial Chamber, 14 January 2000 at [520].
[155] Convention on the Prevention and Punishment of the Crime of Genocide 78 UNTS 277 (opened for signature 11 December 1948, entered into force 12 January 1951), art 1.

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

4.52 The ICJ has described this obligation to prevent genocide as "normative and compelling" and has stated that this obligation is one of "conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide."[156] A State's obligation to prevent arises when the State "learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed".

4.53 The obligation to prevent genocide "varies greatly from one State to another" ... depending upon the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of political and other links between the authorities of that State and the main actors in the events. Significantly in terms of New Zealand's responsibility in this specific situation, the Court also noted that "it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result — averting the commission of genocide — which the efforts of only one State were insufficient to produce.[157]

4.54 The obligation to prevent genocide is also an obligation as a matter of customary international law. In its advisory opinion of 28 May 1951, the ICJ noted that: "the first consequence arising from this conception [that the crime of genocide is a crime of concern to all of humanity] is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation." [158]

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[156] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)*, 26 February 2007, [2007] ICJ Rep 43 at [430].

[157] Above.

[158] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion of 28 May 1951)* [1951] ICJ Rep 15 at 23; "The first consequence arising from this conception [that the crime of genocide is a crime of concern to all of humanity] is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation." For academic commentary, see William Schabas "Genocide and the

4.55 In 2005, the Outcome Document of the Summit of Heads of State and Government declared that:[159]

> Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help states to exercise this responsibility.

4.56 This analysis raises the prospect that New Zealand may have had a positive obligation to take proactive steps to prevent genocide, including in relation its links to the United Kingdom and the United States and the knowledge of the assistance offered by those states to Israel. It could be asked whether New Zealand intelligence and security agencies took such proactive steps when warning signs and trigger points arose. The more general obligation to ensure respect for international humanitarian law fortifies the need for due diligence by the GCSB and NZSIS following the publication of credible reports showcasing breaches of international humanitarian law in Gaza. This obligation may have required, at minimum, that assurances were sought from the United Kingdom and the United States about their position and their role in Gaza; that caveats were placed on intelligence-sharing; and/or that legal initiatives were adopted and segmented cooperation established.

4.57 Turning to a breach of the International Crimes and International Criminal Court Act 2000 ("**the ICICC Act**"): at the very least, there are matters relating to compliance with that Act that warrant inquiry (as per section 158(1)(a) of the Intelligence and Security Act 2017). The ICICC Act criminalises three categories of international crimes (war crimes, crimes against humanity, and genocide) as a matter of New Zealand law.[160] As observed in the Ministerial Policy Statement, cooperation with overseas authorities risks New Zealand becoming complicit in unlawful conduct breaching obligations like those found in the ICICC Act.[161]

4.58 Relevantly, s 11(1) of the ICICC Act provides that every person who, in New Zealand or elsewhere, commits a war crime is criminally liable. War crimes are defined by reference to acts

International Court of Justice: Finally, a Duty to Prevent the Crime of Crimes" (2007) *Genocide Studies and Prevention: An International Journal* 2(2) 101.

[159] *2005 World Summit Outcome* S-60 UN Doc A/RES/60/1 (24 October 2005) at [138].

[160] International Crimes and International Criminal Court Act 2000, ss 6, 9, 10 and 11.

[161] *Ministerial Policy Statement: Cooperating with overseas public authorities* (March 2022) at [2].

set out in the Rome Statute of the ICC (**"Rome Statute"**).[162] The acts we consider are engaged include:

(i) Grave breaches of the Geneva Conventions,[163] namely any of the following acts against persons or property protected under the relevant Geneva Convention:

a. Wilful killing[164] [included in the request for arrest warrant by the ICC Prosecutor];

b. Torture or inhuman treatment;[165]

c. Wilfully causing great suffering, or serious injury to body or health[166] [included in the request for arrest warrant by the ICC Prosecutor]; and

d. Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.[167]

