In the Government Inquiry into Operation Burnham

SYNOPSIS OF SUBMISSIONS OF COUNSEL FOR JON STEPHENSON FOR PUBLIC HEARING 3

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MAY IT PLEASE THE INQUIRY

INTRODUCTION

Mr Stephenson's position

1. The purpose of Module 3 is to identify principles of law relevant to the events that took place in Operation Burnham on the night of 21-22 August 2010.[1]

2. To assist the Inquiry in doing so, it has invited presentations by two eminent experts in international law, Sir Kenneth Keith and Professor Dapo Akande. In addition, the Inquiry has available to it its own legal advisors, including experienced Queen's Counsel.

3. While he is grateful for the opportunity to appear and present at the Module, Mr Stephenson considers his role at the Module to be limited. He is a core participant primarily because of his knowledge of facts relevant to the Inquiry, and his access to information and witnesses, rather than as a commentator on legal issues in a general sense.

4. For this reason, he considers that he and his counsel can be of most assistance to the Inquiry at the public hearings by:

   (a) Cross-examining NZDF witnesses at the upcoming hearing in September, based on his knowledge of facts and events that will be the subject of that examination.

   (b) Making submissions, on both matters of fact and law, at the proposed October hearing, following provision of the Inquiry's preliminary findings.

5. In the light of this, this presentation will be limited to some general comment on the applicable general legal principles. He reserves his right to make more comprehensive submissions on the application of those principles to the facts as established following the intended examinations.

Contents of this synopsis

6. This synopsis addresses:

   (a) The relevance of the applicable law to the Inquiry, and the Inquiry's jurisdiction to consider compliance with the law.

   (b) The general legal framework applicable to the Inquiry.

   (c) Relationships between different bodies of applicable law.

[1] Inquiry Minute No. 17 dated 27 June 2019 at [2].

(d) General principles of International Humanitarian Law (**IHL**).

RELEVANCE OF APPLICABLE LAW AND JURISDICTION

Relevance

7. The applicable law is relevant to the Inquiry's work for three main reasons:

   (a) First, the main purpose of the Inquiry is to examine the allegations of impropriety or wrongdoing against NZDF personnel in connection with Operation Burnham and related matters.[2] The law provides a robust framework against which these allegations can be examined.

   (b) Second, the Inquiry's Terms of Reference (**TOR**) expressly authorise it to report on compliance with the applicable law.[3]

   (c) Third, the Inquiry also has jurisdiction to make recommendations that further steps be taken to determine liability.[4]

Jurisdiction

8. Following Hearing No 2, the Crown Agencies submitted that the Inquiry's jurisdiction to report on compliance with the law was limited in relation to the treatment of Qari Miraj.[5] The Agencies submitted that all the Inquiry has jurisdiction to do is examine whether the NZDF acted in accordance with Crown legal advice and government policy.

9. Mr Stephenson disagrees with this position, for the reasons set out in the submissions filed following Hearing No 2.[6] Should a similar argument be advanced in relation to Operation Burnham, it is submitted the Inquiry also has jurisdiction to report on all applicable law in relation to this operation, including IHL, IHRL and domestic human rights law.

10. This is supported by clause 7.1 of the Inquiry's TOR, which provides:

> Having regard to its purpose, the Inquiry will inquire into and report on the following:
>
> 7.1 The conduct of NZDF forces in Operation Burnham, including compliance with the applicable rules of engagement and international humanitarian law.

11. Three points can be made about this clause. First, it expressly authorises the Inquiry to report on compliance with the applicable IHL. The reference to reporting on "compliance" must envisage a process whereby the Inquiry first determines what the applicable law was, then assesses and reports

[2] TOR at [5].
[3] See paragraphs [8]-[13] below.
[4] Inquiries Act 2013, s 11(2)(b).
[5] Crown Agencies Reply Submissions following Hearing 2 at [13].
[6] Submissions of Counsel for Jon Stephenson in Reply following Hearing 2 at [4]-[7].

on whether the NZDF complied with it. The clause also refers to "IHL" – not what the Crown understood the law to be, or Crown policy.

12. Second, clause 7.1 does not limit the Inquiry to considering IHL only. Compliance with IHL is given as an example of the Inquiry's general jurisdiction to report on the conduct of NZDF forces on the operation. Applying the principle of *ejusdem generis*, the specific example should colour the general authority. The Inquiry ought to have jurisdiction to report and make recommendations regarding other applicable law, too, in particular international and domestic human rights law.

