

5 March 2018

Hon David Parker
Attorney-General
Parliament Buildings
Wellington 6160
New Zealand

By email to d.parker@ministers.govt.nz

**Re: Investigation into New Zealand Defence Force actions in Afghanistan
Terms of Reference**

Dear Sir,

- 1 We write to you further to our previous correspondence of 17 November 2017 and 15 February 2018 regarding “Operation Burnham” and the need for an independent inquiry. We understand that the Government is currently giving active consideration to the initiation of an independent inquiry into Operation Burnham and related matters. To assist with that consideration, we propose to set out our clients’ representations as to the applicable standards required to be observed by the New Zealand state to discharge the obligations owed to our clients (and others), and to offer a model terms of reference for your assistance.
- 2 While we acknowledge that you are no doubt in receipt of your own legal advice, we propose to provide for your assistance a brief summary of some relevant legal principles which (we respectfully submit) must inform your decision-making.

Legal Background

- 3 In the New Zealand context, elements of International Humanitarian Law (“IHL”) and International Criminal Law (“ICL”) are directly incorporated into the criminal law through statutes such as the Geneva Conventions Act 1958, the International Crimes and International Criminal Court Act 2000 (“ICICCA”), and the Crimes of Torture Act 1989. These give effect to, respectively, the Geneva Conventions,¹ the Rome Statute of the International Criminal Court,² and the Convention Against Torture.³ ICICCA implements the Rome Statute of the International Criminal Court, and creates in domestic law the concepts of war crimes and crimes against humanity.⁴ Section 11 ICICCA provides for the punishment of war crimes, and s 10 for the punishment of crimes against humanity. Section 3 of the Geneva Conventions Act provides for the punishment of grave breaches of certain parts of the Geneva Conventions.

¹ Geneva Conventions Act 1958, schs 1–7.

² Rome Statute of the International Criminal Court, UN General Assembly (adopted 17 July 1998, entered into force 1 July 2002).

³ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987).

⁴ ICICCA, ss 6–11.

4 The principle of complementarity under the Rome Statute provides that the International Criminal Court, established by the Statute, shall have jurisdiction complementary to, rather than supplementary to, that of domestic courts. This means that the obligation falls first to countries to investigate and prosecute these crimes themselves, and the International Criminal Court should intervene only where States are “unwilling or unable to genuinely carry out the investigation or prosecution”.

5 The right to life occupies a position at the core of our legal system. The Court of Appeal has described it as the right upon which all others depend, stating:⁵

...when questions about the right to life are in issue the consideration of the lawfulness of the official action must call for the most anxious scrutiny.

6 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.⁶ 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.⁷ Such investigation is necessary to determine whether the deprivation of life was in fact arbitrary. The Strasbourg Court observed in *McCann v United Kingdom*:⁸

... a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the Convention to “secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention”, requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State.

7 In the context of art 6 ICCPR, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions concluded:⁹

Armed conflict and occupation do not discharge the State's duty to investigate and prosecute human rights abuses. The right to life is non-derogable regardless of circumstance. This prohibits any practice of not investigating alleged violations during armed conflict or occupation. As the

⁵ *Shortland v Northland Health Ltd* [1998] 1 NZLR 433 at 444; *Wallace v Commissioner of Police* [2016] NZHC 1338 at [12].

⁶ 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].

⁷ *Edwards v United Kingdom* (2002) 35 EHRR 487 at [69].

⁸ *McCann v United Kingdom* (1996) 21 EHRR 97 at [161].

⁹ *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions* E/CN.4/2006/53 (8 March 2006) at [36].

Human Rights Committee has held, 'It is inherent in the protection of rights explicitly recognized as non-derogable ... that they must be secured by procedural guarantees ... The provisions of the [International Covenant on Civil and Political Rights] relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights.' It is undeniable that during armed conflicts circumstances will sometimes impede investigation. Such circumstances will never discharge the obligation to investigate - this would eviscerate the non-derogable character of the right to life - but they may affect the modalities or particulars of the investigation. ... Regardless of the circumstances, however, investigations must always be conducted as effectively as possible and never be reduced to mere formality.

