Government Inquiry into Operation Burnham and Related Matters

Public Hearing 3 presentation, Monday 29 July 2019

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1. **Avoiding civilian casualties, assisting the injured and protecting detained people**

1.1. I am presenting today, like the other speakers, on the international legal framework relevant to the issues being considered by the Inquiry. Professor Ken Keith's paper authoritatively covered the key issues:

1.1.1. the duties to avoid civilian casualties and damage to civilian objects (the laws of distinction, proportion and precaution);

1.1.2. the requirements to render aid to the injured; and

1.1.3. the obligation to protect detained people.

1.2. This is largely the same list of potential breaches of international and domestic law, albeit more precisely stated, that we included in the book *Hit & Run*. Specifically, we listed:

> *failing to distinguish between combatants and non-combatants and the disproportionate use of force, especially the killing and wounding of civilians and attacking or bombarding dwellings that were undefended and not military objectives; destroying the property of an adversary where that destruction was not imperatively demanded by the necessities of the conflict; failing to search and care for the wounded; and the cruel treatment and torture of a prisoner. (p. 110)*

1.3. To these should be added the obligation to investigate credible allegations of each of these breaches, a very important issue for this Inquiry.

1.4. I will discuss each of them in turn, with reference to Professor Keith's paper and some relevant declassified documents published on the Inquiry website. I will not be disputing any of the paper. I agree entirely with Professor Keith's analysis and I am grateful to him for taking an interest in this Inquiry. I will merely develop some points and comment on contrary positions presented by some other parties to the Inquiry.

1.5. I want to thank the Inquiry for its process of declassifying key documents. These

documents inform a lot of what I will say today.

1.6. Also, I note Professor Keith's point that "The customary law continues to evolve....". This Inquiry will hopefully contribute to the evolution.

1.7. Professor Keith bases some of his paper on rules set out in the ICRC Customary Law Study and notes that: "Each of the rules... are cited in the recent NZDF Manual and are not questioned".

1.8. He goes relatively quickly through the first rules and then spends most of his time on the subject of protection of those in detention. I will do the same.

2. **Protection of civilians**

2.1. International law states that parties must distinguish between civilians and combatants; and between civilian objects and military objectives. They must not make indiscriminate attacks, as stated in Rule 14: "Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, and a combination thereof, which would be excessive in relation to the concrete and direct military anticipated, is prohibited".

2.2. Also, there is the obligation to take "all feasible precautions must be taken to avoid, and in any event minimise, incidental loss of civilian life, injury to civilians and damage to civilian objects".

2.3. Since these are not in dispute, the questions facing this Inquiry concern how those laws relate to the facts. The rules can be framed as a series of factual questions that need to be answered to determine whether the international laws on protection of civilians have been breached and, if so, the extent of the breach.

2.4. I have provided a list of questions and answers in an appendix to this presentation. This list supports the view that international law has been breached – but my main point now is that these factual issues are relatively straight forward. It should be possible for the Inquiry to reach clear positions on the international law issues.

3. **Collect and care for the wounded** (Rules 109 and 110)

3.1. Collecting and caring for the wounded has been a clear obligation in treaty for last 155 years. Military forces are supposed to look for and help all wounded people, friend or foe.

3.2. As with the protection of civilians above, these rules can be framed as a series of factual questions that need to be answered to determine whether the international laws on protection of civilians have been breached. I have again provided a list of questions and answers in an appendix to this presentation. This shows it should be possible for the Inquiry to reach clear positions on the international law issues on this important issue of NZDF neglecting to find and assist the wounded.

4. Obligation to investigate civilian casualty incidents and other potential international law breaches

4.1. In addition to breaching the international obligations for protection of civilians and care for the wounded, there is a separate and important issue about failing to investigate those primary breaches.

