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 IN RESPONSE TO INQUIRY MINUTE NO 4

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I INTRODUCTION

1 This memorandum is filed on behalf of the Villagers to address matters raised in Minute 4 of the Inquiry. This memorandum addresses:

1.1 The right to life as the starting point for the Inquiry;

1.2 Classification/declassification processes;

1.3 Public and core participants' access to the Inquiry;

1.4 Other matters including timeframes and the list of allegations.

2 Counsel support the proposal for an interlocutory hearing to further address the matters raised below.

3 Counsel have reviewed the memorandum filed by Mr Hager in response to Minute 4, and support his observations and recommendations, including *inter alia* that:

3.1 Security concerns should not be treated as absolute, with openness and natural justice fitting around security concerns where feasible.

3.2 Material classified as Confidential or Restricted poses little security risk, and concerns regarding disclosure of such information to other core participants can be adequately addressed through non-disclosure agreements.

3.3 Rather than imposing a binary public/private distinction, there should be three categories of information, namely (i) information generally available, including to the public; information available to core participants and the Inquiry; and (iii) a limited range of information available to the Inquiry only that is.

3.4 Core participants need to be involved in the declassification/reclassification process.

3.5 All core participants ought to be provided with a full list of all classified documents as soon as possible, including the title, originating organisation and date and security classification (and, where applicable, the recommended security classification by the Inquiry and/or Mr Keith).

3.6 A clear distinction can and should be drawn between treating vulnerable witnesses (including the villagers) respectfully and carefully, on the one hand, and adopting an essentially closed process for the bulk of the evidence before the Inquiry, on the other. The two are not comparable, and the former cannot be used to justify the latter. The former may amount simply to not permitting cross-examination for witnesses unfamiliar with a Western-style legal system, while their evidence (but not their identity) remains public - as is likely to be the case.

3.7 Counsel support all of Mr Hager's proposals with respect to the ways in which core participants should be involved in the Inquiry, including through access to confidential and restricted documents, involvement in the classification review, provision of lists of all disclosure, involvement and attendance for all hearings and witness evidence, provision of lists of all NZDF and other personnel involved with Operation Burnham (with redactions only where necessary), consultation regarding witnesses to be called, and disclosure of all correspondence relating to efforts to obtain agreement on disclosure of foreign-sourced material.

3.8 The inequality of resources between participants in the Inquiry must be to the fore of the Inquiry's reasoning, as it has significant flow-on effects for all aspects of the conduct of the Inquiry. One way to mitigate this inequality is through the adoption of a process which is as open and transparent as possible.

3.9 Counsel concur with Mr Hager's concerns regarding the independence of NZDF witnesses.

II RIGHT TO LIFE AS STARTING POINT FOR INQUIRY

4 At para 10 of Minute 4, the Inquiry states that "our overall purpose is to inquire into the allegations of wrongdoing by NZDF in connection with the Operation Burnham and related matters". Respectfully, it is submitted that this fails to give due consideration to the right to life as central focus and indeed as a starting point of this Inquiry.

5 It is submitted that a primary purpose of this Inquiry which has largely been overlooked is to satisfy the New Zealand State's obligation – substantive in nature, albeit concerned with due process - to investigate possible breaches of the right to life, namely the deaths of the six villagers killed during Operation Burnham. This purpose was put to the Attorney-General in correspondence in advance of the Inquiry on a number of occasions.[1] On 24 March 2017, counsel wrote to the Attorney-General:[2]

> In our view, the material that has been released to date on these raids (including Hit & Run, ISAF press releases and 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)) 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.

6 Again on 28 March 2017, counsel wrote to the Attorney-General:[3]

> 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.
>
> [...]
>
> 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;

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1 Letter to Attorney-General dated 24 March 2017, Document 1; Letter to Attorney-General dated 28 March 2017, Document 2.

2 Document 1.

3 Document 2.

> (iii) Crimes of Torture Act 1989, as per s 3;
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> (iv) War crimes, as per s 11 of the International Crimes and International Criminal Court Act 2000;
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> (v) United Nations Convention Against Torture, Cruel, Inhuman and Degrading Treatment;
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> (vi) United Nations International Covenant on Civil and Political Rights;
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> (vii) United Nations Universal Declaration on Human Rights;
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> (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).
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> 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.
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> 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).
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> 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.

