

UNDER THE

Inquiries Act 2013

IN THE MATTER OF

a Government Inquiry into Operation Burnham and related matters

**MEMORANDUM OF COUNSEL FOR FORMER RESIDENTS OF KHAK
KHUDAY DAD AND NAIK REGARDING PROPOSED PUBLIC HEARINGS**

Dated 5th March 2019

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- 1 This memorandum is filed further to Minute 8 of the Inquiry and the Inquiry's letters dated 11 and 27 February 2019 regarding Hearings 1, 2 and 3 of the Inquiry.
- 2 In its letter of 27 February, the Inquiry indicated that Hearings 2 and 3 would cover topics including rules of engagement, obligations towards detainees, the applicable law for the Inquiry, and the predetermined and offensive use of force against targeted individuals. Our clients, as well as Messrs Stephenson and Hager, have been asked to present legal argument on the issues raised by these topics.
- 3 As noted in our earlier memorandum of 26 February, we have not been consulted regarding these modules. Respectfully, counsel hold serious concerns regarding the proposal for Hearings 1, 2 and 3. In our view, the proposed agenda is vague and unclear in certain respects, overlooks important related topics, and fails to offer any meaningful role for our clients, the victims of Operation Burnham. Unfortunately, in these circumstances it is difficult to see how our clients may meaningfully participate in the Inquiry and we are yet again disappointed with the approach taken by the Inquiry.

Hearing 2

- 4 Our clients have been placed at an extreme disadvantage by the manner in which these hearings are to be concluded and the inequality of information between Crown and non-Crown participants. By way of example, we have been asked to present on legal issues arising from the Rules of Engagement, but have not been provided with a copy of the Rules of Engagement.
- 5 It is submitted that adequate disclosure must be undertaken before our clients can be expected to engage on the topics outlined. We therefore request disclosure of the Rules of Engagement applicable to Operation Burnham, as well as any earlier versions and interpretive materials from the New Zealand Defence Force which will be relevant to para 7.10 of the Terms of Reference.
- 6 More broadly, we request an urgent ruling on the scope of disclosure for the purpose of these hearings, in particular and specifically the request for disclosure specified in the immediately preceding paragraph. It is submitted that it is not practicably possible for us to participate in these hearings, when critical

underlying information is withheld from us and our clients. We therefore request the urgent disclosure of all Crown material relevant to the proposed agenda.

Hearing 3

7 The proposed agenda unfortunately overlooks numerous issues which should be considered as part of these modules. Counsel have previously provided a draft list of issues addressing matters including the applicable legal framework.¹ It is submitted that they must be considered in the upcoming modules, and we again repeat our request for a List of Issues setting out clearly what is to be within the scope of the Inquiry.

8 Furthermore, it is currently unclear how counsel are expected to participate in this process. We have not been informed who the expert(s) will be, or when we will be provided with their presentation for our comment. This information is needed well in advance for us to be able to meaningfully engage.

9 Finally, and most importantly, the proposed agenda at no point envisages any application of any of these matters to Operation Burnham. Counsel have not been informed of the proposed topics for hearings beyond these, and it is currently unclear whether we will have any role to play in hearings regarding the application of this framework to the events in issue. Respectfully, this process is of little value without application to Operation Burnham. While there are evident disputes regarding what is and is not the applicable law, it is likely that many matters under international humanitarian law will be relatively non-contentious, from an abstracted perspective. The issue will be around the application of these laws to Operation Burnham, and that is where we are particularly anxious that our clients should play a meaningful role.

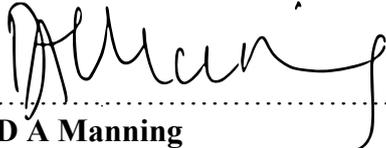
Location of events

10 Counsel are aware of Mr Hager's letter to the Inquiry of 13 February 2019, and Counsel Assisting's letter in response. We concur with Mr Hager's letter, and question the Inquiry's emphasis on location in these early hearings.

¹ Annexed to this memorandum, Section 1 Applicable Legal Framework at paras 1-11.