13. Third, as previously submitted, the applicable IHL and human rights law imposed obligations on the NZDF to take positive steps to prevent torture and mistreatment. These obligations would have been engaged by Operation Burnham. The operation was intended as a potential detention operation. The Inquiry has specific jurisdiction under clause 7.4 of the TOR to report on the planning for the operations. The fact that no detentions ultimately resulted is immaterial to whether New Zealand complied with these obligations in the preparation of the operations.

APPLICABLE LEGAL FRAMEWORK

14. The legal framework relevant to the Inquiry includes New Zealand and Afghan domestic law, and public international law. These bodies of law are briefly summarised below. The relationships between domestic and international human rights law and IHL, and the specific principles of IHL relevant to Operation Burnham, are set out separately.

New Zealand domestic law

Criminal law

15. The criminal law of New Zealand generally only applies to acts or omissions that occur within New Zealand's territorial jurisdiction. No act or omission done or omitted outside that territory can be an offence unless this is specifically provided for in legislation.[7]

16. The main criminal statute which specifically provides for extraterritorial offences is the Armed Forces Discipline Act 1971 (**AFDA**). The AFDA applies to acts or omissions by members of the NZDF done in New Zealand or elsewhere.[8] Of relevance to the Inquiry, it includes:

    (a) specific offences relating to contravening orders and committing cruel and disgraceful conduct; and

    (b) a general offence, under which any act done outside New Zealand which would be an offence under the civil (as opposed to military)

[7] Crimes Act 1961, s 6.
[8] The persons to whom the AFDA are defined in Part 1. Section 4 affirms the extraterritorial application of the Act.

law of New Zealand if done inside New Zealand, an offence under the AFDA.[9]

17. The AFDA contains limitation provisions governing its application to historic offences. These were considered by Defence Legal Services in a recently declassified legal opinion.[10]

18. The AFDA also contains double jeopardy provisions which prevent a person who has been previously charged with an offence under the AFDA which has been dismissed or determined from being charged before a civil court with the same or a substantially similar offence.

19. Apart from the AFDA, the other main criminal statutes which have extraterritorial effect are the statutes criminalising what are crimes under international criminal law.[11]

Public and administrative law

20. Key actions or decisions taken by members of the NZDF or responsible Ministers would have been amenable to review in principle.[12]

21. In addition, members of the NZDF are part of the executive branch of the government of New Zealand and therefore their acts and omissions would have been subject to the New Zealand Bill of Rights Act 1990 (**NZBORA**).[13] The NZBORA affirms the right not to be deprived of life (s 8), the right not to be subjected to torture or cruel, degrading or disproportionately severe treatment or punishment (s 9), to freedom from arbitrary detention (s 22) and to appropriate treatment while in detention (s 23), among other rights.

22. In their reply submissions following Hearing 2, the Crown Agencies addressed the extraterritorial application of the NZBORA. The Agencies submitted that the Inquiry should not consider this issue as it is currently before the High Court. They further submitted that if the Inquiry was minded to disagree, it should adopt a narrow approach and decline to apply the principles as stated by the European Court of Human Rights (**ECtHR**) in a series of recent decisions applying the European Convention on Human Rights (**European Convention**). The ECtHR has applied the European Convention to actions in places where states exercise effective control or governmental functions, or actions in respect of people over whom states exercise sufficient control to guarantee rights.

23. The Agencies submitted this case law is limited and has only considered situations where the defendant state had control over detention centres[14]

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[9] AFDA, s 74.
[10] Doc 06/07 at [4]-[9].
[11] Geneva Conventions Act 1958, s 3; Crimes of Torture Act 1989, s 3; International Crimes and International Criminal Court Act 2000, ss 9-11.
[12] See Submissions of Counsel for Jon Stephenson for Hearing 2 at [52]-[54].
[13] NZBORA, s 3.
[14] *Al-Saadoon v United* Kingdom (2010) 51 EHRR 9; *Al-Jedda v United Kingdom* (2011) 53 EHRR 23 (GC), and *Hassan v United Kingdom* App. No. 29750/09, Judgment, 16 September 2014 (GC).

or checkpoints,[15] or were acting as an occupying power,[16] or exercised physical control over a person for a long time.[17] They contended that few of those features were present in this case.

24. Three points can be made in response. First, following the Afghan villagers' decision to discontinue their judicial review proceedings, the issue is no longer before the High Court.

