

28 March 2017

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**Re: Allegations of breaches of domestic and international law in Afghanistan by
New Zealand Defence Forces – “Operation Burnham”**

Dear Sirs,

1. We refer to our correspondence of 24 March 2017. As you are now aware, we have been instructed to act for the families of the deceased and other individuals of the villages of Khak Khuday Dad and Naik in Baghlan Province, Afghanistan. Our clients are the innocent victims of military operations conducted against their villages by international forces, including the New Zealand Defence Force (“NZDF”), during the early hours of 22 August 2010, and also during a subsequent raid carried out on Naik village some weeks later (“the military operations”).
2. You are by now aware of recent allegations of breaches of domestic and international law committed by the NZDF in relation to these military operations. These allegations have been raised publicly, including in a book entitled *Hit & Run: The New Zealand SAS in Afghanistan and the Meaning of Honour* by Nicky Hager and Jon Stephenson (“*Hit & Run*”). Since its release on 21 March 2017, *Hit & Run* has generated considerable public interest and outrage concerning the actions taken by the NZDF in military operations under the auspices of “Operation Burnham”.
3. In our earlier correspondence, we advised that shortly we would be writing to you on behalf of our clients requesting that you initiate a full and independent inquiry to investigate the matters referred to in that correspondence and this is the purpose of this correspondence. We are aware that Ministers may be considering making a decision today on whether to commission an inquiry into the allegations and concerns raised about the actions of the NZDF during Operation Burnham.

4. We advise that we have just received information that is directly relevant to our request for an inquiry and which relates to the various claims publicised by the New Zealand Defence Force in a media release of 26 March 2017 and press conference of the Chief of Defence Force Lieutenant-General Tim Keating on 27 March 2017. We are currently in the process of confirming instructions with our clients before that information is provided to you. These instructions and this information are of great significance to the decision that you are presently facing.
5. We expect to be in a position to provide this information to you, by or before **tomorrow morning**, Wednesday 29 March 2017, due to time zone constraints. In the meantime, we request that no decision be made regarding an inquiry without our clients being first afforded the opportunity to provide potentially significant information to the Government of New Zealand which would be directly relevant to the need for an inquiry. However, you are of course welcome to make a decision accepting our request for an inquiry before this time. In the interim, we set out our request for the need for an inquiry into Operation Burnham below.

Operation Burnham

6. We are aware of the recent NZDF Media Release of 26 March 2017 entitled, “NZDF Statement on Hager/Stephenson Book” (“the latest NZDF media release”), augmented by a media conference held by the Chief of Defence Force Lieutenant General Tim Keating to rebut allegations about the NZDF made in *Hit & Run* on 27 March 2017. The latest NZDF media release and follow up media conference claims that NZDF personnel have never operated in the villages of Naik and Khak Khuday Dad. It further states that Operation Burnham was conducted in a settlement called Tirgiran, which is 2.2 kilometres south of Khak Khuday Dad village. The latest NZDF media release also refers to an ISAF investigation which alleges a “gun sight malfunction”. That is a reference to a 29 August 2010 News Release from the ISAF Joint Command-Afghanistan, which uses identical language to that of the latest NZDF media release. (Refer to page 135 of *Hit & Run* for a full copy of the ISAF News Release.)
7. The necessary conclusion to be drawn is that the NZDF has by means of its latest media release and media conference now publicly advised and confirmed that Operation Burnham took place on 22 August 2010 – allegedly 2.2 kilometres south of Khak Kuday Dad village. In its version of the events of Operation Burnham, the NZDF has confirmed that the operations included “air support capacity” and that two buildings suffered damage.
8. It is important in this context to note that the NZDF earlier issued a media release on 20 April 2011, which confirmed that on 22 August 2010, operating as part of a Coalition Force, they were part of a wider ISAF mission in Bamyán Province where nine insurgents were killed. (We note that the NZDF clearly made an error by stating that the operation was in Bamyán. It seems accepted by all involved that the operation occurred in neighbouring Baghlan province: for the earlier NZDF press release, refer to *Hit & Run*, page 136.)