4.2. The obligation to investigate civilian casualties and other potential international law breaches is not covered explicitly by Ken Keith's paper. However, it is implicit in the other obligations he discusses because investigating is an essential part of fulfilling those other obligations. I will discuss this now. My position is that NZDF should have launched its own investigations following the events under investigation in this Inquiry but failed to do so.

4.3. There is a large body of writing about civilian casualty reporting and investigation. For instance, an article called "Protection of Civilians: a NATO Perspective" (by Steven Hill and Andreea Manea) discusses NATO's efforts in Afghanistan to (quote) "instil a culture of investigation and mitigation of civilian casualty incidents and redressing civilian harm".[1]

4.4. In Afghanistan, the International Security Assistance Force (ISAF) had established procedures and specialised staff for civilian casualty reporting by 2010. By the time of Operation Burnham there were well-known obligations on NZDF to investigate allegations of civilian casualties and damage to civilian property.

4.5. The obligation on NZDF to investigate allegations of civilian casualties can be seen in one of the documents declassified as part of this Inquiry. Declassified document 06/14 comes from "Task Force 81" – the NZSAS deployment in Afghanistan from 2009-2012 – and is headed "Legal Checklist and Procedures". The legal checklist specifies a series of pre-operation and post-operation steps the NZSAS was required

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1 https://www.utrechtjournal.org/articles/10.5334/ujiel.461/

to follow to ensure its activities were lawful. The first item on the post-operation legal checklist was "CIVCAS", the abbreviation for civilian casualties. It says:

> Check compliance with Directive and initiate investigation.

4.6. The Directive refers to the Petraeus Directive, where the US military commander in Afghanistan General David Petraeus wrote about the need to "reduce the loss of innocent civilian life to an absolute minimum" and ordered:

> Prior to the use of fires, the commander approving the strike must determine that no civilians are present. If unable to assess the risk of civilian presence, fires are prohibited.

4.7. So, when the NZSAS legal check list said "check[ing] compliance with Directive", it meant checking whether civilians were present during weapon fire and whether there may have been civilian casualties. If so, the legal check list instructed, NZSAS should (quote) "initiate investigation".

4.8. This document shows that the NZDF's own legal instructions required it to begin an investigation whenever there were allegations or suspicions of civilian casualties. When it did not, this amounted to a serious breach of its obligations.

4.9. This document is important because NZDF has repeatedly claimed that the obligation to investigate civilian casualties was fulfilled by a two-day Initial Assessment Team investigation into Operation Burnham conducted by ISAF staff in the first days after the operation. However, NZDF, as a participant in and indeed the leader of the operation, had its own obligations to investigate its part in any civilian casualties.

4.10. NZDF has also claimed that the Initial Assessment Team investigation concluded that all was well, and no further action was required. We now know, thanks to new information on Operation Burham released under the US Freedom of Information Act, that the Initial Assessment Team did not conclude this at all. It concluded the opposite: that further investigation was required.

4.11. The US military then conducted a much more thorough investigation into the actions of US military personnel who took part in the operation; the investigation that described groups of women and children running and trying to hide as the helicopter gunship fired into their village and that NZDF kept secret.

4.12. However, the US military was not responsible for investigating the actions of the

NZDF personnel. That was NZDF's responsibility, as in the legal check list. Despite the strong evidence of civilian casualties, it did not. This is confirmed by declassified document 06/07, dated 31 May 2017, which says at [14] that:

> NZDF advises: the only inquiries into the conduct of NZDF members during the operation were those carried out: in the NZDF debrief immediately following it; and by the IAT [Initial Assessment Team] in its immediate aftermath....

Note that the NZDF debrief immediately following Operation Burnham was clearly insubstantial since the NZDF-assisted ISAF media release the next day said there had been no civilian casualties.

4.13. My submission is that the failure to investigate was a separate and clear breach of NZDF's international law obligations.

4.14. There may also be a breach of New Zealand law. Declassified document 06/07 includes 24 March 2017 Crown Law advice that discusses possible offences under the Armed Forces Discipline Act and the obligation of NZDF commanders to investigate.