25. Second, the Crown Agencies did not appear to submit that the NZBORA should not have any extraterritorial application, only that the Inquiry not apply it as widely as the ECtHR has applied the European Convention. The latter submission is not accepted. There is a principled basis for New Zealand authorities to follow the ECtHR on this issue. The purposes of the NZBORA include giving effect to New Zealand's commitment to the ICCPR. Article 2(1) of the ICCPR and article 1 of the European Convention are worded similarly[18] and the Human Rights Committee's jurisprudence under article 2(1) is broadly similar to that of the ECtHR.[19] The ECtHR's approach is also based on workable principles which enable wider considerations such as the potential application of domestic legal arrangements to be taken into account.

26. Third, two recent cases support the application of the NZBORA in the particular case of partnering operations. The first is *Jaloud v Netherlands*. In that case, the ECtHR Grand Chamber held that a state may exercise sufficient control over an area to give rise to the application of the Convention:[20]

> [Where], in accordance with custom, treaty *or other agreement*, authorities of the Contracting State carry out *executive* or judicial *functions* on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State
>
> (emphasis added)

27. In that case, the Convention was applied to Dutch forces who were present by chance at a checkpoint in Iraq which was usually manned by Iraqi forces. The Dutch forces had been present in Iraq as part of a UN-authorised stabilisation force and were under the command of a UK officer. Despite these factors, the Grand Chamber held the Dutch forces had assumed responsibility for providing security in the area, which was a governmental function, and also retained the authority to formulate policy

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[15] *Jaloud v Netherlands* App. No. 47708/08, Judgment, 20 November 2014 (GC).
[16] *Al-Skeini v United Kingdom* (2011) 53 EHRR 18 (GC).
[17] *Ocalan v Turkey* App. No. 46221/99, Judgment, 12 May 2005 (GC).
[18] Article 2(1) of the ICCPR provides "*Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*." Article 1 of the European Convention provides "*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention*."
[19] Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act : A Commentary* (2 ed, LexisNexis NZ Ltd, Wellington, 2015) at [5.16.3].
[20] At [135].

for themselves such as ROE. These factors supported the application of the European Convention.

28. Second, in the *Green Desert* case, the Danish High Court recently held that Danish forces were liable for the detention, transfer and subsequent mistreatment of detainees in Iraq in November 2004 following a joint military operation with both Iraqi and British Forces.[21] Iraqi forces had arrested about 30 Iraqis who were transferred to detention facilities managed by Iraqi authorities. Those detained were subject to torture by electrical shocks and *falanga* (a form of torture involving the beating or whipping of the feet) both while they were being transported to the institution and during their detention. Danish forces had not directly assisted with the arrests, but had followed the Iraqi security forces and assisted with the evacuation of some areas. The Danish court held the Danish personnel ought to have known there was a real risk the Iraqi forces would torture or mistreat the detainees, and that their involvement breached various provisions of Danish constitutional law, read alongside article 3 of the European Convention.

29. Thomas Hansen and Fiona Nelson have noted that:[22]

> The [Danish] Court strongly suggested that the lack of concern from the relevant Danish authorities regarding the risk of inhuman treatment was a result of a legal framework which established that detentions undertaken by Iraqi security forces as part of missions carried out in cooperation with Danish forces 'were seen as beyond Danish responsibility and monitoring' (810-13). This criticism of the arrangements for handling detainees presents a significant blow to Danish authorities who, following previous incidents of abuse in the context of detention involving Danish forces, appear to have been working on the assumption that the creation of this legal and policy framework would shield them from liability.

30. Against that backdrop, several factors support the application of the NZBORA to the actions of the NZDF at issue in the Inquiry:

    (a) NZDF personnel were present in Afghanistan with the consent of, and under an agreement with, the government of Afghanistan, for the purposes of assisting to maintain stability, defeating the insurgency and training and "mentoring" the Afghan CRU. NZDF personnel trained and mentored CRU personnel, took part with them in numerous deliberate detention, and other, operations, and fought alongside CRU personnel. In the case of Qari Miraj, NZDF personnel assisted the NDS. These were executive functions.

    (b) NZDF personnel played an active role in planning the various operations. There appears to be no evidence that the decision to place the various persons targeted in Operations Burnham, Nova

[21] The judgment appears only to be available in Danish, here: https://www.domstol.dk/oestrelandsret/nyheder/domsresumeer/Documents/Irak.pdf (last accessed 24 July 2019). See Thomas Hansen and Fiona Nelson "Liability of an Assisting Army for Detainee Abuse by Local Forces: The Danish High Court Judgment in Green Desert" EJILTalk, 24 January 2019, available at: https://www.ejiltalk.org/liability-of-an-assisting-army-for-detainee-abuse-by-local-forces-the-danish-high-court-judgment-in-green-desert/ (last accessed 24 July 2019).