- 11 As Mr Hager has outlined, the location of Operation Burnham seems to be a non-contentious issue. Following Mr Hager's correction on 29 March 2017, there has not appeared to be any genuine dispute as to the location of Operation Burnham. The NZDF has maintained that the location of Operation Burnham was "Tirgiran Village", while our clients maintain that it was the Villages of Naik and Khak Khuday Dad. While the opinion of the former residents is, in our submission, more compelling in that respect, the fact remains that to the best of our knowledge, it is no longer contested they are referring to the same location.
- 12 In response to Mr Hager's letter, Ms McDonald referred to a submission from a member of the public, Sam Warburton, which was said to be an example of the "unclear" public record. That submission merely mirrors Mr Hager's point, however, that the location is not genuinely disputed. Both Mr Hager's letter and Mr Warburton's submission identify that the actual location of Operation Burnham is not disputed. Mr Warburton's letter simply goes further, noting that other photos were provided in *Hit and Run* corresponding to the location identified by the NZDF, pointing, he says, to the disingenuity of the NZDF in relying on the incorrect coordinates to dispute the substantive account in *Hit and Run*.
- 13 Given the above, the focus on the location appears to be a distraction and an inefficient use of Inquiry resources. Counsel request the Inquiry direct the participants to confer and confirm whether any extant dispute as to location does in fact remain. If no such dispute exists, it is submitted that portion of the hearing may be largely dispensed with.

Dated this 5th day of March 2019


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D A Manning
Co-Counsel for the Villagers

ANNEXURE**PROPOSED DRAFT LIST OF ISSUES***Legal framework*

- 1 Does the right to life and in particular its associated investigative obligations apply in relation to Operation Burnham (“the Operation”), and if so in what respects? What are the legal sources of that right (e.g. customary international law, international human rights law, or domestic law)?
- 2 In the context of a non-international armed conflict, who qualifies as a “civilian”? What legal rights and protections does having that status entitled the citizen to?
- 3 In what circumstances and/or in what situations in a non-international armed conflict could a civilian be considered to lose that protective status?
- 4 Under what circumstances and/or in what situations is a civilian in a non-international armed conflict considered to have directly participated in hostilities?
- 5 Under what other circumstances or in what other situations can a civilian be said to otherwise be a “legitimate target”?
- 6 To what extent did the NZDF abide by the foregoing standards for the safety and protection of civilians in the course of the planning and carrying out of Operations Burnham and Nova?
- 7 What are New Zealand’s obligations with respect to prisoners in a non-international armed conflict under the Convention Against Torture and international humanitarian law?
- 8 Did the NZDF rules of engagement (or any version of them) governing the deployment of NZDF forces and personnel for the purposes of the Afghanistan deployment and the Operation in particular authorise the predetermined and offensive use of lethal force against specified individuals (other than in the course of direct battle)?
- 9 Further to Question 8, was it apparent or should it have been apparent to:

9.1 The NZDF who approved the relevant version(s); and

9.2 Responsible Ministers;

that such force was or was not authorised?

10 Further to Question 8, what written briefings were provided to Ministers relevant to the scope of the rules of engagement regarding the authorisation of such force?

11 Did the NZDF's interpretation or application of the rules of engagement in relation to Question 8 change over the course of the Afghanistan deployment, and if so to what extent.

Pre-operational planning, intelligence and training

12 What was the NZDF justification or basis for embarking on each of Operations Burnham and Nova?

13 What intelligence or pre-operational materials were available regarding the civilian status (or otherwise) of Afghan nationals in the area(s) of the Operation?

14 Were paid informants used for intelligence gathering in preparation for the Operation?

15 What precautions (if any) were taken by NZDF and the NZDF personnel involved to determine whether Victims 1-21 were civilians? Were any feasible precautions not taken?

16 What precautions (if any) were taken to determine whether Victims 1-21 were directly participating in hostilities? Were any feasible precautions not taken?

17 What training was provided to personnel regarding compliance with international humanitarian law and international human rights law?

18 Were Operations Burnham and Nova appropriately authorised through the military chains of command?

19 Who was involved in the preparation and planning of Operations Burnham and Nova (including state actors, forces, and individuals)?

20 Did Operations Burnham and Nova each receive Ministerial authorisation? If so which Cabinet Minister or Ministers were involved and what was the nature and extent of the ministerial involvement in each case?

21 Further to Questions 16-19, did all briefings or other material provided for the purpose of such Ministerial authorisation appropriately and accurately reflect the nature and degree of involvement of civilians in Operations Burnham and Nova, and were the military chains of command and civilian government properly apprised of all matters of which they ought to have been aware?

Conduct of operation

22 What were the events of Operations Burnham and Nova? Prepare a factual reconstruction of the conduct of the Operations, moving in a chronological manner through all events which can be ascertained.