9. We note also that the NZDF confirmed, in their media release issued on 21 March 2017, that “[t]he [NZDF] stands by the statement it made dated 20 April 2011”, referred to above.
10. The inevitable conclusion is that the NZDF has now confirmed in three media releases (20 April 2011, 21 March 2017 and 26 March 2017) and a media conference that it was involved in a military operation on 22 August 2010 in Baghlan province; that there were fatalities (allegedly nine “insurgents”), and that there were associated allegations of civilian casualties (which the NZDF denied). Furthermore, taking into account the ISAF media release and the NZDF media releases, it has also effectively been confirmed by NZDF that property damage occurred during a military operation in which it was involved, namely damage to two village buildings.
11. Our clients have been made aware of the latest NZDF media release and its contents and allegations, as well as prior NZDF media releases and ISAF media releases. Contrary to the latest NZDF media release, our emphatic instructions from our clients are that there was no other military operation in the area of Tirgiran on or about 22 August 2010, and that the only military operation or raid that occurred on this date took place in the villages of Naik and Khak Khuday Dad. Furthermore, to be clear, the only villages to suffer deaths, injuries and/or destruction of property on the night of 22 August 2010 in the Tirgiran area were Naik and Khak Khuday Dad. Our clients reject outright the latest claims by the NZDF that there was a separate military operation (resulting in deaths and destruction of buildings) on the same night, occurring some kilometres south of Khak Khuday Dad village.

Need for an inquiry

12. In our view, the recent NZDF media release both reinforces and increases the need for an independent inquiry into Operation Burnham. There is now considerable public confusion and concern in relation to the events and outcome of Operation Burnham.
13. In requesting an independent inquiry, we rely on both our instructions from our clients as to what occurred and the content of the *Hit & Run* publication, which you no doubt have available to you. We further note there are other statements in the public record to support the claim being advanced that there was only one military operation involving civilian deaths in Tirgiran on 22 August 2010, including:
 - (i) The Afghanistan Annual Report 2010, Protection of Civilians in Armed Conflict prepared by the United Nations Assistance Mission and the Afghanistan Independent Human Rights Commission (published in March 2011) which records that “[i]nternational military forces conducted an investigation into an air strike on 22 August in...Baghlan province that caused six civilian deaths...”;
 - (ii) There were independent media reports of the military operation in the Tirgiran area on 22 August 2010 in Afghanistan and in the New York Times, which referred to civilian deaths (refer pages 77-78 of *Hit & Run*).
14. It is clear that both the Afghanistan Human Rights Commission and the Afghanistan media reported on the military operation and deaths. That they could report as they did and at the same time fail to mention a second and separate military operation on the same

night in the Tirgiran area, which allegedly also caused nine insurgent deaths and the destruction of buildings in a village or villages, is completely implausible.

15. Given all of the above, we submit that it is untenable for the NZDF to assert that Operation Burnham was a separate operation on the night of 22 August 2010 which occurred 2.2 kilometres south of Khak Khuday Dad village.
16. In our view, the latest NZDF media release has, at best, created confusion for not only the public but also the public sector, and at worst is an attempt to conceal the true nature of their role in military operations conducted in relation to our clients' villages on 22 August 2010.
17. In our letter of last Friday we wrote that the publicly available material, along with our clients' instructions, establishes credible allegations that the NZDF has breached the most fundamental principles of New Zealand and international law. The alleged breaches include war crimes and violations of the right to life.

Requests

18. We now formally request on behalf of our clients that a full and independent inquiry be established under the Inquiries Act 2013 to inquire into the actions of the NZDF in relation to Operation Burnham, including what appear to be subsequent and indeed ongoing attempts to cover up and conceal those actions, and indeed into all of the serious allegations outlined above. We note that the Chief of Defence Force stated publicly yesterday at the media conference that he is not opposed to an inquiry into Operation Burnham, but that such an inquiry requires a legal basis. We set out the legal basis for such an inquiry below.
19. Without limiting the matters to be considered by an inquiry, some key matters are identified here. For ease, we refer to relevant page numbers in the publication *Hit & Run*, but this should not be taken that this forms the sole basis of our instructions. The allegations which require an independent inquiry firstly relate to the military operations on 22 August 2010 and some weeks later affecting the villages of Naik and Khak Khuday Dad. The inquiry should include consideration of the conduct and actions of the NZDF, and also the responsibility of the NZDF and individuals involved for the following human rights violations:
 - (i) The deaths of six civilians and injuring a further fifteen civilians, all non-combatants and including children in Khak Khuday Dad and Naik;¹
 - (ii) Bombardment of the villages of Khak Khuday Dad and Naik by helicopter fire;²
 - (iii) The destruction of civilian homes and property by helicopter fire and by New Zealand forces using fires and explosives, without military justification;³

¹ Nicky Hager and Jon Stephenson *Hit & Run: The New Zealand SAS in Afghanistan and the meaning of honour* (Nelson, Potton & Burton, 2017): chapters 3 and 4 and pages 42, 50-59 and 61-63.