[22] Hansen and Nelson, supra.

and Yamaha on the Joint Prorities Effects List (**JPEL**) was made at the instigation of the government of Afghanistan.

(c) NZDF personnel played a leading role in all of these operations – for example, much of the intelligence as well as the planning that led to these operations was provided by the NZDF – and had the capacity to ensure respect for the rights in the NZBORA during the operations.

(d) When Qari Miraj was captured and detained, he was placed in an NZDF vehicle with NZDF personnel and transported to an NDS facility. During this time he was physically restrained, unable to escape and NZDF personnel were responsible for keeping him restrained.

(e) NZDF entered the NDS facility with Qari Miraj and processed him. At this stage NZDF and NDS personnel were responsible for keeping him restrained.

Civil law

31. Finally, in additional to criminal and public law, it is noted that, to the extent that NZDF personnel caused loss or damage to persons in Afghanistan, this could have given rise to a claim in tort which could have been brought before the New Zealand courts. A court considering such a claim would have had to have considered whether New Zealand was an appropriate forum to hear the case, determine the applicable law (likely under the old double actionability rule[23]) and determine whether the act of state doctrine was engaged[24] before deciding whether the cause of action was made out.

Afghan law

32. New Zealand signed a Military Technical Arrangement (**MTA**) with Afghanistan in 2004. The MTA was revised in 2009. It purported to confer on New Zealand personnel in Afghanistan a range of privileges and immunities in relation to the application of the law Afghanistan.[25] However, this was a non-binding arrangement.[26]

33. In civil proceedings foreign law is a matter of evidence and is usually proved by way of expert evidence.[27] To Mr Stephenson's knowledge, no such evidence has been obtained by the Inquiry. Given the applicability of that law, Mr Stephenson considers that it may be appropriate for the Inquiry to obtain such evidence.

[23] Private International Law (Choice of Law in Tort) Act 2017, sch 1.
[24] As discussed in *Serdar Mohammed v Minister of Defence* [2017] UKSC 1.
[25] Doc 05/32, MTA, Annex at [1.1]-[1.4], [3.1].
[26] Doc 05/28 at [2] noting "[the MTA] is a political instrument rather than a treaty binding at international law".
[27] David Goddard QC and Campbell McLachlan QC *Private International Law – Litigating in the Trans-Tasman Context and Beyond* NZLS Seminar (Aug 2012) at [3.2] and the cases there cited.

Public international law

34. The NZDF were also required to act consistently with New Zealand's obligations under public international law. These included the law of IHL applicable in NIACs and IHRL, as well as the customary law of state responsibility, under which New Zealand had obligations not to become complicit in the internationally wrongful acts of other states, and to avoid assisting other states to maintain serious breaches of peremptory norms and to work co-operatively to bring such breaches to an end.

35. Sir Kenneth Keith addressed the law of state complicity in his opinion and reached two important conclusions, namely that: [28]

    (a) The assistance rendered by the secondary state does not have to have been necessary to the commission of the offence by the primary state.

    (b) The secondary state does not need to have shared the primary state's intention to commit the wrongful act; it is sufficient that it has knowledge of the commission of such acts.

36. On the latter issue, it is noted that the author of one of the leading texts on complicity in international law, Miles Jackson, takes a similar view and contends that wilful blindness as to the commission of wrongful acts by the primary state should suffice.[29] As the Crown Agencies have also acknowledged, there is support for this interpretation in the case law of the ICJ and other treaty bodies.[30] Philippe Sands QC made a similar submission on the scope of article 4 of the Convention Against Torture to the UK Parliament Human Rights Joint Committee on Allegations of UK Complicity in Torture, drawing on the jurisprudence of the ICTY.[31]

37. Finally, in addition to relevant rules of treaty and customary law, New Zealand also had authority to act in accordance with relevant Security Council Resolutions (**SCRs**), which are summarised by Sir Kenneth Keith in his opinion.[32]

RELATIONSHIPS BETWEEN BODIES OF APPLICABLE LAW

Domestic human rights law and IHL

38. Mr Stephenson's position is that the Inquiry has jurisdiction to consider both domestic and international human rights law. The relationships between both bodies of law and IHL are therefore considered.

