

UNDER

THE INQUIRIES ACT 2013

IN THE MATTER

**A GOVERNMENT INQUIRY INTO OPERATION BURNHAM
AND RELATED MATTERS**

**Memorandum for New Zealand Defence Force on the public and unclassified account
of events at issue in Government Inquiry into Operation Burnham**

7 November 2018

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1. In paragraphs [11] and [94] of Minute 4 of 14 September 2018, the Inquiry said that it considered that it would be helpful to the Inquiry and to the general public if the New Zealand Defence Force (**NZDF**) was to prepare an unreferenced narrative account of the events at issue that could be made publicly available (“the NZDF narrative account”). The NZDF narrative account is filed with the Inquiry with this memorandum.
2. The NZDF narrative account is based on information held by, and research conducted by, the NZDF on the events in issue. Where it was necessary to do so, NZDF personnel with relevant knowledge of the events in issue were consulted in order to provide an account, of objectives that occurred several years ago, that is as accurate as possible.
3. The document provides a detailed factual account suitable for public release of three objectives that occurred during the NZSAS deployment in Afghanistan in 2010 – the objectives that are in issue before the Inquiry – and is accompanied by a map of the area in which the objectives took place. It includes a high-level description of the of military and strategic context for the operations that took place. It does not seek to provide views or to make submissions on the issues before the inquiry.
4. In order to give effect to the Inquiry’s request, the NZDF is making an unprecedented amount of information publicly available on the three classified objectives in issue. The NZDF asks that the information that is being made available is not seen to reflect the level of public information that would otherwise be considered necessary or appropriate for it to provide in relation to future NZDF operations.



Paul Radich QC
Counsel for the New Zealand Defence Force
7 November 2018

NZDF unreferenced account of events at issue

Inquiry's request for an unreferenced account of events at issue

In the Inquiry's Minute No 4, the NZDF was asked to prepare an unreferenced account of the events at issue in Operation Burnham and related matters which could be made publicly available.

The account contained in this document has been prepared by the NZDF on the basis of documents, video footage, photographs, and records and interviews from a prior investigation. The material is from the NZDF and other sources. The NZDF has not interviewed any NZDF personnel to produce or contribute to this account; that is a task for the Inquiry once it has identified the people from whom it wishes to hear. However, NZDF personnel with relevant knowledge of the events in issue were consulted in order to provide an accurate account as possible of operations that occurred several years ago.

There are inherent limitations in reconstructing three events in armed conflict, occurring at night in dangerous environments, on the basis of the material mentioned above. However, the thorough process that has been used enables the NZDF to confirm the fundamental elements of information it has released publicly on other occasions, including that NZDF personnel did not kill or harm any civilians during these operations. The account preparation process also updates information provided previously and resolves minor discrepancies discovered in earlier accounts.

This account reflects the NZDF's current understanding of what occurred during the operations in question, based on information it holds and confirmation by its relevant personnel. It is possible that the Crown may update aspects of this account at a later stage, following review of information held by other agencies, or based on information provided by their personnel.

Key information and material used or drawn from in preparing this account, including video footage, is of a classified nature, and is owned and controlled by New Zealand's international partners. This precludes the NZDF from disclosing this information at an unclassified level for the New Zealand public. However, the Inquiry is being provided with relevant classified material and will be able to review, consider and test that information closely.

The deployment of New Zealand troops in Afghanistan – a brief background

On 7 October 2001, American and British forces entered Afghanistan in response to the September 11 attacks in the United States. Other coalition partners, including New Zealand, supported the efforts from mid-October 2001.

By mid-December 2001, when coalition forces had removed the Taliban from power, United Nations Security Council Resolution 1386 established ISAF to oversee the US-led military operations and to support and train the newly created Afghan National Security Forces (ANSF) so that, in time, ANSF would be able to provide independently for the national security of Afghanistan.

In 2003, the North Atlantic Treaty Organization (NATO) took over the lead of ISAF from the United States military. The New Zealand Government approved the contribution of a military contingent of 120 personnel to serve as a Provincial Reconstruction Team (NZ PRT) in the Bamiyan Province in Afghanistan.

