

UNDER

THE INQUIRIES ACT 2013

IN THE MATTER

A GOVERNMENT INQUIRY INTO OPERATION  
BURNHAM AND RELATED MATTERS

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SUMMARY OF CROWN SUBMISSIONS  
ON THE INVESTIGATIVE OBLIGATION OF THE RIGHT TO LIFE  
23 NOVEMBER 2018

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**MAY IT PLEASE THE INQUIRY:**

1. Counsel for the Afghan villagers relies on s 8 of the New Zealand Bill of Rights Act (NZBORA) and/or Art 6 of the International Covenant on Civil and Political Rights (ICCPR) to argue that there is a legal obligation on this Inquiry to satisfy New Zealand's duty to investigate breaches of the right to life.
2. The Crown rejects that contention and says the Inquiry's task is simply to fulfil its terms of reference. The Crown says that it is no part of the Inquiry's current function to satisfy New Zealand's duty to investigate because no such duty is currently engaged. Such an obligation might arise if the Inquiry *concludes* that there are reasonable grounds to suspect that a war crime was committed. But we are not there yet.
3. To establish their case, counsel for the Afghan villagers would need to establish four things:
  - 3.1 NZBORA and/or the ICCPR impose a legal duty to investigate breaches of the right to life;
  - 3.2 If so, that duty applies extra-territorially;
  - 3.3 If so, the extra-territorial application extends to persons who are not subject to New Zealand's "effective control";
  - 3.4 If so, the duty was triggered in this case.
4. Taking each in turn:
  - 4.1 **Does NZBORA and/or the ICCPR impose a legal duty to investigate breaches of the right to life?**
    - **NZBORA:** There is no jurisprudence establishing that s 8 of NZBORA incorporates a duty to investigate a potentially unlawful death. There are reasonable arguments that it does not. Section 8 of NZBORA confers a right not to be deprived of life rather than a 'right to life'. It is arguable that the duty to investigate contained in Art 6 ICCPR and Art 2 of the European Convention on Human

Rights (ECHR) derives from the broader ‘right to life’ and that the ‘right not to be deprived of life’ does not incorporate such a duty.

- **ICCPR:** It is well established that Art 6 ICCPR incorporates a duty to investigate breaches of the right to life.

#### 4.2 If so, does the duty to investigate apply extra-territorially?

- **NZBORA:** The existing jurisprudence is that NZBORA does not apply outside of NZ: *R v Matthews* (HC) (1994) 11 CRNZ 564. Academic commentators suggest that developments in international jurisprudence may require this position to be reconsidered and the Court of Appeal in *Young v Attorney General* [2018] NZCA 307 at [40] considered, obiter, that there was no reason in principle why NZBORA could not apply offshore. The Crown does not concede that point.
- **ICCPR:** Art.2 provides that “[e]ach 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”. It is suggested that the emboldened word ‘and’ is to be read disjunctively and that such duties may extend beyond the state’s territory.<sup>1</sup>

#### 4.3 If so, does the extra-territorial application extend to persons who are not subject to New Zealand’s “effective control”?

- “effective control” is the test for extra-territorial application of the ECHR: for application to military operations see *Al Skeini v UK*<sup>2</sup> and *Jaloud v Netherlands*<sup>3</sup>. That is the basis on which the ECHR has been held to apply in areas where the UK has taken on a responsibility for authority and control in areas of occupied Iraq

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<sup>1</sup> UN Human Rights Committee, General Comment 31 (2004) [10].

<sup>2</sup> (2011) 53 EHRR 18

<sup>3</sup> Application 47708/08 [2014] ECHR 1403

(and explains why, for instance, Art 2 ECHR was held to apply to the circumstances pertaining to the death of Baha Mousa).

- **NZBORA:** there is no jurisprudence on the point, and while the Crown does not concede that NZBORA applies extra-territorially at all, there is no serious suggestion in any of the academic literature that its extra-territorial application would extend beyond an area where NZ had “effective control”.
- **ICCPR:** applies only to individuals “within [a state’s] territory and subject to its jurisdiction” (Art.2). In certain situations, the ICCPR’s obligations may therefore apply in respect of “those within the power or effective control” of a state’s forces that act outside its territory.<sup>4</sup>

Operation Burnham took place in a context in which New Zealand had no effective control or authority. There is no conventional basis for claiming that NZBORA or the ICCPR applied to the circumstances applicable to any of the deaths that took place during Operation Burnham. As the operation concerned the conduct of hostilities in a non-international armed conflict, International Humanitarian Law (IHL) applies to all aspects of that operation, including the resulting deaths. In that regard, the Crown submits that NZBORA and the ICCPR did not govern the conduct of Operation Burnham.

The Crown notes that the very recently published UN Human Rights Committee’s General Comment 36 states at [63] that the ICCPR may also apply to “persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner”. This statement appears to be inconsistent with the wording of Art 2(1) of the ICCPR and General Comment 31 at [10].<sup>5</sup> However, it is clear – when read in context –

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<sup>4</sup> UN Human Rights Committee, General Comment 31 (2004) [10].