[28] Keith Opinion at p 16.
[29] Miles Jackson *Complicity in International Law* (OUP, Oxford, 2015) at 159-162.
[30] Dr Penelope Ridings "International legal issues relating to detention" presentation during Hearing No 2 at [26] – [27].
[31] Memorandum dated 20 April 2009, read with Supplementary memorandum submitted following oral evidence on 28 April 2019, available at: https://publications.parliament.uk/pa/jt200809/jtselect/jtrights/152/152we01.htm (last accessed 23 July 2019).
[32] These are succinctly summarised in the Keith Opinion at [4]-[5].

39. The potential for conflict between relevant norms of domestic human rights law (set out in the NZBORA) and IHL is low, as these norms are largely co-extensive. By way of example:

(a) Section 8 of the NZBORA affirms that "*no one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice*". The killing of a combatant or civilian who is taking a direct part in hostilities under IHL, in accordance with relevant rules governing distinction and targeting and so on, will be "*on grounds established by law*". It is also very likely that such killings would be held to be "*consistent with principles of fundamental justice*" although a conflict could potentially arise here in that s 8 could provide greater protection than IHL.[33] To the extent s 8 imposes positive duties to protect life and procedural duties to investigate into reports of deprivations of life, inconsistencies could also arise.

(b) Section 22 of the NZBORA prohibits detention which is "*arbitrary*". This aligns with IHL applicable in NIAC, under which arbitrary deprivations of liberty are prohibited.[34] In the context of NZDF operations in Afghanistan it is also consistent with SCR 1386 (2001) which only authorised detention where necessary to fulfil the mandate of ISAF.

(c) Sections 9 and 23(5) of the NZBORA affirm the rights to be free from torture or cruel, degrading or disproportionately severe treatment and punishment; or inhuman treatment while in detention. Materially similar rules apply under IHL applicable in NIAC.[35]

(d) Section 23(1) of the NZBORA confers rights on persons detained under any enactment to counsel and to challenge the validity of their detention by way of *habeas corpus* "*without delay*". These rights are ostensibly wider than the minimum protections for detainees in non international armed conflicts under common article 3 and AP II.[36]

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[33] While there is limited domestic case law on this proviso, case law under the European Convention on Human Rights on the use of lethal force by police suggests that killing must not only be in accordance with law, but be "*no more than absolutely necessary*" to achieve specific purposes relating to law enforcement: *McCann v United Kingdom* (1995) 21 EHRR 97. While it is possible a court may interpret the proviso to require a similar "capture of kill" approach in the context of an armed conflict in an appropriate case, the ECtHR has generally upheld uses of lethal force in armed conflict as lawful: see generally Louise Doswald-Beck "The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?" (2006) (88)864 IRRC 881. On the scope of IHL on this issue see paragraphs [61]-[64] of these submissions.

[34] Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law Vol 1: Rules* (CUP, Cambridge, 2005) (**ICRC Study**), Rule 99.

[35] ICRC Study, Rule 90.

[36] Common article 3(1)(d), AP II art 6(5).

40. In the limited circumstances in which a conflict of norms arose, a domestic court would be limited in its ability to give effect to IHL. It is trite law that to a domestic court, domestic and international law exist on different planes. Treaty law is not part of domestic law unless and until it is incorporated in an Act of Parliament[37] while customary law is only part of domestic law to the extent it has not been overridden by an Act of Parliament.[38] Where possible, statutes must be interpreted consistently with New Zealand's international obligations; however, this cannot lead to the court "*contradicting or avoiding applying the terms of the domestic legislation*".[39]

41. In interpreting rights which have the potential to provide greater protection than comparable IHL such as ss 8 and 23(1), a court would have to address the "conflict" through the application of orthodox principles of statutory interpretation. Upholding the wider human rights norm would not put New Zealand in breach of its international obligations; however, it could create practical difficulties for the NZDF and undermine its ability to accomplish its mission, which could be taken into account.[40]

International human rights law and IHL

42. The relationship between IHRL and IHL is similar. It is now well-established that IHRL continues to apply alongside IHL during armed conflict.[41] As with domestic human rights law and IHL, the potential for a conflict of norms is low, given many of the relevant norms are co-extensive.[42] Potential conflicts can also be avoided by interpreting or applying IHRL provisions in a manner consistent with IHL or vice versa.[43]

43. As Milanovic notes, if an unavoidable conflict of IHL and IHRL norms arises, it may be resolved by either:[44]

    (a) Applying a relevant rule of international law which gives priority to one norm over the other, such as the *jus cogens* principle, article 103 of the UN Charter, specific clauses in treaties which address the issue or the *lex posterior* principle; or