7 This approach is consistent with the ultimate position of the Attorney-General as outlined in the Terms of Reference:

> 5. The matter of public importance which the Inquiry is directed to examine is the allegations of wrongdoing by NZDF forces in connection with Operation Burnham and related matters.

8 This matter was raised previously in counsel's memorandum of 10 August 2018, however it is respectfully submitted that it has not been adequately addressed in the Inquiry's Minute.[4] It is helpful at this juncture to provide an overview of the law as it relates to this Inquiry.

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[4] Memorandum of Counsel for the Villagers, dated 10 August 2018 at paras 13–17.

Background to the right to life and the procedural obligation

9 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.

10 The Supreme Court of the United Kingdom has noted:[6]

> But the right to life is the most fundamental of all human rights. It is put at the forefront of the Convention. The power to derogate from it is very limited.

11 Along with the development of human rights treaties and statutes, the content of the right to life has been significantly expanded. Accordingly, any full consideration of the right under NZBORA must go beyond New Zealand's limited case law on the subject,[7] and account for jurisprudence in other common law countries and international courts.[8]

12 Section 8 of NZBORA affirms the right of all persons not to be deprived of life, except on such grounds as are established by law and are consistent with the principles of fundamental justice.[9] 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):[10]

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

6 *R v Director of Public Prosecutions, ex parte Manning* [2001] QB 330, [2000] 3 WLR 463 at [33].

7 Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 220.

8 *Attorney-General v Taylor* [2017] NZCA 215 at [86]–[91].

9 NZBORA, s 8.

10 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.

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.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

   (a) in defence of any person from unlawful violence;

   (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

   (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

13 The differences between these texts are semantic only, and the content of the substantive right is the same. Accordingly, jurisprudence under art 2 of the Convention and art 6 of the ICCPR should be regarded as highly persuasive when considering the right to life.[11]

14 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.[12] 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.[13] Such investigation is necessary to determine whether the deprivation of life was in fact arbitrary. The Strasbourg Court observed in *McCann v United Kingdom*:[14]

> ... 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

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[11] 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]; *Laws of New Zealand* Human Rights (online ed) at [4]–[5].

[12] 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].

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

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

> 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.

15 The Strasbourg Court affirmed this position in *Al-Skeini v United Kingdom,* which concerned the killing of six civilians by British forces in Iraq between 2003-2004.[15] The Court held:

> [163] The general legal prohibition of arbitrary killing by 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 art.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. The essential purpose of such an investigation is to secure the effective implementation of the domestic laws safeguarding the right to life and, in those cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility. However, the investigation should also be broad enough to permit the investigating authorities to take into consideration not only the actions of the state agents who directly used lethal force but also all the surrounding circumstances, including such matters as the planning and control of the operations in question, where this is necessary in order to determine whether the state complied with its obligation under art.2 to protect life.
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> [164] The Court has held that the procedural obligation under art.2 continues to apply in difficult security conditions, including in a context of armed conflict. It is clear that where the death to be investigated under art.2 occurs in circumstances of generalised violence, armed conflict or insurgency, 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.

16 The Intra-American Court of Human Rights similarly observed:[16]

> Likewise, the general prohibition imposed on government officers to arbitrarily kill people would be practically ineffective if there were not any procedures to verify the legality of the use of lethal force by government officers. Upon learning that member of the security forces have used firearms causing lethal consequences, the State must immediately initiate a rigorous, impartial and effective investigation *ex officio*.

17 The point does not need to be laboured. While this aspect of the right to life has yet to receive any substantial or decisive attention from New Zealand courts,[17]

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[15] *Al-Skeini v United Kingdom* (2011) 53 EHRR 18.

[16] *Montero-Aranguren v Venezuela* (5 July 2006) Inter-Am Ct H R at [79].

[17] 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].

the procedural obligation is by now well-traversed and firmly established under the Convention, the ICCPR and other sources of human rights law.

