

**UNDER THE**

**Inquiries Act 2013**

**IN THE MATTER OF**

**a Government Inquiry into Operation Burnham and  
related matters**

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**MEMORANDUM OF COUNSEL FOR FORMER RESIDENTS OF KHAK  
KHUDAY DAD AND NAIK REGARDING THE INVESTIGATIVE  
OBLIGATION UNDER THE RIGHT TO LIFE**

**Dated 30 November 2018**

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- 1 This memorandum is filed in response to the Crown memorandum of 23 November 2018. A further memorandum will be filed in reply to other matters raised at the hearing on 21-22 November 2018.
- 2 In their memorandum dated 23 November 2018, the Crown have rejected the contention that s 8 of the New Zealand Bill of Rights Act 1990 (“NZBORA”) and/or art 6 of the International Covenant on Civil and Political Rights (“ICCPR”) create a legal obligation to investigate breaches of the right to life. The Crown have posed four questions, each of which it says must be answered in the affirmative for such a duty to exist. These are addressed in turn below.
- 3 These are complex and unsettled questions of law in New Zealand, although they have been considered extensively in other jurisdictions, including the United Kingdom and the European Court of Human Rights. For this reason, if the Inquiry is minded to make final rulings on these issues, counsel request the opportunity to prepare more comprehensive submissions outlining our argument and the relevant jurisprudence. If the Inquiry is minded to receive further submissions on this point, these can be prepared and filed in a timely manner.

***Do NZBORA or ICCPR impose a legal duty?***

- 4 It is submitted that a legal duty to investigate a potentially unlawful death arises under both NZBORA and ICCPR (the latter being accepted by the Crown). The submission by the Crown that s 8 of NZBORA confers a narrower right than that conferred by the ICCPR or the European Convention is rejected.
- 5 The right is set out in a substantively identical way in the International Covenant on Civil and Political Rights (ICCPR), and the European Convention on Human Rights (the Convention):<sup>1</sup>

**NZBORA, s 8:**

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.

**ICCPR, art 6:**

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

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<sup>1</sup> International Covenant on Civil and Political Rights, 999 UNTS 171 (adopted 16 December 1966, entered into force 23 March 1976), art 6; European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5 (adopted 4 November 1950, entered into force 3 September 1953), art 2.

**European Convention, art 2:**

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
- 6 The long title to the NZBORA explains that the Act is intended to affirm New Zealand's commitment to the ICCPR. Where the text is substantively the same, jurisprudence under the ICCPR should be regarded as persuasive, although not determinative.<sup>2</sup> While the differences between the above definitions are noted, it is submitted here that the differences are, for present purposes, semantic only. For that reason, jurisprudence under art 2 of the Convention can be analysed as a persuasive source for domestic application.<sup>3</sup>
- 7 The right to life is composed of two distinct rights: the 'negative' right, which obliges states and state actors not to interfere with the right to life; and the 'positive' right, which obliges states and state actors to take active steps to protect the right to life. In order to give practical effect to the right to life, states are obliged to investigate possible or suspected breaches and provide a remedy where the breach is proved.<sup>4</sup> An effective official investigation is necessary to secure the rights under the Convention or under domestic law, and to ensure the accountability of state agents where they are responsible.<sup>5</sup> Such investigation is necessary to determine whether the deprivation of life was in fact arbitrary.
- 8 While this aspect of the right to life has yet to receive any substantial or decisive attention from New Zealand courts,<sup>6</sup> the procedural obligation is by now well-traversed and firmly established under the Convention, the ICCPR and other sources of human rights law. It is submitted that in the absence of guidance to the contrary, the same approach is likely to and should be taken in New Zealand.

<sup>2</sup> See: *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667 (CA) at 691; *R v Jeffries* [1994] 1 NZLR 290 (CA) at 299-300; *Taunoa v Attorney-General* [2007] NZSC 70 [2008] 1 NZLR 429 at [179].

<sup>3</sup> See also: *Laws of New Zealand Human Rights* (online ed) at [4]-[5]; *R v Jeffries* [1994] 1 NZLR 290 (CA) at 299-300.