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[37] Ross Carter *Burrows and Carter Statute Law in New Zealand* (5 ed, LexisNexis NZ Ltd, Wellington, 2015) at 24 and the cases there cited.
[38] *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289 (SC) at 24 per Keith J.
[39] *Helu v Immigration and Protection Tribunal* [2015] NZSC 28, [2016] 1 NZLR 298 at [143] per McGrath J.
[40] As the UK Supreme Court did in relation to article 5(4) of the European Convention in *Serdar Mohammed v Ministry of Defence* [2017] UKSC 2 at [100]-[109].
[41] Akande Opinion at [58] noting the point is "clear".
[42] On the relationship between the right to life in article 6 of the ICCPR and IHL specifically, see Human Rights Committee General Comment No 36 (2018) at [64].
[43] Article 31(3)(c) VCLT, discussed in Campbell McLachlan "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention" (2005) 54(2) ICLQ 279. See also *Nuclear Weapons Advisory Opinion* at [24].
[44] Marko Milanovic "Norm Conflicts, International Humanitarian law and Human Rights Law" in Orna Ben-Naftali (ed) *Human Rights and International Humanitarian law: Collected Courses of the Academy of European Law* (Vol 19/1, OUP, 2010).

(b) If no such rule is applicable in the circumstances, acknowledging that the conflict may not be "resolvable" and that the consequences must be dealt with in the political sphere.

44. As Milanovic notes, many of the rules of international law giving priority to certain norms of international law over others have limited application to IHL and IHRL. For instance, there are no specific clauses in IHL or IHRL treaties which can be deployed to resolve conflicts between relevant norms. While art 103 of the UN Charter can generally be invoked to give priority to Security Council Resolutions over conflicting treaty norms, the ECtHR has held that this rule does not apply to conduct authorised under a Security Council Resolution which confers a general mandate and leaves states with discretion as to the way in which the mandate will be implemented.[45]

45. One principle which is sometimes put forward as a general principle of law capable of giving priority to one norm over the other (usually described in terms of giving priority to IHL over IHRL in armed conflict) is *lex specialis*. In his opinion, Professor Akande argues that there is insufficient basis in international law for recognition of such a principle as a rule for determining the relative priority of norms.[46] Mr Stephenson agrees with this view, for the reasons given by Professor Akande. IHL and IHRL serve distinct purposes. Other than by the agreement of states, or sufficient state practice supported by *opinio juris* sufficient to give rise to a rule of customary international law, there is no principled basis on which a court or authority could give preference to one purpose over the other.

IHL

46. The Inquiry has requested that parties address applicable principles of IHL relating to Operation Burnham.

Applicable law

47. As noted in the Inquiry's TOR, there was an armed conflict in Afghanistan which was not of an international character. This implies there was conflict of sufficient intensity between the Afghan government and armed groups who were sufficiently well organised as to engage at least common article 3 and possibly AP II to the Geneva Conventions.

48. Mr Stephenson's position is that such an armed conflict existed and:

(a) Reached the standard necessary for the application of both common article 3 and Additional Protocol II to the Geneva Conventions (**AP II**).

[45] *Al Jedda v United Kingdom*, supra.
[46] Akande Opinion at [71].

(b) Involved, as OAGs in opposition to the government, the Taliban, the Haqqani network, Hezb-e-Islami, and Al Qaida in Afghanistan.[47]

(c) Also involved, as a party to the conflict, individual UN member states participating as part of International Security Assistance Force (**ISAF**) authorised under SCR 1386 (2001) and subsequent SCRs, including New Zealand.

49. The applicable IHL included common articles 1 and 3 and AP II to the Geneva Conventions,[48] other treaty law applicable in NIACs and principles of customary international law applicable in NIACs.

Duty to ensure respect for the Geneva Conventions

50. Common article 1 to the Geneva Conventions provides:

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

51. Common article 3 of the Conventions contain a number of minimum guarantees applicable in NIACs, including prohibitions against torture and other forms of mistreatment. The common article 1 duty to "ensure respect" for each of the Convention "in all circumstances" includes ensuring respect for the minimum guarantees applicable in NIACs.

52. This duty is a binding treaty law obligation applicable both during NIAC and in peacetime. Sir Kenneth Keith addressed this duty in detail in his opinion. Mr Stephenson endorses Sir Kenneth's comments, in particular regarding the application of the duty to all other parties to the conflict.

53. It suffices to add one point: Sir Kenneth's opinion does not go into detail about what the common article 1 duty might have required in relation to ensuring respect for common article 3, other than to refer to the conclusion of the 2009 arrangement between the governments of Afghanistan and New Zealand regarding the treatment of detainees.