Between 2001 and 2005 there were four separate deployments of New Zealand Special Air Service (NZSAS) personnel to Afghanistan in a wide variety of roles.

In 2007, the international community was becoming increasingly concerned with the deteriorating security situation in Afghanistan. In response to international partners' requests to the New Zealand Government, the New Zealand Cabinet decided in 2009 to again deploy the NZSAS. The deployment, known as Operation Wātea (which means 'freedom'), began in 2009 and, following several Cabinet-approved extensions, ended in March 2012. In accordance with the Cabinet decision and the Defence Act 1990, the Chief of the Defence Force (CDF) Lieutenant General Jerry Mataparae had full command of the deployment and held the authority to approve specific operations within the mandate.

The situation in Afghanistan at the time was considered by New Zealand to be one of a non-international armed conflict. Accordingly, the legal framework governing the conduct of members of the New Zealand Armed Forces was regulated by international humanitarian law, also called the 'law of armed conflict'. All members of the Armed Forces are required to undergo training in the law of armed conflict. It is a baseline training requirement.

In accordance with Cabinet decisions, the NZDF prepared the Rules of Engagement (ROE) for the operation. The ROE used by the NZSAS in Afghanistan were drafted by the NZDF's Defence Legal Services, endorsed by the Minister of Defence, and approved by the Prime Minister. The CDF then authorised the ROE as an order to NZDF personnel. The ROE reflected the Law of Armed Conflict and included the authority to attack insurgent groups identified in the ROE as direct participants in hostilities. The NZDF ROE were amended to be consistent with the ROE developed by ISAF and other special forces operating in Afghanistan.

The deployed New Zealand troops entered into an increasingly violent environment in Afghanistan as the Taliban fought to regain power. The NZSAS was based in Kabul and operated in a partnered relationship with the Afghanistan National Police Crisis Response Unit (CRU). The CRU was responsible for counter-insurgency operations and the NZSAS provided professional development and mentoring to the CRU.

The NZSAS contingent in Afghanistan, amongst other responsibilities, carried out approximately 56 operations in the eleven months from October 2009 to the beginning of August 2010. These operations had the purpose of assisting the Afghan Government and CRU to disrupt or apprehend known Taliban or other insurgent leaders. Of the many operations planned around particular persons ('objectives'), more than half of the operations resulted in the detention of 75 persons by Afghan partners. In many of those operations, illegal weapons and/or munitions were found, and confiscated and/or destroyed. In the vast majority of the operations that were conducted during the course of the Operation Wātea deployment, the NZSAS did not fire a single shot to achieve their objectives.

The particular operations that are the subject of this Inquiry – to apprehend or disrupt persons described as Objectives Burnham, Nova and Yamaha – were three of many operations that the NZSAS, as part of the ISAF forces, conducted during the entirety of Operation Wātea.

ISAF operations of this type, including those covered in this account, were led, formally, by the CRU with ISAF forces in support. ISAF forces (which included NZSAS forces) would provide the personnel, intelligence gathering and planning. The Afghan Government approved the operations and the Afghan Ministry of Interior (MOI), which had responsibility for justice matters, issued arrest warrants for identified individuals to the CRU. The operations were carried out with CRU personnel together with a MOI prosecutor who would accompany the CRU to execute the arrest warrants.

Over the course of the Operation Wātea deployment, NZSAS mentoring improved the capability of the CRU. The NZSAS played a material role in developing arrest warrant systems for the CRU and MOI, which were then utilised more broadly by ISAF. Over time, the CRU took on more responsibility within the partnered operations with the NZSAS. By the end of the NZSAS deployment, the CRU was able to conduct some of its operations without NZSAS assistance. The CRU required assistance to conduct or lead complex operations to ensure minimal risk to CRU personnel and Afghan civilians.