8 There are several key basic criteria established in jurisprudence:

- a. *Triggering the obligation:* The obligation arises when the state is aware or ought to be aware of any potentially unlawful death,¹⁰ or where a person has died as the result of the exercise of force by the state.¹¹ 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. This obligation applies both in times of peace, internal conflicts and tensions, and armed conflict. In *Güleç v Turkey*, for example:¹²

Loss of life is unfortunately a frequent occurrence in south-east Turkey in view of the security situation there. However, neither the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation under Article 2 to ensure that an effective, independent investigation is conducted into deaths arising out of clashes involving the security forces, or, as in the present case, a demonstration, however illegal it may have been.

- b. *Independence:* an inquiry must be wholly independent of the body being investigated or implicated. The Court in *Jordan v United Kingdom* stated:¹³

For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence.

- c. *Means:* The Court in *Jordan* stated:¹⁴

¹⁰ *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].

¹¹ *Edwards v United Kingdom* (2002) 35 EHRR 487 at [69].

¹² *Güleç v Turkey* (1999) 28 EHRR 121 at [81]. See also 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> at [20]–[21].

¹³ At [106]. See also *Edwards v United Kingdom* (2002) 35 EHRR 487 at [70]; *Isayeva v Russia* (2005) 41 EHRR 38 at [211]; *McKerr v United Kingdom* (2002) 34 EHRR 20 at [112]; *Güleç v Turkey* (1999) 28 EHRR 121.

¹⁴ At [107].

The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible. This is not an obligation of result, but of means.

An inquiry must possess a sufficient mandate and powers that enable it to determine whether the force used was or was not justified in the circumstances.¹⁵ Reasonable steps must be taken to secure and collect evidence, including eye witness testimony, forensic evidence, autopsy results, and similar. Failure to do so, or unnecessary delays in doing so, will compromise the results of any investigation and lead to impunity by state actors.¹⁶

- d. *Promptness:* An effective investigation must be conducted promptly once the obligation has been triggered.¹⁷ This aspect ties in closely with means, but also serves its own purpose. Delays in beginning or progressing an investigation will undermine the ability to secure and collect evidence, such as scene examinations or reliable eye-witness statements. Even apart from that, however, the appearance of authorities dragging their heels may undermine public confidence in the rule of law and risks presenting the appearance of collusion in or tolerance of unlawful acts.¹⁸
- e. *Transparency:* an effective inquiry must be subject to public scrutiny, relating to the investigation itself and its results.¹⁹ Related to this is the requirement that in all cases the next-of-kin of the victim must be involved to the extent necessary to safeguard their legitimate interests.²⁰

9 In the leading case of *Al-Skeini v United Kingdom*, the Strasbourg Court said:²¹

... obstacles may be placed in the way of investigators and, as the United Nations Special Rapporteur has also observed, concrete constraints may compel the use of less effective measures of investigation or may cause an investigation to be delayed. Nonetheless, the obligation under art.2 to safeguard life entails that, even in difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life.

10 Ultimately, the Court concluded that the United Kingdom fell short of satisfying this obligation in several respects. First, authorities failed to conduct prompt eyewitness interviews.²² Second, the investigations into the shootings of the relatives of three of the applicants were conducted entirely within the military chain of command. Third,

¹⁵ *Jordan v United Kingdom* (2003) 37 EHRR 2 at [107]; *Kaya v Turkey* (1999) 28 EHRR 1 at [87]; *Güleç v Turkey* (1999) 28 EHRR 121 at [78].

¹⁶ *Jordan v United Kingdom* (2003) 37 EHRR 2 at [107]; *Edwards v United Kingdom* (2002) 35 EHRR 487 at [71].

¹⁷ *Jordan v United Kingdom* (2003) 37 EHRR 2 at [108].

¹⁸ *Jordan v United Kingdom* (2003) 37 EHRR 2 at [108].

¹⁹ *Jordan v United Kingdom* (2003) 37 EHRR 2 at [109].

²⁰ *Jordan v United Kingdom* (2003) 37 EHRR 2 at [109]; *Güleç v Turkey* (1999) 28 EHRR 121 at [82].

²¹ At [164].

²² At [170].

while the investigations into the other deaths were conducted by the Special Investigations Branch, which had a separate chain of command from those under investigation, the Branch was not wholly independent. The decision whether to involve the Branch generally rested with the Commanding Officer of the unit facing investigation, and if the Branch involved itself of its own accord the investigation could be closed down by the military chain of command.²³ Indeed, a Branch investigation into the fourth applicant's brother's death was shut down by military command.²⁴ That same investigation also failed to take statements from key witnesses and from the soldier whose actions were under investigation.