² Pages 36, 41, 49-53 and 61-62.

³ Pages 39-41, 60-61 and 68-69.

- (iv) Failing to provide medical assistance to the injured and dying or other assistance to the villagers, both immediately following the attack and subsequently;⁴ and
 - (v) The destruction of civilian homes and property including the destruction of religious materials.⁵
20. In relation to the actions of the military helicopters during Operation Burnham, the allegation is that US helicopters were acting directly under the control of the NZSAS, which had overall command of the raid and all forces involved. In relation to the deceased victims, it is alleged that four were killed by helicopter fire, while two were killed by sniper fire which likely came from NZSAS soldiers.⁶
21. We also note that further serious allegations of grave human rights violations in *Hit & Run* include:
- (i) The mistreatment of a restrained prisoner by New Zealand SAS soldiers – it is alleged they beat and injured a bound and restrained prisoner in their custody;⁷
 - (ii) The transfer of the prisoner to the custody of the Afghan National Directorate of Security, an organisation known to use torture routinely;⁸
 - (iii) This prisoner was tortured, and a confession obtained under torture was provided to New Zealand forces;⁹ and
 - (iv) NZDF involvement in targeted and extrajudicial killings of individuals. The NZDF were responsible for eight individuals being placed on the JPEL target list, of whom at least several were authorised for both capture and targeted killing. Two of those individuals were killed in 2011; both during separate targeted air strikes.¹⁰
22. While we do not have our clients' instructions to pursue the serious allegations set out in the above paragraph, we do note these as responsible members of the legal profession, given the grave nature of these issues and our professional obligations to uphold the rule of law.
23. We also note that the term 'war crimes' can provoke a strong emotive response, and consider it helpful to place it in its international law context. New Zealand's engagement in Afghanistan is described as an armed conflict of a non-international nature, and a war crime in this context is a serious violation of the laws and customs applicable in such a conflict, within the framework of international law.¹¹ A breach can be an act or an

⁴ With the exception of medical assistance provided by Afghan forces to one elderly man injured by shrapnel: pages 44 and 69-70.

⁵ Pages 39 and 68-69.

⁶ Pages 56-59, see also David Fisher "A Kiwi soldier dead; a firefight ignites" NZ Herald (22 March 2017) http://m.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11822830.

⁷ Pages 83-85.

⁸ Pages 87-88.

⁹ Pages 88-89.

¹⁰ Pages 24-26 and 91-92.

¹¹ International Crimes and International Criminal Court Act 2000, s 11(2)(d); Rome Statute of the International Criminal Court, art 8(2)(e).

omission, and must typically be committed either intentionally or recklessly. Prohibited conduct can be identified by reference to instruments such as the Rome Statute of the International Criminal Court or the Geneva Conventions, for example, or by reference to customary international law including the jurisprudence of various international tribunals and state practice. War crimes can include the destruction of property not justified by military necessity.

24. The request for a full and independent inquiry is based on a number of legal grounds. There are numerous obligations upon the New Zealand authorities to inquire into these alleged human rights violations set out above, including the clear obligation to investigate and inquire into allegations of serious human rights violations when they arise. New Zealand's human rights obligations arise under a number of statutes, common law and international obligations including the following:
 - (i) The right to life, as per s 8 of the New Zealand Bill of Rights Act 1990 ("NZBORA");
 - (ii) The right to be free from torture, as per s 9 of the NZBORA;
 - (iii) Crimes of Torture Act 1989, as per s 3;
 - (iv) War crimes, as per s 11 of the International Crimes and International Criminal Court Act 2000;
 - (v) United Nations Convention Against Torture, Cruel, Inhuman and Degrading Treatment;
 - (vi) United Nations International Covenant on Civil and Political Rights;
 - (vii) United Nations Universal Declaration on Human Rights;
 - (viii) United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (resolution adopted on 29 November 1985 by the UN General Assembly).
25. We submit that a commission of inquiry is necessary to establish a full account of the NZDF's actions in Afghanistan during Operation Burnham and also subsequently, in relation to the extent of any investigation conducted by the NZDF and what appears to have been a concerted and high level attempt to cover up and indeed conceal from the public of New Zealand what in fact occurred during and subsequent to Operation Burnham.
26. Any inquiry will require full and sufficient terms of reference to inquire into all allegations; the power to compel witnesses and require evidence under oath; the ability to review all relevant information including that which may be subject to national security concerns, in accordance with accepted procedures for handling such material; the inclusion of all affected parties; and finally, findings to be made in public. Findings should also address the causes of these events, including the planning of any operations and provide guidance to prevent future human rights violations (assuming violations are found).