The NZDF personnel deployed as part of ISAF were under the operational control of the Commander of ISAF and subject to ISAF directives and standard operating procedures. However, they remained under the full command of the New Zealand CDF, and were therefore bound by legal requirements determined by the New Zealand Government, including adherence to New Zealand's ROE and detention policies. The CDF deployed a NZDF Legal Adviser (LEGAD) to Operation Wātea, to work closely with the NZSAS and to ensure that the operations complied with international law, the mandate, and the ROE. The LEGAD was involved in the training, planning and the execution of NZSAS operations.

Detention by Afghan Government, ISAF and NZSAS

The NZSAS had a standard operating procedure (SOP) for detention, based on the equivalent ISAF SOP. It identified the rights of the detainees, the obligations on the NZSAS in dealing with the detainees and the processes for detainee handover to the Afghan Government or another ISAF member. In 2009, the New Zealand Defence Force concluded an Arrangement for the Transfer of Detainees with the Afghan Ministry of Foreign Affairs. The purpose of this arrangement was to establish principles and procedures concerning the transfer of persons in Afghanistan from the NZDF to the Afghan authorities and to affirm the obligation of both parties to observe applicable international law pertaining to the treatment and transfer of such persons.

The NZSAS standard procedure for its operations was not to take detainees unless strictly required by operational circumstances. In partnered operations, the CRU and MOI prosecutor executed the Afghan arrest warrant and were responsible for detention of any insurgents. This practice reflected both the authority of the Afghan Government and the role and mandate of ISAF in Afghanistan.

As noted above, the NZDF and other partners in Afghanistan recognised the importance of having clear rules governing questions of detention and ISAF Headquarters engaged significantly with the Afghan Government and the International Committee of the Red Cross (ICRC) on them, as did many ISAF members such as New Zealand. New Zealand's understanding of applicable international law was reviewed again in 2009 following the release of the UK High Court case of *Evans v Secretary of State for Defence*. That case related to the transfer of detainees by British forces to Afghan Government detention facilities.¹

Intelligence, planning and arrest warrants

Individuals or an identified group would become of interest to ISAF if they were linked to insurgency activity against the Afghan Government. Their status as a person of interest was confirmed through significant intelligence gathering and analysis. If there was sufficient information to confirm illegal activity or imminent violent activity, ISAF Headquarters would approve the designation of that person or group as an objective for a deliberate operation. ISAF would typically monitor a significant number of potential objectives at any one time.

Intelligence was updated regularly and ISAF used it to confirm, postpone, or conduct operations against objectives – across each regional command, province, and country-wide. Operations that involved deliberate planning (over the course of several days or weeks) were more common than short notice or immediate response operations. However, there were contingency plans in place for short notice or immediate response operations.

¹ *R (OAO Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin).

Once an individual or group objective had met the threshold for government response and an arrest warrant had been issued, a deliberate operation planning process would commence. This could take days or weeks (depending on the time available), and would include liaising with partner forces to allow joint planning, providing GPS and mapping support, undertaking intelligence planning to identify the timeframe for the most successful outcome, and requesting from the Commander ISAF Special Operations Force deployment of assets and partner forces. Every operation was approved by the MOI. The system for arrest warrants progressed during the course of Operation Wātea, as CRU procedures were supported by the NZSAS.

This would result in the creation of a 'Concept of Operations' for approval by the Commander ISAF Special Operations, the creation of orders, the conduct of rehearsals and the briefing of the Afghan government investigator and prosecutor. Short notice or time-sensitive operations would involve an abridged version of these steps.

The objectives (individuals) with whom this account of events is concerned – known as Burnham, Nova and Yamaha – met the threshold for government response and became the subject of deliberate operations in the following way.

On 3 August 2010, a NZ PRT patrol was ambushed in the northeastern region of Bamyān province by an insurgent group.

The NZDF identified the insurgents responsible. The three insurgent commanders identified were associates of an active and armed Taliban group with a track record of targeting Afghan and ISAF security forces. In addition to their attack on the NZ PRT, they had previously attacked and killed elements of the Afghan security forces and German and Hungarian PRTs.