- 11 In *R (Mousa) v Secretary of State for Defence (No 2)* the United Kingdom High Court criticised the Iraq Historical Allegations Team (IHAT), a government inquiry into abuses in Iraq, for failing to meet their investigative obligation.²⁵ The Court emphasised the need for the investigation to be public and accessible to the victims' families, sufficiently broad to cover issues such as planning, and to include "lessons learned" following the identification of wider or systemic issues.²⁶ The Court concluded:²⁷

In our judgment, the Article 2 investigative duty of the State in the case of deaths in custody is only discharged by a full, fair and fearless investigation accessible to the victim's families and to the public into each death, which must look into and consider the immediate and surrounding circumstances in which each of the deaths occurred. These circumstances will ordinarily include the instructions, training and supervision given to soldiers involved in the interrogation of those who died in custody in the aftermath of the invasion. It should also identify the culpable and discreditable conduct of those involved, including their acts, omissions as well as identifying the steps needed for the rectification of dangerous practices and procedures. We accept that wider policy matters are essentially matters for public and political debate and do not fall under the Article 2 investigative duty.

- 12 With respect to IHAT, the United Kingdom concluded that the inquiry's independence was compromised by its inclusion of personnel from the Royal Military Police alongside civilian investigators. The Court emphasised that the test was one of apparent rather than actual bias:²⁸

... for the appellant to succeed in establishing a lack of independence, it is not necessary for him to prove that some element or person in IHAT actually lacks impartiality. One of the essential functions of independence is to ensure public confidence and, in this context, perception is important.

- 13 The independence of IHAT was found to be fundamentally flawed because:²⁹

... the Provost Branch members of IHAT are participants in investigating allegations which, if true, occurred at a time when Provost Branch members

²³ At [172].

²⁴ At [52].

²⁵ *R (Mousa) v Secretary of State for Defence (No 2)* [2013] EWHC 1412 (Admin) at [179].

²⁶ At [147].

²⁷ At [148].

²⁸ At [35].

²⁹ At [36].

were plainly involved in matters surrounding the detention and internment of suspected persons in Iraq. Moreover, the [Provost Marshall (Army)] himself and his predecessors would also be likely to be called to account, given his position as head of the Provost Branch and the nature of his responsibilities... It is, of course, to him that IHAT is required to report.

IHAT was subsequently restructured to address these concerns.

- 14 It is submitted that the investigative procedure in the Armed Forces Discipline Act 1971 fails to meet these criteria. The crux of the investigative procedure arising under s 102 of that Act is an assessment by a commanding officer as to whether an allegation is “well-founded”. The Act does not require that investigators take steps to collect evidence, take statements from witnesses, or indeed any proactive steps. In this case, it does not appear that any such steps were taken to an adequate degree. The assessment is then made by an officer integrated into the command structure, who cannot be considered to be independent either of those under investigation or the NZDF as a whole.
- 15 The investigative obligation under s 102 AFDA must be seen for what it is – a requirement to conduct a preliminary inquiry into alleged disciplinary offences. Where the investigative obligation is engaged under human rights law, it will require an effective and independent investigation of a character wholly distinct from that arising under s 102.
- 16 With respect to Operation Burnham, it is important to note that the operation was initiated and/or conducted by New Zealand. In this instance, the existence and extent of our obligation to investigate is not determined by considerations of the nationality of the forces who in fact (or allegedly) used the deadly force in question.
- 17 For these reasons we consider it necessary to have a full and independent inquiry established under the Inquiries Act 2013. To assist, we have prepared Draft Terms of Reference and Draft List of Issues. We again request to be meaningfully included in your consideration of the mode and nature of any inquiry concerning the events of Operation Burnham.

Yours faithfully,
McLEOD & ASSOCIATES



RICHARD McLEOD

Cc: Rt Hon Jacinda Ardern
Prime Minister
Parliament Buildings
Wellington 6160
New Zealand
By email to j.ardern@ministers.govt.nz

DRAFT TERMS OF REFERENCE

INQUIRY INTO OPERATION BURNHAM AND RELATED EVENTS

MANDATE

- 1 A public inquiry (“the inquiry”) is established pursuant to section 6(2) of the Inquiries Act 2013 with the powers to inquire into the August 21-22 2010 military operation in Afghanistan which included members of the New Zealand Defence Force (“NZDF”), referred to as “Operation Burnham”, and into allegations of civilian casualties, property damage and other matters arising from that operation and a subsequent related operation in 2010.
- 2 The inquiry may establish a list of issues to be considered, which it may amend as it sees fit in the course of the inquiry. The list of issues shall not be considered to limit the scope of the inquiry.