4.15. Paragraph 19 of the document states:

> *New Zealand will be best placed to resist any investigation by the ICC [International Criminal Court] prosecutor if it conducts its own, genuine investigation into the allegations.*

4.16. This did not happen. NZDF argued against there being any investigation at all, notably to the then government.

4.17. Paragraph 15 spells out the specific obligations on NZDF commanders when allegations arose of civilian casualties and the mistreatment of a prisoner. It says:

> *15. In the context of these allegations we consider NZDF commanding officers are <u>required</u> [with the word "required" underlined] to take one of the following three actions.*
>
> > *15.1 Satisfy themselves on the information now available that it cannot be said that the allegations are "not well-founded". The allegations must thereafter be either:*

> *15.1.1 the subject of charges under the AFDA [Armed Forces Discipline Act], and a military investigation carried out.*
>
> *15.1.2 referred to the appropriate civil authority for investigation.*
>
> *15.2 Satisfy themselves on the information now available (including the IAT [Initial Assessment Team] report in relation to the operation) that the allegations are not "well-founded".*
>
> *15.3 Initiate a preliminary inquiry to enable them to determine whether the allegations are "not well-founded".*

4.18. In other words, NZDF considered itself to have an investigatory obligation arising under New Zealand legislation, namely the Armed Forces Discipline Act.

4.19. I submit that NZDF commanding officers breached their legal obligations when they claimed the allegations were not well-founded and so took no action to investigate them. Did the NZDF lawyers stand up to this? Civilian casualties are, after all, the concern from which a lot of international humanitarian law first arose. It is very important, as a message to future commanders, that the Inquiry finds fault with the failure to investigate.

5. Protection of those in detention

5.1. The issues discussed so far concern the Inquiry Terms of Reference parts 6.1, 6.2, 7.1, 7.5 and 7.7. I now move on to legal issues concerning parts 6.3 and 7.8, concerning the protection of those in detention.

5.2. As Professor Keith spelt out clearly, the prohibition on torture and other mistreatment of prisoners is a peremptory norm. (Quote:) "There can be no derogations from the prohibition". He took us through a range of pieces of international law and concluded that the most relevant one in "partnering and close support situations" – as was the case of the NZSAS in the arrest of the insurgent Qari Miraj in January 2011 – is Article 16 of United Nations-prepared law, which is about aiding or assisting another state in the commission of an unlawful act.

5.3. As he told us, Article 16 reads:

> *A State which aids or assists another state in the commission of an internationally wrongful act by the latter is internationally responsible*

for doing so if:

(a) That state does so with knowledge of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by that State.

5.4. By these rules, NZDF is undoubtedly in breach of very serious obligations. However, legal advice written by the Director General of Defence Legal Services (declassified document 06/10), in September 2010, just a few months before the torture of Qari Miraj, cited the same Article 16 and concluded that NZDF had no responsibility for prisoners arrested during partnered operations. It was presumably this advice that led NZDF to continue to help taking prisoners to the notorious NDS secret police interrogation centre in Kabul.

5.5. The Director General of Defence Legal Services' 10 September 2010 minute was written in response to the High Court of England and Wales judgment (the Evans decision) that the UK moratorium of handing prisoners across to the NDS in Kabul was correct and should be maintained owing to the Kabul NDS's well documented record of torture and abuse of prisoners. He wrote: "The fact that these are the same facilities that the UK High Court considered should not be used by UK Forces has caused you [presumably the Chief of Defence Force Jerry Mateparae] to seek legal advice about the consequences of the *Evans* decision for NZDF operations".