18 The position under the Convention was set out comprehensively in *Jordan v United Kingdom*.[18] Pearse Jordan, a suspected member of the Irish Republican Army (IRA), was shot and killed in Northern Ireland by the Royal Ulster Constabulary (RUC). Four civilians witnessed his death, and gave statements to a Belfast NGO that contradicted the official account. The Director of Public Prosecutions determined the evidence was insufficient to justify laying criminal charges.[19] A coronial inquest was held, but was subject to various legal challenges and remained ongoing more than eight years after Jordan's death. Jordan's father argued that his son's death was unjustifiable, and that there had been no effective investigation into or redress for his son's death.[20]

19 The Court ultimately concluded that the authorities had failed in their obligation to carry out a prompt and effective investigation into the circumstances of Jordan's death. With respect to the content of this obligation, the Court identified five principles: state instigation, independence, means, promptness, and transparency.[21]

20 An effective investigation or inquiry, therefore, is one which:

20.1 is triggered by the State of its own motion;[22]

20.2 is conducted by independent investigating authorities, capable of scrutinising the accounts of the parties and making an independent reconstruction of the events;[23]

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18 *Jordan v United Kingdom* (2003) 37 EHRR 2.
19 At [38].
20 At [95]–[97].
21 At [105]–[109].
22 *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].
23 *Kaya v Turkey* (1999) 28 EHRR 1 at [89]; *Jordan v United Kingdom* (2003) 37 EHRR 2 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].

20.3 possesses a sufficient mandate and powers that enable it to determine whether the force used was or was not justified in the circumstances, including the ability to compel witnesses, gather and secure evidence, and reach conclusions of fact;[24]

20.4 proceeds promptly, both in terms of initiation and progress;[25]

20.5 is subject to public scrutiny.[26] 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.[27]

21 The procedural obligation has been extended to military operations in recent years in a number of cases decided under art 2 of the Convention.[28] In the context of art 6 ICCPR, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions concluded:[29]

> 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 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.

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[24] *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].

[25] *Jordan v United Kingdom* (2003) 37 EHRR 2 at [108]; *Ergi v Turkey* (2001) 32 EHRR 18 at [85]; *Kaya v Turkey* (1999) 28 EHRR 1 at [91].

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

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

[28] *Al-Skeini v United Kingdom* (2011) 53 EHRR 18; *Smith v Ministry of Defence* [2013] UKSC 41; *R (Mousa) v Secretary of State for Defence (No 1)* [2010] EWHC 3304 (Admin); *R (Mousa) v Secretary of State for Defence* [2013] EWCA Civ 1334; and *R (Mousa) v Secretary of State for Defence (No 2)* [2013] EWHC 1412 (Admin); *Jaloud v The Netherlands* (2015) 60 EHRR 29.

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

Application to this Inquiry

22 It is submitted that the right to life should be considered the starting point for this Inquiry. Six civilians are alleged to have died as a result of the conduct of state actors. The primary goal should be for the Inquiry to provide an independent, accurate reconstruction of the events at issue for publication to the public and to the participants, to satisfy the procedural obligation to investigate these potential breaches of the right to life. With respect, this requires a substantial conceptual reframing of the purpose of the Inquiry, with consequences for the conduct of the Inquiry including with respect to the involvement of participants and public access.

III CLASSIFICATION / DECLASSIFICATION PROCESS

23 Counsel support the Inquiry's position that it ought not to agree to any process or requirement that has the effect of limiting the Inquiry's ability to exercise its statutory power under s 27 of the Inquiries Act.

24 A number of concerns are raised, however, with respect to the classification/ declassification process outlined by the Inquiry and in other participants' memoranda.

Approach to foreign-sourced material

25 As noted in the Minute, DPMC, GCSB and NZSIS have indicated that the release of partner-controlled classified material to the Inquiry is "unlikely" to be permitted. MFAT have further noted that for NATO information to be disclosed to the Inquiry, it must follow an "established process".[30] Counsel for MFAT continue to note the advice from NATO that:[31]

[Withheld]

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[30] Memorandum of Counsel for Ministry of Foreign Affairs and Trade in relation to NATO process regarding release of documents, dated 3 September 2018 at [3].