<sup>5</sup> The Committee’s views on interpretation of the ICCPR may be persuasive under certain circumstances but are not binding on states. This statement in the General Comment is not drawn from any other international treaties, prior court or tribunal decisions and is not representative of state practice. As such, it may be considered as the Committee’s attempt at progressive development of international law rather than codification. In addition, a number of states have expressed

that even if that proposition is taken at face value, it is to be read consistently with IHL as the applicable body of law for deaths in the conduct of hostilities.<sup>6</sup>

#### 4.4 If so, was a duty to investigate triggered in this case?

Under IHL, a duty to investigate is triggered when there are reasonable grounds to suspect, or credible allegations, that a war crime was committed by the NZDF. The NZDF Law of Armed Conflict Manual refers to allegations that are “well-founded”, which is consistent with the Armed Forces Discipline Act 1971.<sup>7</sup>

In this case, a post-operation assessment carried out by ISAF and the Afghan Government raised no concerns about NZDF’s compliance with IHL. As a result, the threshold for the duty to investigate under IHL was not triggered.

Subsequently, Mr Hagar and Mr Stephenson made serious allegations in their book *Hit & Run*, including allegations that the actions of NZDF personnel during Objective Burnham constituted possible war crimes.<sup>8</sup> Those allegations are denied: after the publication of *Hit and Run*, the NZDF engaged further with international partners and confirmed its initial conclusion that no civilian casualties were caused by the NZSAS.<sup>9</sup>

To engage an investigative obligation, allegations of war crimes must be “well founded”. This Inquiry is tasked – in part - with assessing whether the

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their disagreement with this statement on the basis that it does not represent a valid interpretation of the ICCPR, including some of New Zealand’s key military partners. Should the Inquiry wish to consider this question further, the Crown would wish to provide more detailed submissions on whether this statement accurately reflects current international law.

<sup>6</sup> See General Comment 36 at [64]: i) use of lethal force consistent with international humanitarian law is not arbitrary for the purposes of Art 6; and ii) alleged violations of Art 6 in situations of armed conflict should be investigated in accordance with relevant international standards, with a footnote reference to paragraphs 20 – 21 of the Minnesota Protocol. Minnesota Protocol at [20] – [21] confirms that in the context of armed conflict any investigative obligation is to be understood in line with the rules of IHL: where casualties may have arisen during the conduct of hostilities, the trigger for an investigative obligation is that there are reasonable grounds to suspect that a war crime was committed. As a result, whether or not the statement at [63] of General Comment 36 is consistent with the current state of international law, the existence and scope of any investigative obligation in the circumstances arising in Operation Burnham are to be assessed against IHL principles.

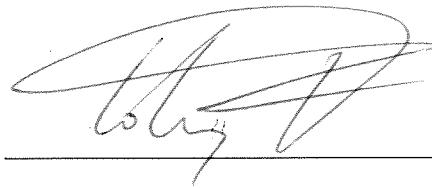
<sup>7</sup> Also see the Minnesota Protocol at [21]

<sup>8</sup> See heading (vii) in Appendix 2 to Inquiry Minute No.4

<sup>9</sup> NZDF unreferenced account of events at p 14.

allegations made by Messrs Hager and Stephenson are well founded.<sup>10</sup> If they are, then New Zealand will consider what steps to take to comply with any investigative obligation. If they are not, then no investigative obligation ever arose. For that reason, the Crown submits that it is premature to conclude that an investigative obligation is *currently* engaged.

5. Further, even if the Crown is wrong and an investigative obligation is currently engaged, the Inquiry has not been tasked with the function of satisfying that obligation and nor should it assume that function for itself. The Inquiry's function is to satisfy the terms of reference, none of which direct the inquiry to conduct itself as a right to life inquiry.
6. If a duty to investigate has arisen, the question of which mechanisms to use to secure compliance with that duty is a question for the state. A state is entitled to comply with the duty to investigate through a combination of mechanisms, including, for instance, a government inquiry followed by criminal prosecutions. Compliance with the duty would need to be assessed against the combined mechanisms, not each individual part.<sup>11</sup> As a result, even if an investigative obligation is engaged (which is denied), this Inquiry is not required to assume functions that were not conferred on it in the terms of reference unless i) it considers that it would be impossible for subsequent mechanisms – combined with the Inquiry process - to satisfy the state's duty to investigate; and ii) it can assume those functions without straying beyond the terms of reference and without exceeding the powers in the Inquiries Act 2013.




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Aaron Martin / Toby Fisher

23 November 2018

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<sup>10</sup> The terms of reference require the Inquiry to “seek to establish the facts in connection with the allegations of wrongdoing on the part of NZDF personnel during the Operations.”

<sup>11</sup> See *McKerr v United Kingdom* (2002) 34 E.H.R.R. 20 at [158] – [159]; Minnesota Protocol at [38] – [40]