5.6. The Director General of Defence Legal Services advised, on the subject of NZDF aiding or abetting torture, that state complicity relied on two factors. First, the aiding state must have knowledge of the circumstances that made the conduct of the partner state unlawful. For this factor, he wrote (p. 9) that "In the present case, for the reasons set out in the Evans decision, it can be assumed that New Zealand is constructively 'on notice' that the NDS used torture". However, he argued in the next sentence – I think completely unsoundly – that this did not mean that NZDF had knowledge that the NDS would continue to use torture. He cited selective evidence of the Kabul NDS standards "improving substantially" and said "Clearly this is [a] major risk reduction factor in terms of NZDF operations and provides comfort that if NDS have used torture in the past, we are not forced to the conclusion that they will continue to do so". (p. 14)

5.7. The other factor determining complicity, the Director General of Defence Legal Services argued, was that a state was only responsible if it intended, by its aid or assistance, to facilitate the occurrence of the wrongful conduct, ie torture. He says (p. 21): "an intention to facilitate the crime is necessary".

5.8. This sounds improbable and weak, and I am pleased that Professor Keith has strongly disagreed with the position in his paper. An aiding or assisting party (quote) "need not share the intention," he says on p.17. (Quote:) "The [International Criminal Tribunal for the Former Yugoslavia] Appeals judgement, drawing on extensive national practice, made it clear that knowledge of the wrongdoing was enough. To be complicit or to aid and assist did not require that the intent be shared".

5.9. This means that NZDF was operating under faulty legal advice and, as I argue shortly, self-justifying legal advice when it assisted the capture and handing over to the NDS of Qari Miraj.

6. The bureaucratic/legal context

6.1. Professor Keith concluded his paper saying that "the law of aiding or assisting or complicity is very fact dependent". He said:

> The particular characteristics of the provision of 'partnering, including close support and technical support' or more generally the 'provision of assistance' by the NZDF with the Afghan authorities may well be decisive in determining whether the NZDF is in breach of the duty to ensure respect, to the best of its ability, for the prohibition on torture, … or is complicit in torture under customary international law. (p. 17)

6.2. Back in 2010 and 2011, when the handling of Afghan prisoners was controversial internationally and in New Zealand, NZDF and MFAT constructed a careful justification for NZSAS detention operations. This official line was set down in declassified document 06/08, which was advice prepared by MFAT for the Minister of Foreign Affairs after the same UK High Court judgment. It went as follows:

6.3. The (quote) "concept of operations" was that (quote) "the Afghan authorities will arrest and detain persons of interest subsequent to an arrest warrant issued by the Afghan Attorney General" (p. 8). The New Zealand troops would just be "in the vicinity" (p. 3) to give assistance.

6.4. That meant that, it wrote, “New Zealand does not have any legal obligation with respect to Afghan nationals arrested by Afghan authorities” (p. 8).

6.5. This argument consists, in practice, of one fiction supporting another. The fiction of the NZSAS only being in the vicinity supports the fiction of NZDF having no legal responsibility.

6.6. This hearing is not the place to go through the factual detail of SAS partnered detention operations at that time, but New Zealand troops were far more involved than this expedient formula suggests. The relatively inexperienced soldiers they were mentoring – the “partnered” Afghan troops – were being sent forward at the moment of arrest so that they could be claimed to be the “detaining authority”. It was a legal nicety, designed to try to wash away New Zealand's obligations.

6.7. Indeed, the NZSAS troops were specifically instructed to ensure they went along with the fiction. For instance the Task Force 81 legal checklist (declassified document 06/14) quoted earlier instructs the troopers, under a heading “Scheme of Manoeuvre”, to (quote) “[e]nsure we are not detention authority”. The MFAT document (declassified document 06/08 again) likewise said the “risk” of legal challenge to detention activities in New Zealand courts – the equivalent of the UK High Court case – (quote) “can be minimised (but not eliminated) by – so far as possible – continuing to ensure that Afghan authorities are responsible for arrests/detentions, rather than the New Zealand forces” (p. 9).

6.8. Note the phrase “continuing to ensure”. The word “ensure” is an active verb, meaning that the NZSAS was creating the convenient situation, not responding to a situation imposed by others.