[31] At [3].

[Withheld]

26 An important preliminary question is whether what is claimed to be "foreign-sourced material" is properly so categorised. Counsel refer to and reiterate the points made in that regard in paras 21 – 24 of our earlier memorandum dated 10 August 2018. Separate and distinct issues arise in relation to NZ-sourced material, copies of which have ended up with NATO. As regards this material, Counsel for the Villagers reiterates and adopts the submissions made in paras 25 – 31 of the 10 August 2018 memorandum. Minute No 4 fails to address these arguments. It is submitted that they must now be addressed and ruled upon. The meaning and effect of the NATO Agreement on which the NZDF and now MFAT are placing reliance is a matter of interpretation of the language used and ultimately (so far as the Inquiry is concerned) New Zealand law. The Villagers' position remains that the NATO Agreement is inapplicable to NZ-sourced material. If that is correct, the contended-for obstacles to its being made available fall away.

27 Without prejudice to those issues, the nature of the asserted "established process"(para 25 above) is not further elaborated. Nor are the implications of the Inquiry's intended use of the documents on the decision to release information explained. It may be inferred from that memorandum that an intention to provide material to other participants will negatively impact the release of information to the Inquiry. It is not apparent however that this inference is intended by NATO, nor whether any concerns can be mitigated, for example, by non-disclosure agreements.

28 This position is entirely too vague and requires urgent clarification. In this respect, counsel again refer to the dicta of Glazebrook J in *Zaoui v Attorney-General*:[32]

> It is trite, too, that, for information to be classified security information, it must satisfy

[32] *Zaoui v Attorney-General (No. 2)* [2005] 1 NZLR 690 at [74] per Glazebrook J (emphasis added).

> both para (a) and para (b) of the definition. For example, it is not enough that the information might lead to identification of the operational methods available to the SIS, it must also prejudice the security or international relations of New Zealand or meet one of the other criteria in para (b) of the definition. **It is not enough that a foreign Government or agency refuses consent to disclosure. Disclosure must also prejudice the entrusting of information to the Government of New Zealand or meet one of the other criteria in para (b). In that regard, absent evidence to the contrary, it would have to be assumed that the foreign Governments or agencies were acting reasonably. Therefore, if the information is of a type, for example, that those Governments or agencies would be required to disclose to Mr Zaoui in a similar judicial or quasi-judicial process in their own jurisdiction, then one would not have thought that disclosure in similar circumstances here would prejudice future information flows.** The same applies if the information is classified only because of its immediate source rather than because of its content, as is suggested may often be the case in the affidavit of Mr Buchanan, sworn 30 October 2003 at para 15.

29 To this end, counsel for the Villagers have been making inquiries regarding the procedures under which NATO and the United States of America may disclose information in their respective jurisdictions.[33] It is submitted that urgent clarification from NATO as to the nature of its process is required. This would inform the Inquiry as to the minimum requirements necessary for *its* procedure, rather than leaving it to the Inquiry adopt a procedure against opaque criteria outlined only vaguely in advice to date.

Redactions and summaries

30 Counsel further wish to raise concerns with the approach outlined at para 23 of Minute 4:

> No classified material will be made available to those without security clearances, although the Inquiry will consider options to support engagement by core participants, such as redaction and summaries, *if feasible and appropriate*.
>
> (emphasis added)

31 This approach raises serious concerns relating to public access to the Inquiry, the involvement of the participants, and natural justice rights, many of which are expanded upon below. Presently, it is submitted that engagement by core participants must be permitted at all times, and not simply where "feasible and appropriate". Access to redacted or summarised versions of classified material ought to be available as of right, or the basic natural justice rights of the participants will not have been met.

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[33] In addition to these inquiries, counsel requested information from the United States armed forces pursuant to the Freedom of Information Act in April 2017. This request remains outstanding.