The NZ PRT Commander concluded that the successful attack would have the effect of emboldening the insurgent commanders and encouraging further attacks, causing vulnerability in the Shakera Valley area. In addition, the NZ PRT was of the view that the attacks would erode the Bamyān locals' trust in the NZ PRT's and Afghan security forces' ability to protect them from the Taliban. It was considered, also, that the insurgent commanders benefitted from being based in Baghlan province, in the border region of Hungary's PRT area of operations. The area was Taliban controlled, and had not seen the presence of coalition or Afghan security forces for approximately eight years.

The NZDF raised an application through the ISAF system for the three identified insurgent commanders to be considered as objectives for an operation to disrupt their insurgent forces and networks operating in the cross-provincial area between Bamyān and Baghlan. The intent of the operation was to arrest, detain, or, if necessary, neutralise the insurgent commanders so as to: reduce the insurgent group's capacity to target ISAF, Afghan security forces, and NGOs; remove illegal weapons from the community; and to enforce Afghan law against insurgent activity. The ISAF Commander approved the

designation of these insurgents as objectives and, based on the evidence provided, the Afghan MOI issued written arrest warrants.

NZSAS assessed that two of the insurgent commanders and their forces were presently located in the village of Tirgiran,² Tirgiran Valley in the Tala Wa Barfak district of the Baghlan province, near the Bamyan border.

The operational plan to go into the Tirgiran Valley to capture, arrest or, if necessary, neutralise (in accordance with the ROE) the objectives, and to remove weapons, was approved by the ISAF Commander, and the Afghan MOI. As with all ISAF operations of this nature, there was a rigorous approval process that went up the ISAF chain of command. The village of Tirgiran is unable to be accessed by road and was considered to be a dangerous environment. It was a Taliban-controlled territory with insurgent commanders and forces who were expected to be well-armed and to pose a security threat to friendly forces.

Because the operation was outside the NZSAS approved area of operations, and as directed by the Government in the 2009 Wātea deployment Cabinet Paper, the prior approval of the NZ CDF was required. That approval was sought and received for both operations before the Inquiry that were conducted in Baghlan province.

21/22 August 2010 - Objective Burnham

“Operation” Burnham was a focused operation targeting specific individuals. It was not a law enforcement operation or mentoring exercise for the CRU, but a national task approved by the CDF. The operation included Afghan assets (personnel from the Afghan CRU and interpreters) and was supported by ISAF forces. The ISAF forces comprised NZSAS personnel and coalition air assets, operated by coalition personnel, to transport the personnel involved and to provide surveillance and fire support. The operation would not have been possible without this level of support. The NZSAS were equipped for the operation with appropriate equipment, including night vision goggles which provided enhanced but still impaired vision.

Arrival in Tirgiran Valley

On the night of 21/22 August 2010, an intelligence, security, and reconnaissance (ISR) remotely piloted aircraft (RPA) was the first aircraft to reach the Tirgiran Valley, closely followed by two Apache helicopters, which arrived at approximately 2359 hours.

² 35.09'47.98"N, 068°09'16.29"E

The Apaches' role was to undertake visual inspection of the proposed helicopter landing zones (HLZ),³ to provide cover for the imminent arrival of the ground force transport helicopters, and to support the ground force elements for the duration of the mission.

The ISR RPA was stationed above the area of the operation, relaying near-real time footage back to CRU (and the NZSAS) Headquarters in Kabul where Command personnel and the LEGAD were viewing the ISR footage. In the event that they formed the view, from viewing the footage, that actions contravened legal principles, they had the means to contact the Ground Force Commander (the GFC). The ISR RPA's near-continuous recorded coverage (approximately 8 hours) was also able to be used to provide post-operation battle damage assessment.