<sup>4</sup> See, for example: *McCann v United Kingdom* (1996) 21 EHRR 97 at [161]; *Edwards v United Kingdom* (2002) 35 EHRR 487 at [69]; *R (Middleton) v HM Coroner for Western Somerset* [2004] UKHL 10, [2004] 2 AC 182 at [2]-[4]; *Baboeram v Suriname* (1985) HRC (146/1983 and 148 to 154/1983) at [16]; *Herrera v Colombia* (1987) HRC (161/1983) at [10.3]; *Arevalo v Colombia* (1989) HRC (181/1984) at [10]; *Montero-Aranguren v Venezuela* (5 July 2006) Inter-Am Ct H R at [79].

<sup>5</sup> *Edwards v United Kingdom* (2002) 35 EHRR 487 at [69].

<sup>6</sup> Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 220; *Wallace v Commissioner of Police* [2016] NZHC 1338 at [13].

*Does that duty apply extra-territorially?*

9 Counsel do not accept the Crown’s proposition that “and” in art 6 ICCPR is to be read disjunctively. It is an open question presently whether the NZBORA is capable of possessing extra-territorial jurisdiction, the issue having been considered only once before inconclusively.<sup>7</sup> There is a general presumption that in the absence of words to the contrary, legislation does not possess extra-territorial jurisdiction.<sup>8</sup> The Strasbourg Court has seen fit however to extend domestic human rights extra-territorially on the basis that states have asserted jurisdiction through the conduct of military operations.<sup>9</sup> The Court of Appeal recently noted (as *obiter*):<sup>10</sup>

[40] Although the first limb of the long title refers to the protection of human rights and fundamental freedoms “in New Zealand”, the NZBORA does not contain any express limitation to acts done within New Zealand. Andrew Butler and Petra Butler made the point that the avowed purpose would not be advanced if New Zealand officials could avoid the application of the NZBORA simply by conducting NZBORA inconsistent acts offshore. We consider that there is no reason in principle why the NZBORA should not be interpreted to apply to acts that would otherwise fall within the ambit of s 3 by reason only that they occur offshore.

10 It is submitted here that New Zealand courts should be prepared to do so for several reasons. First, the jurisdiction under NZBORA is focused on the actor responsible, rather than the location of the act. Section 3(b) provides that the Act applies to acts done:

... by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

11 Military operations would therefore be *prima facie* subject to the Act, and a narrow interpretation should not be taken to limit this to acts done within New Zealand. While such a narrow approach may be justified elsewhere, there is a well-established principle that human rights and NZBORA should be approached in a purposive way that gives real and practical effect to the rights contained therein.<sup>11</sup>

12 Second, the courts in New Zealand should strive in this respect to maintain consistency with the approach taken under international human rights law and in the

<sup>7</sup> *R v Matthews* (1994) 11 CRNZ 564 (CA). See also: *Laws of New Zealand Human Rights* (online ed) at [39].

<sup>8</sup> *Macleod v Attorney-General for New South Wales* [1891] AC 455 (PC).

<sup>9</sup> *Al-Skeini v United Kingdom* (2011) 53 EHRR 18 at [131]–[142].

<sup>10</sup> *Young v Attorney-General* [2018] NZCA 307 at [40].

<sup>11</sup> NZBORA, s 6; *Ministry of Transport v Noort* [1992] 3 NZLR 260, (1992) 8 CRNZ 114 (CA) at 278; *R v Te Kira* [1993] 3 NZLR 257 (CA) at 271; *R v Goodwin* [1993] 2 NZLR 153 (CA) at 199. See also *Laws of New Zealand Human Rights* (online ed) at [1].

United Kingdom. This is important for New Zealand to observe and be seen to observe its obligations under international law, and because the approach taken by the Strasbourg Court and the United Kingdom has had the advantage of having been examined in great detail over many years, in many different cases and with many different fact patterns.

***Does the extra-territorial application extend to persons who are not subject to New Zealand’s “effective control”?***

- 13 The proposition underlying this question is that during Operation Burnham, New Zealand had no effective control or authority. While this proposition is asserted by the Crown, this is in fact a **factual** question for the Inquiry to determine and it is not a settled fact. In *Al-Skeini v United Kingdom*, the Strasbourg Court held:<sup>12</sup>

It is a question of fact whether a contracting state exercises effective control over an area outside its own territory. In determining whether effective control exists, the Court will primarily have reference to the strength of the state’s military presence in the area. Other indicators may also be relevant, such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region.