(ii) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

a. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities[168] [included in the request for arrest warrant by the ICC Prosecutor];

b. Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;[169]

c. Attacking or bombarding, by whatever means, towns, villages, dwellings, or buildings which are undefended and which are not military objectives;[170]

d. Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not military objectives; and[171]

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[162] Above n 154, s 11(2).
[163] The four Geneva Conventions operate in times of international armed conflict. The Prosecutor of the ICC has determined that the conflict between Israel and Palestine is an international armed conflict; above n 95.
[164] Above n 96, art 8(2)(a)(i).
[165] art 8(2)(a)(ii).
[166] art 8(2)(a)(iii).
[167] art 8(2)(a)(iii).
[168] art 8(2)(b)(i).
[169] art 8(2)(b)(ii).
[170] art 8(2)(b)(v).
[171] art 8(2)(b)(ix).

e. Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions[172] [included in the request for arrest warrant by the ICC Prosecutor].

(iii) In the case of an armed conflict not of an international character,[173] serious violations of article 3 common to the four Geneva Conventions, namely any of the following acts when committed against persons taking no active part in the hostilities:

a. Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment, and torture[174] [included in the request for arrest warrant by the ICC Prosecutor]; and

b. Committing outrages upon personal dignity, in particular humiliating and degrading treatment.[175]

(iv) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely any of the following acts:

a. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities[176] [included in the request for arrest warrant by the ICC Prosecutor];

b. Intentionally directing attacks against buildings, material, medical units, and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law; and[177]

c. Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not military objectives.[178]

4.59 Section 10 of the ICICC Act provides that every person who, in New Zealand or elsewhere, commits a crime against humanity is criminally liable. A crime against humanity is defined by

[172] art 8(2)(b)(xxv).
[173] The Prosecutor of the ICC has determined that the conflict between Israel and Hamas is a non-international armed conflict; above n 95.
[174] art 8(2)(c)(i).
[175] art 8(2)(c)(ii).
[176] art 8(2)(e)(i).
[177] art 8(2)(e)(ii).
[178] art 8(2)(e)(iv).

reference to acts set out in the Rome Statute[179] and includes enumerated acts "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".[180] The acts we consider are engaged include:

(i) Murder[181] [included in the request for arrest warrant by the ICC Prosecutor];

(ii) Extermination[182] [included in the request for arrest warrant by the ICC Prosecutor];

(iii) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious ... or other grounds that are universally recognized as impermissible under international law[183] [included in the request for arrest warrant by the ICC Prosecutor]; and

(iv) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health"[184] [included in the request for arrest warrant by the ICC Prosecutor].

4.60 Section 9 of the ICICC Act provides that every person who, in New Zealand or elsewhere, "commits genocide; or conspires or agrees with any person to commit genocide, whether that genocide is to take place in New Zealand or elsewhere" is criminally liable.[185] Genocide is defined by reference to acts set out in the Rome Statute[186] and "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group".[187] The Rome Statute (and thus, the New Zealand ICICC Act) lists a total of five acts which may constitute genocide if carried out with the requisite intent to destroy in whole or in part an enumerated group. In our view, three of those acts are engaged in the present context. These are:

(i) Killing members of a group;[188]

(ii) Causing serious bodily or mental harm to members of a group;[189] and

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[179] Above n 154, s 10(2).
[180] Above n 96, art 7(1).
[181] art 7(1)(a).
[182] The Rome Statute further defines "extermination" as including "the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population"; above n 96, art 7(2)(b).
[183] The Rome Statute further defines "persecution" as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity"; above n 96, art 7(2)(g).
[184] Above n 96, art 7(1).
[185] Above n 154, s 9(1).
[186] Above n 154, s 9(2).
[187] Above n 96, art 6.
[188] art 6(a).
[189] art 6(b).

(iii) Deliberately inflicting on a group conditions of life calculated to bring about its physical destruction in whole or in part.[190]

4.61 We do not suggest, of course, that New Zealand intelligence and security agencies themselves have, through a *direct* mode of liability, breached these provisions. However, given the existence of these provisions in New Zealand law, which serve to domesticate various international crimes, there is a question of whether contact by the intelligence and security agencies with Israel and/or the United States and/or the United Kingdom with respect to Israel's actions in the Gaza Strip have caused a breach of the law.