6.9. The word “ensure” is also used in other documents as well. However, the idea of international law is not that nations try to sidestep their responsibilities in this way, and especially not where peremptory norms are stake.

6.10. The MFAT document expressed this side-step intention when it noted (p. 8) that “the arrest by Afghan force is the best scenario for mitigating detainee issues”.

6.11. It then muddied the legal obligations with political/diplomatic concerns, advising that “[m]aintaining the viability of the Arrangement on detainees is essential for the continued deployment of the NZSAS” (p. 8).

6.12. In very MFAT fashion, the document continued:

> There may be a perception that New Zealand has a moral/political obligation with respect to Afghan nationals arrested by Afghan authorities – for example when the NZSAS have supported the Afghan CRU on operations. (p. 8)

And then it minimises this perceived obligation.

6.13. The Minister of Foreign Affairs, presumably Murray McCully, was not convinced by the advice provided by MFAT. The MFAT document had stated "... New Zealand's legal obligations on detainees are clear – i.e. they extend only to individuals detained by New Zealand forces....". However, the Minister wrote in the margin: "I do not agree with this. This is a developing area and is not 'clear'".

6.14. Overall, there is a striking difference between the independent expert advice given by Professor Keith and the official advice from the NZDF and MFAT, where non-legal concerns seem to have contaminated the legal obligations. The point of this international law is not for countries to find clever ways to minimise and sidestep their obligations, it is to stop people being tortured.

6.15. Declassified document 06/05 records that when former defence minister Wayne Mapp and Chief of Defence Force Jerry Mateparae visited the NZSAS in Kabul in August 2010, an internal NZSAS note for the person briefing them said:

> *You should be prep[ared] to discuss the detainee issue if it was to arise, but be careful the Min[ister] has a PhD in law so sees things in a different light to us.*

6.16. The NZDF and MFAT lawyers and other public servants should be insisting on New Zealand staff conforming with the law, not devising arguments to justify ignoring the law. Likewise, there is not one word in the MFAT advice about the importance of human rights law and New Zealand doing the right thing. I hope the Inquiry will take note of this point.

6.17. Looking at the 2010 legal advice from NZDF and MFAT is not an academic discussion, it is directly relevant to why the events of January 2011 occurred. NZSAS troops helped – helped a great deal – to capture and hand a prisoner over to exactly the place that the UK Court had found to have a repeated record of torture, enabling the actual torture that followed; and then took no action when they learned about the torture and instead tried to hide it and evade responsibility.

7. **The obligation to investigate reports of torture**

7.1. The final issue worth discussing today is the obligation on states to investigate reported or alleged cases of torture.

7.2. If NZDF had had its way, no one outside a small group of defence staff might ever have known about the torture of Qari Miraj. Secrecy would have protected them from accountability. It was only because of the personal actions of a whistle blower (one of the sources of the book *Hit & Run*) that the rest of us ever learned that a man named Qari Miraj was tortured after being handed over to the Afghan secret police.

7.3. An important issue for this Inquiry is, therefore, the legal obligation on NZDF to report and investigate reports of torture – an obligation that it appears to have ignored.

7.4. NZDF was reminded of this obligation only two months before the detention of Qari Miraj, in a 2 November 2010 letter from Crown Law to the Director-General, Defence Legal Services (declassified document 03/02). It states (32.9):

> *The Convention Against Torture has been held by the United Nations Committee against Torture to impose duties of investigation and pursuit of remedial measures where a state party becomes aware of torture committed by another state party in the course of joint operations....*

7.5. It appears from the facts presented in *Hit & Run* that NZDF failed in this legal duty; ie that it did not investigate and instead just kept its knowledge quiet. To the extent that New Zealand forces were actively involved in handing over a prisoner to likely torture, and then received intelligence reporting that torture had occurred, New Zealand's duty to investigate was even greater than that only from "becom[ing] aware of torture".