The ISAF ground force, comprising NZSAS and Afghan CRU personnel, travelled to the Tirgiran Valley in four transport helicopters. The GFC, the Joint Tactical Air Controller (JTAC), and other specialist team members travelled in command helicopter(s) with the ground assault teams, HLZ security, and technical personnel transported in two Chinook helicopters. The GFC was a NZSAS Major, responsible for the conduct of the operation and, in particular, for providing clearance for any engagements. Communication between air and ground forces was coordinated by the JTAC, a NZSAS operator co-located with the Commander, who also had communication with the other elements of the ground force.

The first Chinook landed at the HLZ at approximately 0030 hours, as planned. The CRU and NZSAS ground forces disembarked and moved south-east towards the first objective, building A1, the residence of one of the two insurgent commanders to be arrested and the subject referred to as 'Objective Burnham'.⁴

As the first Chinook landed and ground forces were disembarking to make their way towards buildings A1 and A2, a number of insurgents, military-aged males armed with weapons including rocket propelled grenades (RPG) were observed, exiting a building near the HLZ and moving southward to the high ground of the ridgeline above the village.⁵ Some of the insurgents had hurriedly left the building but then returned and left again, carrying weapons and ammunition that appeared to have been stored in the building. They ran to rejoin the insurgents moving to the high ground. A woman and two children from this building could be seen leaving the building and then returning to it.

The second Chinook was advised to hold off on its scheduled landing, pending safety clearance, due to the risk associated with insurgents carrying RPGs.

At approximately 0035 hours, the GFC (who was still in air transit at the time) was advised that positively identified armed insurgents were extracting weapons from a previously unidentified cache location.

³ Marked **HLZ** on the Map.

⁴ Marked **A1** and **A2** on the Map.

⁵ Marked **INS 1** on the Map.

Shortly after at approximately 00048, the GFC, having been informed of the increasing risk situation, assessed that the armed insurgents were moving above the village to a position that would enable them to fire on the task force from the high ground and would present a threat to the helicopters and to coalition forces already on the ground.

By radio relay through the JTAC, the GFC gave clearance to the Apache helicopters to engage the insurgents when they were certain that the conditions continued to meet the terms of the ROE. These conditions of the clearance included that there was to be clear visual confirmation that there was not likely to be civilian or collateral damage occurring if the targeted insurgents were engaged. The Apache crew were authorised to engage but did not do so immediately because of the proximity of friendly ground forces – the NZSAS and CRU – to the insurgents.

One command helicopter landed the GFC, the JTAC and the observation team that included a sniper pair on the ridgeline to the western side of building A3, at approximately 0045 hours.⁶ A few minutes later, at approximately 0048 hours, the second Chinook landed at the northern HLZ. Security teams stayed to guard and secure the HLZs and the planned exit routes for the ground forces to use at the completion of the operation.

At approximately 0054 hours, once the insurgents were positively identified as direct participants in hostilities – and once checks were made to ensure that there were no civilians visible nearby and that there was sufficient distance from friendly forces – shots were fired by aircraft at the insurgents making their way up to the ridgeline. A number of insurgents were assessed to have been killed in this engagement.

A single insurgent was seen breaking away from the group that had been moving towards the ridgeline, and appeared to be returning back to the building from which the armed insurgents had been seen leaving. One of the Apaches fired on this insurgent. During this engagement, several rounds fell short due to a gun sight malfunction and this resulted in a building near the HLZ being inadvertently hit by gunfire.

The ground forces, including the JTAC and GFC, were not made aware of one of the Apache's malfunctioning equipment during the course of the operation. The possibility of civilian casualties and other collateral damage, as a result of the rounds falling short, only became apparent during ISAF's post-operations review (a week or so after the operation). Video footage from the operations was released to the NZDF following a formal request, some time after the operation had concluded.

⁶ Marked **Observation Position** on the Map.

A1 and A2 – the residence of the first insurgent objective

Between approximately 0035 and 0048, as ground forces moved towards building A1, they passed a tree line behind which a number of armed insurgents positively identified by the Apache helicopters were located. The NZSAS member closest to the tree line appeared to have sighted at least one of these individuals, but was not in a position through his night vision goggles to positively identify the person as an insurgent. The ground forces continued on to their first objective, which was building A1.