27. Given the compromised position of the NZDF, the option of permitting the NZDF itself to conduct or preside over an investigation and/or inquiry into these matters must, we submit, be completely ruled out. In order to ensure public confidence in the outcome of an inquiry, it should in our view be presided over by a retired or sitting High Court (or appellate) Judge.
28. We are also of the clear view that to date there has been no independent investigation or inquiry into Operation Burnham, including the deaths which occurred. All NZDF media releases referred to above have referred to and relied upon an investigation by a joint ISAF-Afghan assessment team (“the ISAF investigation”). We consider the ISAF investigation to be wholly inadequate and as falling far short of New Zealand’s obligations to conduct a full and proper investigation of these matters
29. We are instructed that no investigator or authorities (be it from ISAF or elsewhere) have ever been to the villages of Naik or Khak Khuday Dad, nor spoken to any of their residents (the villagers), about the military operations. We confirm that the villagers have at all times wanted to speak to inquiring and investigating authorities about what happened to them during the military operations. This remains the position of the villagers today. They remain willing to cooperate fully in any way they can with an inquiry into what happened to their villages, to their loved ones and to those who were directly injured and affected.
30. We also advise that ISAF investigations are not considered to be independent investigations, and have been widely criticised by the international human rights community. See for example a recent press release from Amnesty International which states, “[w]e have documented instances of ISAF reaching incorrect findings in their reports and have also raised concerns about their ability, as military forces, to conduct an impartial investigation into military conduct.”¹²
31. Furthermore, we are aware that the New Zealand authorities do not even hold a copy of the ISAF investigation, the NZDF having disclosed this recently to the New Zealand Human Rights Foundation in a response to a request under the Official Information Act dated 15 March 2017. That the NZDF does not even hold a copy of the ISAF investigation further reinforces our view of its inadequacy and the improper over-reliance by the NZDF on the ISAF investigation as having discharged New Zealand’s investigative obligations.
32. To be clear, the purpose of this letter is not to request any criminal prosecutions at this stage. We consider the proper course of action is a full inquiry. We note that an inquiry, under the Inquiries Act 2013, can make findings of fault or recommendations that further steps be taken to determine liability.¹³
33. Following an inquiry, the decision whether to initiate a prosecution would fall to the law officers of the Crown, who are empowered to decide in accordance with the *Solicitor*

¹² Amnesty International “Amnesty International says New Zealand Government can’t rely on the ISAF report into civilian casualties in Afghanistan” (23 March 2017) <https://www.amnesty.org.nz/amnesty-international-says-new-zealand-government-can%E2%80%99t-rely-isaf-report-civilian-casualties>

¹³ Inquiries Act 2013, s 11(2).

General's Guidelines and other relevant information. The principle of complementarity requires state parties to the Statute of the International Criminal Court to undertake investigations where they have jurisdiction to do so. However, we do note that where a state party is unwilling or unable to do so, the intervention of the International Criminal Court will be justified, as will the initiation of civil claims under the NZBORA and tort liability.

34. In our view, there is an additional need to have a formal inquiry into these matters which is the treating the victims of Operation Burnham with respect and dignity. It is not acceptable to deal with such matters through drip feeding information through the media. We hold particular concern regarding the camera footage of this operation which was referred to by the Chief of the Defence Force in the media conference yesterday and that it may be possible to release this footage. Media have subsequently been calling for this footage to be released.
35. It is essential to deal with this information respectfully and to consider the needs of the victims of Operation Burnham before any footage is released publicly. Such footage could include traumatising material of seeing their loved ones killed or themselves being injured. This is not to say that such footage could never be released to the public, but in our view this must be done with respect to the victims. It is essential they are consulted and their views considered before any footage is released publicly.
36. Finally, we note that immediate steps must be taken to preserve all information and evidence relevant to Operation Burnham held by the NZDF and New Zealand government as this will be relevant to any inquiry or litigation surrounding these matters.
37. We urge you finally to take note of the importance of an inquiry in order to avoid irreparable damage to the international reputation of New Zealand; to maintain the integrity of our political and legal systems; and to confirm our commitment to the rule of law and the rights of all individuals.

Yours sincerely,

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