4.62 Finally, we note in passing the New Zealand Bill of Rights Act 1990 ("**the Bill of Rights**"). The intelligence and security agencies are subject to the Bill of Rights under section 3 of that Act. Various rights may be engaged by contact between the intelligence and security agencies and Israel or the United States or the United Kingdom with respect to Israel's actions in Gaza; most relevantly, section 8, which sets out the right not to be deprived of life. There is little authoritative case law on the extra-territorial application of the Bill of Rights.[191] Reasoning by analogy from the extra-territorial application of the International Covenant on Civil and Political Rights, to which the Bill of Rights gives effect,[192] there are good grounds to consider the Bill of Rights applies where New Zealand exercises jurisdiction abroad through effective control or exercises power and authority over individuals.[193] This is broadly similar to the test for the extra-territorial application of the European Court of Human Rights.[194] Actions by the GCSB and/or NZSIS that involve the sharing of intelligence or the receipt of intelligence are significant exercises of state power, with implications for individuals. It is difficult definitively to say that those actions are not subject to the protections and obligations in the Bill of Rights. Questions about compliance with the Bill of Rights, and processes and policies adopted to give effect to the Bill of Rights, are a further reason for the Inspector-General to open an inquiry into this matter.

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[190] art 6(c).

[191] See, for example *R v Matthews* (1994) 11 CRNZ 564 (HC). Compare *Young v Attorney-General* [2018] NZCA 307 at [40].

[192] See New Zealand Bill of Rights Act 1990, Long Title.

[193] See Paolo Busco "Not All that Glitters Is Gold: the Human Rights Committee's Test for the Extraterritorial Application of the ICCPR in the Context of Search and Rescue Operations" Opinio Juris (2 March 2021) <http://opiniojuris.org/2021/03/02/not-all-that-glitters-is-gold-the-human-rights-committees-test-for-the-extraterritorial-application-of-the-iccpr-in-the-context-of-search-and-rescue-operations/>.

[194] See *Al-Skeini v United Kingdom* [2011] ECHR 1093 and discussion at Aleisha Brown "Human rights obligations can travel: The extraterritoriality of human rights and the Iraq War" Human Rights Law Centre <https://www.hrlc.org.au/human-rights-case-summaries/human-rights-obligations-can-travel-the-extraterritoriality-of-human-rights-and-the-iraq-war>.

5. There is sufficient public interest in an inquiry being opened

(a) The value of an inquiry

5.1 There is public concern about New Zealand's complicity in significant breaches of international law in Gaza. We have suggested that some of that concern may be well-founded. To facilitate effective democratic oversight of the work of the intelligence and security agencies, the Inspector-General should open an inquiry of his own motion to establish whether New Zealand has made any contribution (either through the United States and United Kingdom, or more directly to Israel) to breaches of law and human rights obligations recognised by New Zealand law, by Israel in Gaza. It would improve public confidence in the agencies, and the work of the Inspector-General, to both establish that there has been no contribution and to explain to the public what was done when the risk of such contribution was crystallised.

5.2 Because information relating to intelligence is classified, the background we present above is inherently incomplete. Therefore, there is value in conducting an inquiry like the one we have requested. The Inspector-General will have access to material that we do not, which means you will be able to consider the veracity of our contentions in light of all the relevant material. You should investigate, not because intelligence sharing in violation of New Zealand law is known and definite, but because it is plausible, and there is a very high public interest in such an inquiry. Indeed, this is even more pertinent in light of the Prime Minister's recent statement that New Zealand is deepening its relationship with the Five Eyes Alliance, including by being a "participant and a contributor - not an interested bystander."[195] In light of this statement, we consider that the risk of intelligence sharing in violation of New Zealand law is even more plausible.