At approximately 0052 hours, the ground forces reached building A1, the residence of the first insurgent commander (Objective Burnham). The Afghan interpreters assigned to the operation conducted a 'call out' through a loudhailer, the purpose of which was to announce the ground force's presence and intentions to enter to any residents in the building. There was no response.

In order to avoid using the doorway for entry after alerting occupants by the 'call out', and given a lack of knowledge of the environment, the western wall of building A1 was breached by directional explosive charge. Approximately a minute after the entry point was made, the breached wall and part of the roof collapsed onto a NZSAS member. He was seriously injured and was medically evacuated at approximately 0237 hours.

A second entry point was made, again by controlled explosive charge, and the residence was searched. The ground force found signs of ongoing occupancy but did not find anyone present. However, they did find an RPG launcher, rocket grenades, and other weapons and ammunition.

The nearby building A2 was then entered and searched and was found to be unoccupied. It appeared to be a utility building or animal shelter. No weapons or munitions were found. There was no need to use special measures of any kind to make an entry point, as the building had multiple door and window openings.

At approximately 0125 hours, the ISR RPA observed an armed insurgent moving along the ridgeline south of the village towards the observation position where the Commander and his team were stationed. The ground forces were informed that the insurgent was heading up the ridgeline. The insurgent was identified as presenting a threat by the GFC, who authorised a NZSAS sniper to engage the insurgent. On receiving authorisation to fire by the GFC, two shots were fired; the first killing the insurgent while the second hit a rock.

A3 – the residence of the second insurgent commander

At approximately 0145 hours, the ground forces reached building A3. After the Afghan interpreter conducted a 'call out', the ground forces at approximately 0159 hours used explosive entry methods to

breach building A3, the residence of the second insurgent, objective Nova, for whom an arrest warrant had been issued.

A 'flashbang' (a less than lethal 'grenade-like' explosive that creates a high amount of noise, a sudden and strong light flash, and 'air pressure' change (through the sound waves) designed to disorient any persons in the close vicinity of the explosion, and which can 'bounce' around the building interior) was used immediately in A3.

It appeared from warm food and drinks left behind, and a still burning cooking fire, that the inhabitants may have recently and hurriedly exited the building. The ground force did not find anyone present. A search of building A3 found more weapons and munitions. On leaving A3, these items were taken to the A1 building location where they were added to the items seized from A1 awaiting destruction.

Aside from the damage caused by the controlled explosive method of entry, building A3 was left in the same state as that in which it was found. Building A3 was subsequently damaged by fire. No external signs of fire were visible to ground forces up to and including at the time of departure from the village. The ISR RPA did not detect any fire until after the departure of ground forces. The cause of the fire is unknown but it is possible that it was caused by the unattended cooking fire that was observed in the vacated building.

Concurrent activity

At approximately 0123 hours, while the ground forces were at A1 and A2, support aircraft observed and positively identified more armed insurgents moving to the south and engaged them.

At approximately 0155 there were a series of groups of insurgents seen to the south of A3. They were continuously observed but were not engaged, and eventually came together.

At approximately 0238 while the operation continued, air support identified four insurgents leaving the group to the south and moving with purpose towards the high ground overlooking the valley. These insurgents were engaged and neutralised. During this period, ground troops completed the search of A3 and consolidated on A1 to destroy the seized munitions.

Controlled detonation of weapons and ammunition

The stockpile of weapons and ammunition recovered by the ground forces from buildings A1 and A3 included:

- a rocket propelled grenade launcher with seven grenades;
- a bipod (a two-legged rifle rest);

- five RPG rocket motors;
- a full 7.62mm magazine;
- a drum magazine;
- five tins of loose 7.62mm ammunition;
- one tin of 14.55mm armour piercing incendiary ammunition;
- two non-disintegrating belts of 7.62mm ammunition;
- a quantity of 9mm ammunition;
- a leather pistol holder; and
- an AK-47 rifle.