Declassification and reclassification process

32 Counsel in principle support the appointment of Mr Keith to advise the Inquiry regarding matters of classification. It is submitted, however, that further clarification is needed regarding the nature of his role. It is noted that differing approaches exist regarding whether special advocates can be permitted to engage with other counsel *after* viewing classified material. It is necessary to clarify the nature of Mr Keith's involvement at various stages of the process, and the degree to which he will be able to engage with core participants throughout the Inquiry. That is especially the case, if it is anticipated that he will or may be permitted to adopt a special advocate role in the future. It is submitted these issues require prompt consideration and resolution.

33 The Inquiry has proposed a procedure by which the relevant agencies will have the opportunity to be heard or make submissions where there is a dispute regarding classification, redactions or summaries. It is submitted that other parties must also be involved in this process. Where there is a dispute as to whether material ought to be declassified, for example, other core participants ought to have the opportunity to make submissions or be heard, relying on summaries of the material in question and declassified information about the material and the basis on which the agency opposes declassification, or on a special advocate procedure where a special advocate is appointed for the participants.

IV INQUIRY PROCEDURE

Public and core participants' access

34 Counsel strongly resist the proposal that the Inquiry adopt a procedure that is "substantially non-public".[34] Transparency and public access are key to conducting an effective and independent investigation.[35] An essential aspect of this is the right of victims and their families to participate in proceedings.[36]

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[34] Minute 4 at para 7.
[35] *Jordan v United Kingdom* (2003) 37 EHRR 2 at [109].
[36] *Jordan v United Kingdom* (2003) 37 EHRR 2 at [109]; *Güleç v Turkey* (1999) 28 EHRR 121 at [82].

Further to this, however, is the right of the general public to be informed and aware of proceedings, which entails media access to inquiries and investigations. This is necessary in order to maintain public confidence in the Inquiry.

35 The principle of open justice holds a foundational position in common law.[37] It is recognised in the context of criminal proceedings by s 25(a) NZBORA, and is regarded as fundamental to our common law system of civil and criminal justice:[38]

> The principle's underlying rationale is that transparency of court proceedings maintains public confidence in the administration of justice by guarding against arbitrariness or partiality, and suspicion of arbitrariness or partiality, on the part of courts. Open justice "imposes a certain self-discipline on all who are engaged in the adjudicatory process — parties, witnesses, counsel, Court officers and Judges". The principle means not only that judicial proceedings should be held in open court, accessible by the public, but also that media representatives should be free to provide fair and accurate reports of what occurs in court. Given the reality that few members of the public will be able to attend particular hearings, the media carry an important responsibility in this respect.

36 Publicity around proceedings also serves to inform the community, ensure accountability and enable other witnesses to come forward.[39] This contrasts with what David Lovell describes in *Investigating Operational Incidents in a Military Context: Law, Justice, Politics* as in the military context as the 'routine secrecy' of government.[40] This propensity, a characteristic of bureaucracy, serves two key purposes:[41]

> This attempt at control derives from both a desire to shield citizens from incidents that may turn their hearts (and votes) against the prosecution of a war, as well as from a legitimate desire to protect military plans and operations.

37 A balance must be struck between national security and operational concerns, and fundamental values such as open justice. The Johannesburg Principles on

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[37] *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [2]; *Young v District Court at Hamilton* [2015] NZCA 584 at [21]; *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120 at 122-124.

[38] *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [2].

[39] *Young v District Court at Hamilton* [2015] NZCA 584 at [21]; *Hogan v Hinch* [2011] HCA 4, (2011) 243 CLR 506 at 530.

[40] David W Lovell "The Tension between Secrecy and Transparency: Investigations in the 'Wiki Age'" in David W Lovell (ed) *Investigating Operational Incidents in a Military Context: Law, Justice, Politics* (Brill Nijhoff, Boston, 2015) at 180.

[41] At 180-182.

National Security, Freedom of Expression and Access to Information address this matter:[42]

> **Principle 2: Legitimate National Security Interest**
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> (a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.
>
> (b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.

38 The Geneva Centre for Democratic Control of Armed Forces (DCAF) similarly emphasises that:[43]

> the specific of the defence domain, including the requirement for secrecy or confidentiality, should not impede on the exercise of its democratic oversight.