23 In relation to each of the Victims 1-21 above (and particularly in relation to Victims 1-6), were they:

23.1 Civilians;

23.2 Directly participating in hostilities; or

23.3 Otherwise legitimate targets?

24 Further to Question 22, did the NZDF consider each of Victims 1-6 to be:

24.1 Civilians;

24.2 Directly participating in hostilities; or

24.3 Otherwise legitimate targets?

25 In relation to Question 24, has the NZDF's position changed between Operation Burnham and the present?

26 If it is considered that any of Victims 1-21 were not civilians or were directly participating in hostilities or were otherwise legitimate targets, what was the alleged and actual degree and quality of involvement which they had in hostilities?

- 27 What steps were taken by NZDF to minimise civilian casualties during the conduct of Operation Burnham?
- 28 In relation to Victims 1-6, what was the cause of death and the circumstances of their death for each person, and in particular addressing:
- 28.1 Who died;
 - 28.2 The precise location of their death;
 - 28.3 The timing of their death;
 - 28.4 The cause of their death;
 - 28.5 The circumstances of their death;
 - 28.6 Whether medical assistance was rendered.
- 29 In relation to Victims 7-21, what harm did they suffer and what was the cause of such harm?
- 30 What was the geographical “area of Operation Burnham”?²
- 31 In relation to Victims 1-6, were these deaths justifiable in terms of *Jordan v United Kingdom*?
- 32 In relation to Victims 7-21, were the injuries suffered by each of them justifiable (by analogy) in terms of *Jordan v United Kingdom*?
- 33 What role did NZDF personnel play in Operations Burnham and Nova?
- 34 What property damage occurred during Operations Burnham and Nova?
- 35 During Operations Burnham and Nova and each of them did the NZDF comply with the applicable rules of engagement?
- 36 During Operations Burnham and Nova and each of them did the NZDF comply with international humanitarian law?

² TOR at 7.2.

Knowledge of events

- 37 In relation to each of Victims 1-21, does the NZDF accept that death and/or harm occurred as alleged?
- 38 In relation to Question 37, has the NZDF's position changed between Operation Burnham and the present?
- 39 What was the extent and nature of the NZDF's knowledge of casualties (civilian or otherwise) during Operation Burnham?

Post-operational conduct

- 40 What was the extent and nature of the NZDF's knowledge of casualties (civilian or otherwise) following Operation Burnham?
- 41 What steps were taken to gather all relevant evidence relating to casualties, for example eye-witness reports, autopsies and similar material?
- 42 At what point did the NZDF become aware that there were or may have been civilian casualties following Operation Burnham?
- 43 Was all information relating to the possibility or actuality of civilian casualties appropriately relayed through the relevant military chains of command, and if so, when?
- 44 What (if any) information was provided to Ministers in relation to civilian casualties, and when?
- 45 What steps were taken following Operations Burnham and Nova to review the conduct of each of the Operations?
- 46 What actions were taken and conclusions reached by the International Security Assistance Force ("ISAF") investigation into each of Operations Burnham and Nova?
- 47 What was the role of and part played by the NZDF in relation to the ISAF investigation?

48 What information did NZDF receive in the years following each of Operations Burnam and Nova about civilian deaths and injuries and damage of civilian property and what did it do in response to that information?

49 Did the NZDF comply in relation to Operations Burnham and Nova with the investigative obligations arising out of the right to life, or under the Armed Forces Discipline Act, or otherwise?

Treatment of Qari Miraj and other individuals subsequent to the Operation

50 What were the circumstances of the tracking and capture, and subsequent transfer and/or transportation of Qari Miraj to the Afghanistan National Directorate of Security?

51 Was the transfer and/or transportation of Qari Miraj proper, given (amongst other matters) the June 2010 decision in *R (oao Maya Evans) v Secretary of State for Defence* [2010] EWHC 1445?

52 What information did NZDF subsequently receive concerning interrogation, mistreatment and/or torture of Qari Miraj, and what steps were taken in response to such information?

53 Did the NZDF engage in or assist in (whether in terms of intelligence, planning, direction, or in actual conduct) the targeted killings of individuals as alleged in *Hit and Run*, including:

53.1 Alawuddin;

53.2 Qari Musa; and

53.3 Abdullah Kalta?

54 Further to Questions 8 and 53, were any such targeted killings lawful, with reference to the relevant terms of engagement and international humanitarian law.