5.3 We note your stated intention to monitor "conflict-related intelligence activity", including the present conflict, as contextually relevant.[196] We acknowledge that you are "not committed to undertaking any specific reviews".[197] However, in our view, New Zealand's involvement in relation to Israel's actions in the Gaza Strip warrants specific review (over other contemporary conflicts you cited) for a number of further reasons, including:

- The international crimes that Israel has committed are well documented.

[195] Lillian Hanly "Christopher Luxon's Lowy Institute address: 'Deliberately deepening our relationships' with Five Eyes" (16 August 2024) RNZ <https://www.rnz.co.nz/news/top/525282/christopher-luxon-s-lowy-institute-address-deliberately-deepening-our-relationships-with-five-eyes>.
[196] Above n 139, at 2.
[197] Above.

- New Zealand does not have an intelligence relationship, either directly or indirectly, with Russia, the belligerent country which has been documented as committing international crimes in the Ukraine-Russia conflict. The same factual matrix outlined above that details the possibility of New Zealand intelligence sharing with Israel, in violation of New Zealand law, does not apply to Russia.[198]
- The conflict is far more globalised than the conflict in Yemen, a more regional conflict which means that the possibility of the GCSB collecting relevant intelligence is lessened.
- Monitoring in and of itself, while useful, does not possess the same vigour of an inquiry.

5.4 The governing legislation outlines that in conducting an inquiry or review, the Inspector-General must have regard to "any relevant ministerial policy statement" and the extent to which the relevant intelligence agency has complied with it.[199] It is clear that the Ministerial Policy Statement on Cooperating with Overseas Public Authorities is relevant to the inquiry that we request. In our view, the background we outline above may also indicate a breach of the Ministerial Policy Statement. The Statement recognises that for New Zealand to meet its human rights obligations, GCSB and NZSIS employees must act consistently with their obligations under both domestic law and international law. Relevant domestic and international legal instruments cited by the Ministerial Policy Statement include the NZBORA, International Covenant on Civil and Political Rights, Geneva Conventions, and obligations as located under customary international law.

(b) The possible terms of reference of an inquiry

5.5 It is for the Inspector-General to establish the terms of reference. However, to demonstrate that an inquiry would involve approaches consonant with past reports, we suggest the following terms of reference, informed by our reading of past reports:

Term of Reference A: What, if anything, was the knowledge, awareness, and contribution of the GCSB and the NZSIS to Israel's actions in the Gaza Strip from October 2023 to now in relation in particular to alleged breaches of international law, either through contact with the United States and the United Kingdom or direct contact with Israel?

[198] This is not to preclude the possibility that New Zealand-produced intelligence has been used by Ukraine in the commission of international crimes, not that we are asserting this.
[199] Above n 3, s 158(2).

Term of Reference B: If the GCSB and the NZSIS played any role, how did these agencies consider and apply New Zealand's human rights and other international legal obligations to any information collected and/or received about the possibility of genocidal actions and breaches of international humanitarian law?

Term of Reference C: From October 2023 until September 2024, how did the GCSB and the NZSIS consider and apply New Zealand's human rights obligations to relationships with the United States and United Kingdom, and Israel?

Term of Reference D: If the GCSB and NZSIS played any role, did they take any steps as a result of the ICJ opinion on 26 January 2024 (and subsequent follow-up orders), other credible reports on breaches of the law, and the ICJ opinion on 19 July 2024?

6. Conclusion

6.1 We accept that matters raised here involve some considerable political and diplomatic sensitivities. However, so too did the matters inquired into as part of the report into New Zealand involvement in the CIA detention and torture programme, and so too have other reports. The Inspector-General is well capable of limiting disclosure of aspects of the inquiry if that is justified. As the Inspector-General has noted before, the intelligence and security agencies do not operate in a legal or moral vacuum.

6.2 The Inspector-General has taken an admirably robust approach to its role in the past. The events in the Gaza Strip require similar robustness in approach. We implore you to undertake an inquiry of the kind we have described above, informed by the considerations we have set out here in this opinion. Legality and propriety require nothing less.

Associate Professor Treasa Dunworth, Dr Max Harris, and Vinod Bal

12 September 2024