54. It is submitted that the duty in common article 1, as it relates to common article 3, cannot be limited to requiring the agreement of formal or informal rules or protocols. That is the bare minimum required. As the ICRC note in their 2016 commentary to the article:

> The High Contracting Parties also have positive obligations under common Article 1, which means they must take proactive steps to bring violations of the Conventions to an end and to bring an erring Party to a conflict back to an attitude of respect for the Conventions, in particular by using their influence on that Party. This obligation is not limited to stopping ongoing violations but includes an obligation to prevent violations when there is a foreseeable risk that they will be committed and to prevent further violations in case they have already occurred.

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[47] See generally Annyssa Bellal, Gilles Giaca and Stuart Casey-Maslen "International law and armed non-state actors in Afghanistan" (2011) (93)881 IRRC 47.

[48] Afghanistan ratified the four Geneva Conventions in 1956 and AP I and II in June 2009, with AP II coming into force on 24 December 2009. New Zealand ratified the Geneva Conventions on 2 May 1959 and AP II on 8 June 1977.

Conduct of hostilities in NIACs

General principles

55. Under AP II or rules of customary international law applicable to non-international armed conflicts, parties to such conflicts must:

(a) distinguish between civilians and combatants.[49]

(b) not make civilians the subject of direct attack, unless and only for such time as they take a direct part in hostilities (**DPH**).[50]

(c) not attack combatants who are *hors de combat*.[51]

(d) direct attacks at military objectives and not civilian objects.[52]

(e) not launch attacks which employ a method or means of combat with cannot be directed at a specific military objective or the effects of which cannot be limited as required by IHL.

(f) take constant care to spare civilians and civilian objects and take all feasible precautions to avoid or minimise incidental loss of life, injury or damage.[53]

(g) do everything feasible to verify that targets are indeed military targets.[54]

(h) do everything feasible to to assess whether attacks may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.[55]

(i) do everything possible to suspend or cancel an attack if it becomes apparent that the target is not a military objective, or would be disproportionate.[56]

(j) give effective advance warnings of attacks which may affect civilian populations unless the circumstances do not permit it.[57]

(k) not launch attacks which may be expected to cause incidental loss of civilian life, injury or damage to civilian objects, or a combination

[49] AP II article 13; ICRC Study, Rule 1.
[50] ICRC Study, Rule 6.
[51] ICRC Study, Rule 47.
[52] ICRC Study, Rule 8.
[53] ICRC Study, Rule 15.
[54] ICRC Study, Rule 16.
[55] ICRC Study, Rule 18.
[56] ICRC Study, Rule 19.
[57] ICRC Study, Rule 20.

thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.[58]

(l) without delay, whenever circumstances permit and particularly after an engagement, take all possible measures to search for, collect and evacuate the wounded and sick without adverse distinction.[59]

(m) ensure the wounded and sick receive, to the fullest extent practicable and with the least possible delay, medical care and attention required by their condition without distinction other than on medical grounds.[60]

Combatant status and DPH

56. An important issue in non-international armed conflicts is status of members of non-state organised groups who are parties to the conflict. A related issue in all armed conflicts is when a civilian will be DPH.

57. Professor Akande reaches the following conclusions on these issues:

(a) Common article 3 and article 1(1) of AP II state that the parties to armed conflicts to which those treaties apply include members of the state's armed forces, dissident armed forces and "organised groups"; and AP II adds additional requirements regarding the level of organisation non-state organised groups must meet for the Protocol to apply, but otherwise, neither provision sets out the status of members of such groups or how membership of these groups should be determined.[61]

(b) The better view is that all members of groups who have reached a sufficient level of organisation for common article 3 and AP II to apply should have a status similar to combatants in IACs and lose their protection against direct attack.

(c) Absent clear guidance for defining membership of such groups, it is membership of the group's armed or fighting or military wing which is relevant, and in this regard, the ICRC's "continuous combat function" test set out in its 2009 *Interpretive Guidance*[62] provides useful, although probably not exhaustive, guidance.

(d) Treaty law applicable in IAC and NIACs does not define DPH. Whether a civilian is DPH should turn on an assessment of the specific acts they perform. The three constitutive elements set out in the ICRC's *Interpretive Guidance* are useful analytical tools.

