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Smoke, mirrors and pos

The Government has an obligation to investigate suspected war crimes, whether committed by Israelis, Palestinians, or anyone, irrespective of political relationships, writes KENNEDY GRAHAM. But in two recent cases, it has failed to do so.

TWO RECENT developments deriving from the tormented Middle East region shed light on the nature of our own society. They reveal the corrosive influence the crises there are having on the values and ideals New Zealanders cherish. We are not as open a society as we presume to be.

Both developments involve military officers. Both draw this country into decisions we might have preferred to avoid. But given they are with us, we are failing the normal tests of an open society.

The first concerns Lieutenant-general Moshe Ya'alon, former Israeli chief of defence staff. Mr Ya'alon presided over what many claim to be the excessive IDF use of force in Lebanon and Palestine between 2002 and 2005. This included bombing the house of Hamas leader Salah Shehadeh in July 2002 which, while hitting its target in Gaza with precision, also destroyed neighbouring houses killing 15 civilians.

Mr Ya'alon's responsibility for

these actions prompted criminal proceedings against him in Britain (for the assassination of Palestinian military leader Salah Shehadeh in 2002) and the United States (shelling of a UN compound in Qana, Lebanon, in 1996). The British Foreign Secretary described the Shehadeh attack as "unjustified and disproportionate". The UN Secretary-general saw the Qana attack as part of a possible systematic pattern of human-rights violations by the IDF.

Mr Ya'alon described the Shehadeh operation as a "tragic event".

During his visit to New Zealand last November, a complainant filed information to the Auckland District Court concerning the Shehadeh assassination as evidence of breach of the Geneva Convention on protection of civilians in wartime. The judge, having devoted two days to the case, saw "good and sufficient reason" to arrest Mr Ya'alon. The Auckland police, however, chose not to proceed with the arrest, turning to the Solicitor-general for advice. Within hours the Solicitor-general, a public servant of recognised integrity, advised the Attorney-general there was insufficient evidence to sustain a prosecution, and he quashed the arrest warrant.

The second development concerns the British court-martial of Flight-lieutenant Malcolm Kendall-Smith, a dual British-NZ citizen who was a doctor in the RAF. Dr Kendall-Smith, having served one tour in Iraq, concluded that their military presence there was "manifestly unlawful", refused to return, and was duly court-martialled. The judge-advocate dismissed the defence argument on two grounds. First, that he was not called upon to judge the legality or otherwise of the Iraq conflict since, as a junior officer, Dr Kendall-Smith

was required to obey orders. Secondly, the British presence in Iraq had been legalised by Security Council resolutions since March 2003, whatever the legality of the invasion itself.

Dr Kendall-Smith, having served his eight-month sentence, returned to New Zealand late last year. He is prevented now from speaking about his case under the British Official Secrets Act, notwithstanding that he made several highly public appearances in Britain before the court-martial. His arrival in New Zealand was greeted by a tiny paragraph in local newspapers phlegmatically acknowledging his presence.

What do these two developments tell us about ourselves? Two things. First, that we are failing in our legal obligations in international and domestic law. In the Ya'alon case, the Attorney-general's view that insufficient evidence was provided may or may not be correct. But in either case making such a judgement was not the only obligation on the Attorney-general. Under our Geneva Conventions Act 1958 (article 146), the Government has a duty to search for persons alleged to have committed or ordered such breaches "and shall bring such persons . . . before its own Courts." That is not simply a right to prejudice material supplied by a private party — the onus was to inquire, not just pronounce.

The Attorney-general noted the International Criminal Court was not investigating the matter. This was essentially irrelevant. In cases of war crimes the initial jurisdictional responsibility is national. Besides, New Zealand was not acting under its ICC Act but the Geneva Conventions Act. The Attorney-general further advised a correspondent that the informant had sought the arrest before he had opportunity to give

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the matter due consideration. Under the Act his consent is necessary before a trial can commence. This was not, he said, a "candid and principled approach". But impugning the informant's motive is gratuitous and high-handed given the suffering both Palestinians and Israelis endure. In fact the Auckland judge had correctly determined that such consent was necessary for a trial but not an arrest.

It has been widely contended that the Attorney-general's decision reflected political rather than legal considerations. Proof of that is impossible but also unnecessary — it is sufficient, and more significant, to recognise that the decision has resulted in New Zealand falling short of its legal obligations.

This is the more reprehensible in light of the Government's claims to be a leader in international criminal justice. When the ICC legislation passed Parliament in 2000, the Justice Minister declared that NZ law "will ensure that New Zealand cannot be regarded as a safe haven by those sorts of [war] criminals". And the Foreign Ministry declares that "the prosecution of accused persons, whether that occurs at the national or the international level, will help put an end to impunity for international crimes". The Government thus has an obligation to proactively investigate suspected war crimes, whether committed by Israelis, Palestinians, or anyone, irrespective of political relationships.

Secondly, with the Kendall-Smith case we prove ourselves to be pusillanimous in not following through with our political judgements. The Government had a political responsibility for its own citizen in Britain. The legal arguments for and against his

conviction are also finely balanced. They involve the relationship between the invasion and subsequent occupation of Iraq. The international community faced the anguish of determining whether an illegal invasion can be retroactively legitimised. Most experts regarded the invasion as illegitimate having been undertaken without explicit Security Council approval. The UN Secretary general agreed.

Can an illegal invasion be made retroactively legal by the Security Council? If so, what encouragement does that give to future military adventures by "willing coalitions"? If not, the legitimacy of the occupation present government is flawed. The British never agreed the invasion was illegal, relying on their own Attorney-general's justification that they were enforcing 1991 UN resolutions. Nor do they acknowledge the absence of weapons of mass destruction in Iraq invalidated their position. That stance incurred the resignation of the Foreign Office's deputy legal adviser.

Our Government describe the invasion as incompatible with the UN Charter, implying its illegality but never explicitly saying so. It has a political obligation to ensure against a miscarriage of justice to a citizen overseas. No statement was ever made by the Government about the court martial and prison sentence.

In both cases, the Government has sought to keep below the radar on issues of law and politics emanating from the Middle East. In both cases it lets its citizen and itself, down.

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