The ground forces did not enter or search the building, nearer to the HLZ, from which the Apache helicopters had positively identified insurgents exiting and returning to while carrying their weapons.

At approximately 0319 hours the NZSAS Explosive Ordinance Disposal (EOD) Technician placed the munitions taken from buildings A1 and A3 at a distance of approximately 25 metres from building A1 and conducted a controlled detonation to destroy the seized insurgent munitions.⁷

At the time that the ground forces were in location, no damage was seen or reported to building A1 other than that caused by the explosive breaching of the end wall. Approximately 15 minutes after the departure of all ISAF forces, the ISR RPA imagery showed hot spots in three locations. One was the EOD detonated munitions still burning. A second hot spot on the ground nearby is likely to have been a fire started by a RPG motor 'exploding and spiraling' onto the ground near the original detonation point. A third hot spot was on the roof of A1.

The ISR RPA footage indicates that, while the troops were still in the valley, there were no hot spots visible on the roof of the building. The building did not visibly alight until after the ground troops had been extracted.

Positive identification of civilians by NZSAS

The only positive identification of civilians by the NZSAS during the operation occurred near the northern HLZ. Shortly after the second Chinook helicopter landed, the ground forces security team at the HLZ became aware of approaching unidentified persons. This appears to have been an elderly man and two women, who were identified and a CRU member advised them on their safety. The elderly man approached further times. One CRU member, before positively identifying, fired a single shot in the man's direction, after which an NZSAS member again positively identified him as the same elderly man. There were no other reported sightings of civilians by the ground forces during the operation. This was

⁷ Marked X on the Map.

not unexpected. The 'call outs' (using loud hailers) were intended to protect civilians by informing them that this was a legitimate Afghan Government security activity, and that they should stay in their homes.

Extraction of ground force

The ground force was extracted by the helicopters from the northern HLZ at approximately 0346 hours. After the troops from northern HLZ had been extracted, air support identified more insurgents and requested permission to engage. Approval was not given by the GFC as he considered they did not pose a threat to the remaining ground forces at the time.

All of the ground force personnel were taken to the NZ PRT Headquarters in Bamyan. From there, the CRU were airlifted to the Bagram Air Force Base, and the NZSAS were airlifted back to Camp Warehouse in Kabul.

The GFC decided that, based on observations during the operation, the conditions in the village and the fact that the majority of engagements were conducted by air assets away from ground troops, it was not feasible to undertake the usual collection of the deceased, or of biometric data from the deceased, to enable their subsequent identification.

The NZDF and other ISAF personnel involved in the operation took deliberate steps to ensure that the operation was conducted in accordance with the Law of Armed Conflict⁸ and the ROE, including ensuring of positive identification of individuals as direct participants in hostilities, and taking all feasible precautions to minimise potential civilian casualties. The ISR RPA visual coverage was viewed throughout by the LEGAD based in Camp Warehouse, who could advise immediately on any legal or ROE issues that may have been observed. The LEGAD deployed on that mission did not observe any activity during on in relation to Operation Burnham which gave them any cause for concern around compliance with the law of armed conflict or the rules of engagement.

3 October 2010 - Objective Nova

The NZSAS carried out a further operation on the residence of Objective Nova. The proposed operation to return to Tirgiran village, based on the extant arrest warrant, was approved by the Commander, ISAF Headquarters and the Afghan MOI. This operation was also approved by the NZ CDF, as the operation was being conducted outside the NZSAS approved area of operations, as directed by the Government in the Wātea deployment Cabinet Paper.

Objective Nova was to be conducted by a Task Force comprising NZSAS personnel and Afghan CRU personnel, with the support of ISAF reconnaissance assets and aircraft.

⁸ Law of Armed Conflict (LOAC) is also referred to as International Humanitarian Law (IHL)

On 3 October 2010, at approximately 0200 hours, the ground force, transported by a Chinook helicopter, landed at an HLZ between buildings A1 and A3.