7.6. Following the publication of *Hit & Run*, Crown Law considered the options for an official investigation into the allegations in the book, including concerning Qari Miraj. As part of this (in declassified document 06/07), it records that "no preliminary inquiry has been undertaken in relation to the allegations of mistreatment of Qari Miraj". This seems to be saying that for six years after the torture, NZDF had not conducted an investigation.

7.7. My submission is that, just like the failure to investigate the allegations of civilian casualties, the failure to investigate the allegations of torture amount to a breach of

NZDF's legal obligations.

7.8. The September 2010 legal advice quoted above from the Director General of Defence Legal Services (declassified document 06/10) also discussed the idea that maybe NZDF should do detention centre inspections to "ascertain that the human rights of persons detained in partnered activities are respected". As part of that he wrote:

> If, in the course of such an inspection, credible evidence of torture were to be uncovered NZDF must be in a position to act decisively in response. A failure to do so could be interpreted as tacit approval and a much more complete indication of complicity than our current situation. (p. 14)

7.9. Six days later the Chief of Defence Force, Jerry Mateparae, made the same point in a report to the Minister of Defence. He wrote, in declassified document 03/01:

> *If credible evidence of torture were to be uncovered in such inspections, I consider we would be under a moral and legal duty to act decisively in response. A failure to do so could be interpreted as tacit approval and a much more complete indication of complicity than our current situation.*

7.10. That sounds very responsible, but it seems that when credible evidence of torture was uncovered, just a few months later, they did not act decisively in response. We know for sure that NZDF's own intelligence sources informed them that Qari Miraj had been tortured. They also received a report from the NDS secret police on what he said during interrogation. However, it seems NZDF did nothing and kept it quiet.

7.11. The failure to do so can be interpreted, in Jerry Mateparae's words, as tacit approval and an indication of complicity.

7.12. One of the important questions for the Inquiry is who would have heard the reports of torture, why they were not distributed more widely and with greater concern, and who is responsible for the lack of reporting and investigation – and, as elsewhere, who is responsible for the evasions and denials after the allegations were published in the book. For instance, did NZDF tell the PM and Minister of Defence about Qari Miraj's torture?

7.13. Another document signed by Jerry Mateparae, the cover letter to the Minister of

Defence in declassified document 03/02, notes that the Solicitor-General had advised that NZDF (quote) “should restrict or withdraw cooperation in the event that a risk of torture arises”. Mateparae wrote; “I propose to direct NZDF force elements in Afghanistan accordingly”.

7.14. Other important questions for the Inquiry to find answers to are whether Mateparae did instruct his staff to restrict or withdraw cooperation if reports of torture appeared, and whether, when NZDF learned shortly afterwards that Qari Miraj had been tortured, they continued to help capture and hand over people to the NDS or other unsafe detention centres.

7.15. If they did, they would have continued to be in breach of their international obligations.

Appendix on factual questions

Civilian casualties

Question 1 Were civilians killed and wounded?

Yes. I don't think anyone involved genuinely doubts this now. I am still confident that the 21 civilians named and pictured in the book were killed and injured; and that all nine of the NZDF's claimed insurgents (or at least the five we know of who were in the villages of Naik and Khak Khuday Dad) were civilians mistaken as insurgents.

Question 2 Was the attack conducted in a way that might be expected to cause excessive civilian loss of life and injury compared to the military advantage anticipated?

Yes. Use of a helicopter gunship in a civilian area, firing cannon shells that explode on impact scattering deadly shrapnel, inevitably risked excessive civilian loss of life and injury.

Question 3 Did NZDF distinguish between civilians and combatants; and between civilian objects and military objectives?