39 Transparency and public involvement are not just desirable but essential for this Inquiry to have legitimacy, in the eyes of those affected by Operation Burnham and the public. The *Minnesota Protocol* relevantly states:[44]

> 13. The right to know the truth extends to society as a whole, given the public interest in the prevention of, and accountability for, international law violations. Family members and society as a whole both have a right to information held in a state's records that pertains to serious violations, even if those records are held by security agencies or military or police units.
>
> [...]
>
> 32. Investigative processes and outcomes must be transparent, including through openness to the scrutiny of the general public and of victims' families. Transparency promotes the rule of law and public accountability, and enables the efficacy of investigations to be monitored externally. It also enables the victims, defined broadly, to take part in the investigation. States should adopt explicit policies regarding the transparency of investigations. States should, at a minimum, be transparent about the

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[42] Article 19 "The Johannesburg Principles on National Security, Freedom of Expression and Access to Information" (1 October 1995). These Principles have been endorsed by Mr. Abid Hussain, the UN Special Rapporteur on Freedom of Opinion and Expression, in his reports to the 1996, 1998,1999 and 2001 sessions of the United Nations Commission on Human Rights.

[43] Hari Bucur-Marcu (ed) *Essentials of Defence Institution Building* (Geneva Centre for the Democratic Control of Armed Forces, Vienna and Geneva, 2009) at 47.

[44] 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> (attached, Document 3). See also: *Jordan v United Kingdom* (2003) 37 EHRR 2 at [109]; *Güleç v Turkey* (1999) 28 EHRR 121 at [82].

> existence of an investigation, the procedures to be followed in an investigation, and an investigation's findings, including their factual and legal basis.
>
> 33. Any limitations on transparency must be strictly necessary for a legitimate purpose, such as protecting the privacy and safety of affected individuals, ensuring the integrity of ongoing investigations, or securing sensitive information about intelligence sources or military or police operations. In no circumstances may a state restrict transparency in a way that would conceal the fate or whereabouts of any victim of an enforced disappearance or unlawful killing, or would result in impunity for those responsible.

40 The approach suggested by the Inquiry may be contrasted with that of the Chilcot Inquiry in the United Kingdom. Copies of the relevant protocols from the Chilcot Inquiry are annexed to this memorandum.[45] The Protocol for Witnesses states:

> **Principles**
>
> 2. The Iraq Inquiry is committed to ensuring that its proceedings are as open as possible. It recognises this is one of the ways in which the public can have confidence in the integrity and independence of the Inquiry process.
>
> 3. As much as possible of the Inquiry's hearings will therefore be in public. But for witnesses to be able to provide the evidence needed to get to the heart of what happened, and what lessons need to be learned for the future, some evidence sessions will need to be private. That will be appropriate for example when it is necessary:
>
> a. to protect national security, international relations, or defence or economic interests.
>
> b. to ensure witnesses' welfare, personal security or freedom to speak frankly.

41 It is clear in the above examples that the starting point is publicity, with exceptions available *where necessary*. The approach which the Inquiry appears currently to be considering, however, turns this on its head, seemingly involving a presumption of non-public hearings and evidence, with public access being the exception rather than the norm.

42 At para 8 of Minute 4, the Inquiry states:

> … We also see possible means to support core participants' engagement where material is not available to some or all of them. For example, it may be possible to provide summaries of classified material and opportunities for participants to suggest areas of inquiry or specific questions to be put to witnesses. Transcripts of evidence given by witnesses who do not seek confidentiality and are not dealing with classified information could be made available to core-participants, subject to non-publication orders.

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[45] *Iraq Inquiry* "Protocol: Sensitive Information", Document 4; "Protocol: The Iraq Inquiry and Her Majesty's Government regarding Documents and Other Written and Electronic Information", Document 5; "Protocol: Hearing Evidence in Public and Identifying Witnesses", Document 6"; "Protocol: Witnesses Giving Evidence To The Inquiry", Document 7.