- 14 What constitutes effective control is the subject of considerable jurisprudential debate and academic commentary, and is likely to be highly contested during the Inquiry. It is submitted that it is inappropriate and premature to include this question in a set of legal questions, as it effectively predetermines a key factual matter which is before the Inquiry to determine.

***Was the duty triggered in this case?***

- 15 The obligation arises when the state is aware or ought to be aware of any potentially unlawful death,<sup>13</sup> or where a person has died as the result of the exercise of force by the state.<sup>14</sup> This obligation applies both in times of peace, internal conflicts and tensions, and armed conflict.<sup>15</sup> The “well-founded” test contained in the NZDF

<sup>12</sup> *Al-Skeini v United Kingdom* (2011) 53 EHRR 18 at [138]–[139].

<sup>13</sup> Office of the United Nations High Commissioner for Human Rights *The Minnesota Protocol on the Investigation of Potentially Unlawful Death* (2016) (2nd ed, United Nations, 2017) <[www.ohchr.org](http://www.ohchr.org)> at [15]; *Ergi v Turkey* (2001) 32 EHRR 18 at [82]; *Isayeva v Russia* (2005) 41 EHRR 38 at [210]; *Montero-Aranguren v Venezuela* (5 July 2006) Inter-Am Ct H R at [79].

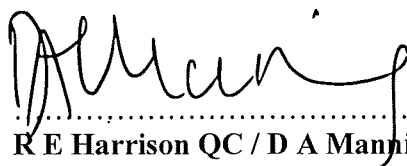
<sup>14</sup> *Edwards v United Kingdom* (2002) 35 EHRR 487 at [69].

<sup>15</sup> *Güleç v Turkey* (1999) 28 EHRR 121 at [81]. See also *The Minnesota Protocol on the Investigation of Potentially Unlawful Death* (2016) at [20]–[21].

Manual and in the Armed Forces Discipline is not determinative, given the different context (IHL) to which that relates.

- 16 Once the matter has come to the attention of the authorities, the state is obliged to act of its own motion to initiate an inquiry. It is not for the next-of-kin to make a formal complaint or otherwise take responsibility for conducting or initiating an investigation.<sup>16</sup> Credible allegations have been made that civilians died as a result of Operation Burnham, not only by Messrs Hager and Stephenson, but also in the media and reflected in NZDF's own intelligence reports. It is not necessary for the allegations to be proved for this obligation to be triggered. Sufficient information is in the public domain and in the possession of the NZDF to trigger the obligation, and the fact that serious and unresolved allegations remain to be addressed is demonstrated by the Terms of Reference<sup>17</sup> and Appendix 2 of Minute 4.
- 17 In essence, the Crown are proposing an Inquiry to determine if an investigation is warranted. Respectfully, it is submitted that this approach fails to meet this obligation of promptness. The Crown have suggested that a combination of mechanisms (such as prosecutions arising out of the Inquiry) may in any case meet the obligation. While other such mechanisms, if appropriate, may further assist the Crown in meeting its other obligations, it remains necessary to satisfy the *investigative* element of the right to life by conducting an inquiry which meets the *Jordan* principles. The failure to conduct *at this time* an inquiry that meets the requirements in *Jordan* cannot be remedied by the hypothetical possibility of further steps being taken in the future.
- 18 In summary, it is submitted that the first, second and fourth questions posed by the Crown can be answered in the affirmative, and that the third question relates to a factual matter which will be for the Inquiry to determine in the course of its process.

**Dated** this 30th day of November 2018

  
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**R E Harrison QC / D A Manning**  
**Counsel for the Villagers**

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<sup>16</sup> *Jordan v United Kingdom* (2003) 37 EHRR 2 at [105]; *Edwards v United Kingdom* (2002) 35 EHRR 487 at [69]; *Isayeva v Russia* (2005) 41 EHRR 38 at [210]; *McKerr v United Kingdom* (2002) 34 EHRR 20 at [111].

<sup>17</sup> TOR at paras 3, 6.1 and 6.2.