No. All military aged men were seen as potential insurgents. Indeed, the new US military investigation documents declassified since the last hearing reveal that during the post-operation brief (quote) “it was stated that anyone leaving the objective was declared hostile”. This is how the NZDF-led forces acted, making insufficient effort to distinguish between combatants and civilians trying to get away from the foreign force. Thus, for instance, an NZSAS sniper was ordered to shoot an unarmed man walking up the hill behind his home. NZDF also managed to burn down two out of two main houses targeted by the operation and damage various others with helicopter fire.

Question 4 Were all feasible precautions taken to avoid incidental loss of civilian life, injury to civilians and damage to civilian objects?

No. The order from the US military commander in Afghanistan issued just weeks before Operation Burnham, the Petraeus Directive, said “if unable to assess the risk of civilian presence, fires are prohibited”. However, the NZDF-led operation fired into a civilian village (and didn't notice that there was inaccurate fire into the civilian village) and fired at unidentified men in the dark.

Question 5 Are New Zealand personnel responsible for the civilian casualties?

Yes. It was an NZDF-led operation. That's what being in command means. The New Zealand commander approved each attack. Some of the casualties may be contributed to by the US personnel's actions, but the commander was responsible for checking and taking precautions (for

instance, using an attack helicopter to fire close to a village is where all the harm began, whether or not the helicopter was mistargeting).

Question 6 Did NZDF know about the casualties?

Yes. NZDF continues to claim that there "may" have been civilian casualties, but it has no evidence that there were. This position never had credibility. NZDF had very good intelligence sources in the villages, there was prominent news media coverage, the Independent Directorate of Local Governance report on the incident listed all the casualty names, and a month later the second US military investigation described the numerous women and children seen running and trying to hide in the village during the helicopter attack. It is even less credible in 2019.

Question 7 Did NZDF take all reasonable steps to investigate the civilian casualties and damage to civilian objects?

No. It never took any steps to investigate the civilian casualties. It hid first behind false claims that an ISAF inquiry had found no evidence of civilian casualties; then hid the results of a second US military investigation; and did nothing to follow up the allegations of civilian casualties itself.

Question 8 Did the NZSAS and NZDF report their knowledge of civilian casualties and the results of any investigations to the government, Parliament and the public?

No. It misled its own minister and the public.

All these factual issues seem clear and so they should not get in the way of the Inquiry determining the international law issues.

Collecting and caring for the wounded

Question 1 Should NZDF ground forces have checked for casualties on the night of the raid?

Yes. They knew they had been firing at supposed insurgents and also close to or in the civilian village.

Question 2 Did NZDF ground forces check for casualties on the night of the raid?

No. The only person they checked was the man shot by the NZSAS sniper, who was dead. The village of Khak Khuday Dad had numerous seriously injured people, just a couple of hundred metres from where all the troops gathered at the helicopter landing zone. The assumed insurgents shot at included a wounded man named Abdul Faqir who was left to die over many hours, only about 100 metres to the side of where most of the troops passed.

Question 3 Should NZDF ground forces have checked for casualties in the following days?

Yes. Within a day or two many reports reached the NZDF troops that people were injured (intelligence reports and new media reports). The US helicopter gunship had fired among civilian houses, where the crew saw groups of women and children running and huddling during the attacks, as the FOIA documents released last month revealed.

Question 4 Did NZDF ground forces check for casualties in the following days?

No. They never did. But they could have. They could have gone back to the villages (as they did in the following Operation Nova). They could also have gone to local hospitals (their intelligence said there were injured people there) and offered assistance. And they could have made contact through NGOs or organised community meetings with villagers in some safe nearby town.

Question 5 Did NZDF offer any financial support or other aid to the wounded?

No. Although this was standard procedure for other ISAF-contributing countries, and it was NZDF's responsibility to do so, it did not.

Question 6 Did NZDF take all reasonable steps to investigate the failure to collect and clear for the wounded?

No. There is no sign that they did anything about it. The only injured person they assisted during the operation was their own accidentally injured SAS trooper.

Again, all these factual issues have clear answers and so they should not get in the way of the