58. Mr Stephenson acknowledges these are issues on which the relevant treaty rules, and existence and scope of any customary rule(s), are not

[58] ICRC Study, Rule 14.
[59] ICRC Study, Rule 109.
[60] ICRC Study, Rule 110.
[61] Akande Opinion at [19].
[62] Akande Opinion at [22].

clear. While the ICRC has put forward one interpretation in its *Interpretive Guidance*, this does not necessarily reflect customary international law. Different scholars have taken different views.[63]

59. Mr Stephenson inclines to Professor Akande's conclusion on the status of members of organised groups in non-international armed conflicts for the reasons he gives. On membership, it is submitted the Inquiry should carefully consider all evidence which bears upon the relationship of the person in question to the military or fighting wing of such a group. While as Professor Akande points out, imposing a continuous combat function test for membership arguably results in asymmetry between the rules applying to state forces and non-state groups, this is arguably appropriate on the basis that members of state forces are not in the same position as people who may assist fighting members of organised groups from time to time. Military cooks have an employment relationship with the state. "Farmers by day" may provide more *ad hoc* or remote assistance.

60. Regarding the DPH test, it should be recalled that the rule applies to putative civilians only, which in non-international armed conflicts arguably excludes members of OAGs who have already lost their protection against direct attack. Civilians are ordinarily absolutely protected for reasons of humanity and the DPH rule represents an exception to that. As Professor Akande notes, the text of AP I and II refers to "direct" participation in "hostilities". These factors cumulatively point toward a narrower test for DPH along the lines of that suggested by the ICRC, both in terms of which acts will qualify and when DPH status begins and ceases.

Limitations on targeting combatants or civilians DPH based on military necessity

61. Another issue framed by Professor Akande is whether international law requires all uses of force to be required by military necessity, such that the killing or wounding of a combatant may be unlawful if the target could have been subdued by wounding or capture instead. Professor Akande concludes that such a rule has not yet emerged in state practice.

62. It is acknowledged that the proposal for a rule along these lines by the ICRC in its *Interpretive Guidance* has been the subject of forceful criticism for the way in which it was proposed. For example, Rogers has noted that:[64]

> Recommendation IX [of the ICRC's *Interpretive Guidance* setting out the proposed rule] deals with a matter that the experts were not asked to decide, it was raised late in the expert process, was strongly objected to by a substantial number of the experts present, was not fully discussed and so should not, in my opinion, have been included in the document.

63. Whether such a rule has a foundation in state practice and *opinio juris*, however, is less clear cut. Professor Ryan Goodman has argued forcefully

[63] For a different view on the status of members of OAGs and a critique of the ICRC's *Interpretive Guidance on DPH* see A P V Rogers "Direct Participation in Hostilities: Some Personal Reflections" (2009) 48 Military Law and the Law of War Review 143.
[64] Rogers, supra.

that such state practice can be demonstrated – albeit his argument for a restrictive rule is based mainly on treaty law, namely the prohibition on the use of means and methods of warfare which cause unnecessary suffering set out in AP I.[65]

64. It is also important to bear in mind that, whether or not a restrictive rule based on military necessity exists, all parties to an armed conflict must respect the rule prohibiting the targeting of combatants who have become *hors de combat*. As Professor Michael Schmitt acknowledged in a response to Professor Goodman on this issue, some cases which might be considered as evidence of the justice of a restrictive rule based on military necessity, may in fact already be covered by a robust application of the *hors de combat* rule.[66]

Duty to collect and provide treatment for the wounded and sick

65. Common article 3 provides that "the wounded and sick shall be collected". Article 8 of AP II provides:

> Whenever circumstances permit, and particularly after an engagement, all possible measures shall be taken, without delay, to search for and collect the wounded, sick and shipwrecked, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead, prevent their being despoiled, and decently dispose of them.

66. The ICRC considers that the provisions of AP II are reflective of customary international law.[67] It is submitted that this obligation is squarely engaged by the allegations in relation to Operation Burnham. It suffices to emphasise one point: the duty is to take all *possible* measures to search for and collect the wounded and sick and provide treatment, where circumstances permit. It is not an all-or-nothing duty. In determining whether NZDF personnel complied with this obligation during Operation Burnham, the Inquiry will need to consider all the evidence about what actions the NZDF could feasibly have taken.

Dated 29 July 2019

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Sam Humphrey
Counsel for Jon Stephenson

[65] Ryan Goodman "The Power to Kill or Capture Enemy Combatants" (2013) 24(3) EJIL 819.
[66] Michael Schmitt "Wound, Capture or Kill: A Reply to Ryan Goodman's 'The Power to Kill or Capture Enemy Combatants'" (2013) 24(3) EJIL 855.
[67] ICRC Study, Rule 109.