43 Respectfully, it is submitted this falls far short of the degree of public access and engagement necessary to maintain public confidence in the Inquiry and to satisfy the requirements of the procedural obligation. The engagement of core participants should be a requirement in all cases, and the provision of summaries should be as of right, not discretionary or where "feasible and appropriate". While the Inquiry asserts that its process is "informed by international best practice", the basis for that assertion is not apparent to Counsel; nor with respect is it accepted.

44 In the Chilcot Inquiry, it is significant that even in private hearings, transcripts of evidence were published with redactions only as far as necessary, with the bulk of the evidence remaining available to the public.[46] Only three transcripts were not published, which related to the evidence of three witnesses from the intelligence services (although transcripts published for a further eight other witnesses from the intelligence services).

45 While the Inquiry has raised concerns regarding the practicality of holding mixed public and private hearings,[47] respectfully, the primary concern is not whether it is "logistically difficult" to hold public hearings, but whether it is *necessary to maintain the integrity of the Inquiry*. It is submitted that the public will not be capable of having confidence in the Inquiry if the majority of the evidence-gathering of the Inquiry is conducted in private. In any case, the concerns regarding the practicality of public or mixed public/private process must surely be rejected, in light of the clear examples internationally of such procedures. The Chilcot Inquiry was able to provide public access to the majority of its evidence, including through publication of redacted versions of private evidence. There is no reason why this Inquiry could not do the same.

46 It is submitted that procedures akin to those adopted in the Chilcot Inquiry and as outlined above, with a presumption of publicity subject to exceptions only where strictly necessary, ought to be adopted by this Inquiry.

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[46] *Iraq Inquiry* "Private Hearings" <http://webarchive.nationalarchives.gov.uk/20171123123044/http://www.iraqinquiry.org.uk/the-evidence/transcript-videos-of-hearings-private/>.

[47] At para 80.

Other matters

47 At para 11, the Inquiry requested the NZDF prepare an unreferenced narrative account of the events at issue. Counsel request that this also include the NZDF defence to the allegations against it, and a list of allegations it makes against the villagers. As noted in our memorandum of 10 August 2018, the NZDF defence against the allegations has already claimed that the Villagers or some of them fired upon armed forces; that they were carrying weapons; that they were terrorists or concealing terrorists;, and/or that for some unspecified reason they were not to have been dealt with as non-combatants.[48] It is essential that these allegations, which to date have been made by a variety of officials and in varying terms, are articulated clearly and placed on the records so our clients may respond.

48 With respect to the draft summary of allegations, leave is requested for further time to provide a substantive response. Counsel have a number of substantive comments to make regarding the draft summary, however it is noted that funding is still yet to be confirmed for the Villager counsel's involvement in this Inquiry. A fairly significant amount of work has been undertaken by counsel to date without remuneration being secured for any aspect of work undertaken to date. It is difficult to undertake such further work on the summary of allegations in the absence of funding and counsel wish to provide a substantive response at the earliest opportunity once funding is secured. We will update the Inquiry accordingly with a time-frame for doing so, and hope to be in a position to provide such a time-frame by Friday 19 October 2018 (pending advice from the Department of Internal Affairs regarding funding).

49 Counsel also wish to note that as yet, no clear timeframes have been set down for the progress of the Inquiry. It is urgently necessary that counsel for the various agencies confer and provide a timetable of when they will provide disclosure to the Inquiry. It is also desirable to avoid multiple streams and iterations of disclosure and declassification which in our experience can lead to

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[48] At para 19.

significant delays. This is essential for the efficient and timely progress of the Inquiry. Timeframes are also needed with respect to the agencies' requests and diplomatic approaches to NATO and partner governments.

V CONCLUSION

50 It is respectfully submitted that significant changes need to be made to the proposed process of the Inquiry to ensure public access to the Inquiry and the meaningful engagement and involvement of core participants. In counsel's view, a three-day hearing will be necessary for oral argument on these matters and those which will be raised by other counsel, and to work towards a clearer process with best estimated time-tabling.

Dated this 5th day of October 2018

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R E Harrison / D A Manning
Counsel for the Villagers