MEMBERSHIP

- 3 The inquiry is to consist of a panel of three members, including a current or former High Court Judge to be appointed chairperson.
- 4 The remaining members of the inquiry are to be qualified lawyers with relevant expertise.
- 5 The inquiry may appoint counsel to assist the inquiry as required, pursuant to section 13 of the Inquiries Act 2013.

POWERS AND METHODS

- 6 The inquiry may regulate its procedure pursuant to section 14 of the Inquiries Act 2013.
- 7 Any person deemed a core participant, including those individuals in Afghanistan alleged to have been directly affected by Operation Burnham, shall have the right to participate in the inquiry pursuant to section 17 of the Inquiries Act 2013.

- 8 Participants in the inquiry may be legally represented and receive legal advice, and the inquiry may recommend funding for that purpose pursuant to section 18 of the Inquiries Act 2013.
- 9 The inquiry has the power to receive evidence, obtain information, order discovery, summon witnesses, and other such matters as set out in sections 19–25 of the Inquiries Act 2013.
- 10 The inquiry has the power to receive submissions and evidence from persons participating in the inquiry.
- 11 The inquiry is to hold a public hearing or hearings in the course of its inquiry.
- 12 The inquiry is to be held in public, and its findings made public, subject only to such minimal exceptions as may be necessary and having regard to the principle of open justice and the factors outlined in section 15(2) of the Inquiries Act 2013.
- 13 The inquiry shall have the power to inquire into all information of relevance, including information subject to confidentiality or security classification.

REPORTING

- 14 The inquiry is to report to the Governor-General as required under section 12 of the Inquiries Act 2013.
- 15 The report of the inquiry is to be made public.
- 16 The report of the inquiry may make findings of fact and of fault, and recommend further steps to determine liability if necessary.

DRAFT LIST OF ISSUES

INQUIRY INTO OPERATION BURNHAM AND RELATED EVENTS

The inquiry shall be entitled to inquire into any such matters it deems relevant to its mandate, including:

- 1 The reported events of the military raids involving the New Zealand Defence Force (NZDF) on 21-22 August 2010, designated “Operation Burnham”, and a subsequent raid on approximately 1 September 2010, and the allegations made in the book “Hit and Run” by authors Nicky Hager and Jon Stephenson and by the lawyers for the affected villagers of Naik and Khak Khuday Dad, including:
 - a. that six civilians were killed and a further fifteen injured by military forces in Operation Burnham;
 - b. that all affected civilians were non-combatants, and that one of the deceased villagers was a three-year-old child;
 - c. that the villages of Naik and Khak Khuday Dad were bombarded by helicopter fire;
 - d. that civilian homes and property, including religious materials, in Naik and Khak Khuday Dad were damaged and destroyed by helicopter fire and by the actions of NZDF soldiers;
 - e. that NZDF failed to provide medical assistance to the injured or dying, either during the raids or subsequently;
 - f. that NZDF failed to provide at any time assistance repairing the damage to the villages of Naik and Khak Khuday Dad;
 - g. that a prisoner subsequently arrested by forces including the NZDF was mistreated by New Zealand soldiers;
 - h. that the same soldier was subsequently subjected to torture by other forces with the complicity of the NZDF, and that information obtained by torture was used by the NZDF;
 - i. that the events described above and other allegations may amount to war crimes or breaches of national or international law.
- 2 The inquiry shall further address:
 - a. the applicable rules of engagement for forces involved in Operation Burnham;

- b. the background, planning and decision-making leading up to the raids;
- c. the conduct of the raids;
- d. the adequacy of the actions and inquiries (if any) undertaken by NZDF and the New Zealand government following Operation Burnham, to investigate and review that Operation and in particular the conduct and outcome of the raids;
- e. the procedures in place to identify between combatants and non-combatants during the raids;
- f. identification of all individuals injured, killed or otherwise harmed in the raids, including identification of their status as combatants or non-combatants and how that conclusion was reached in each case;
- g. the steps taken by NZDF and the New Zealand government after the raid to review the conduct of the raids;
- h. NZDF reporting of the raids to the New Zealand public;
- i. any other matters deemed relevant to the allegations above.