An Afghan prosecutor conducted a 'call out' to the village, before troops proceeded to search buildings A3, A1, and A2, which were the primary buildings of interest, as well as the surrounding areas. No insurgents were found. Aside from a door damaged in the A3 compound, there was no other damage to any building that was entered.

At approximately 0300 hours, the ground force was extracted. No rounds were fired and no one was killed or wounded. No arrests were made and no persons were detained. No damage to property occurred other than minor damage from entry into building A3. The operation was reviewed remotely, in real time, by the LEGAD.

16 January 2011 - Objective Yamaha

Qari Miraj, or objective Yamaha, was an insurgent commander that NZDF assessed to be responsible for a number of deaths and other violent acts (including the 3 August attack on the NZ PRT).

While Miraj was in Kabul, the Afghan National Directorate of Security (NDS), an Afghan prosecutor and the NZSAS conducted an operation. The time-constrained operation was planned and approved in accordance with ISAF standard procedures.

On 16 January 2011, at 0300 hours, a Task Group comprised of NZSAS, the NDS and the prosecutor were deployed by landcruisers and vans to a suburb in northern Kabul. The ground forces entered an Afghan compound, but did not find him there. Miraj was then assessed to be in a nearby mosque. The NZSAS provided a security cordon, but in accordance with ISAF standard procedures the mosque was entered only by the Afghan security forces following a 'call out' procedure.

Five men, including Miraj, were apprehended and arrested in the mosque by the Afghan security forces and prosecutor, and were removed from the mosque without resistance. Due to the operational security risks of processing those arrested on an open street, it was done at the detention facility. (The detainees would have been processed safely in the compound had they been apprehended in that location).

The NZSAS assisted the NDS and ANP by transporting Miraj and his associates to one of the NDS detention facilities in Kabul. At the detention facility, Miraj and his associates were processed by NZSAS personnel. Photographs were taken in a well-lit room, and they were observed and questioned by a female NZDF medical officer. No injuries were seen or noted on Miraj and he was calm throughout the process. Miraj was then admitted to the detention facility and then released later on. In 2017, he was killed in an ISAF operation.

Post the Objective Burnham operation and allegations of civilian casualties

During the Objective Burnham operation, the NZSAS ground forces did not cause, or observe, any civilian casualties.

When reports of civilian casualties were subsequently received after the operation, ISAF, in conjunction with the Afghan Government, ordered a joint investigation and report into the allegations. While the Taliban was known to disseminate false claims of civilian casualties, such allegations were always taken seriously and a full investigation pursued. The ISAF was required to assess all allegations of possible civilian casualties and was required to notify such instances to the UN Assistance Mission in Afghanistan and the International Committee of the Red Cross (ICRC).

Following receipt of information suggesting civilian casualties in operation Burnham, ISAF Headquarters provided a senior and experienced non-New Zealand military officer to conduct an investigation. The NZDF cooperated fully. The ISAF investigation team included an ISAF legal officer as well as Afghan Government representatives from the Ministry of Interior and Ministry of Defence. That report made recommendations as to any further action to be taken by ISAF and or the troop contributing nations.

The NZDF was briefed orally on the investigator's initial findings, and was subsequently provided a copy of the written report. The investigation team concluded that civilian casualties may have been possible due to a gunsight malfunction on one coalition aircraft. The investigation team also concluded that members of the NZSAS appear to have complied with the ISAF commander's tactical directive, the ROE, and accordingly the law of armed conflict. The investigation concluded no further action be taken.

It took some time for the allegations to emerge and to be investigated thoroughly, and for the joint ISAF-Afghan investigative team to report. Throughout this period, the NZDF provided, to the fullest extent possible, and based on available information, ongoing updates to CDF and to the Minister of Defence.

NZDF responses to the *Hit and Run* book

After the publication of *Hit and Run*, the NZDF engaged further with international partners and managed to obtain additional information. This information has confirmed the conclusions that the NZDF reached at an earlier stage; that no civilian casualties were caused by the NZSAS.

Nicky Hager and Jon Stephenson did not seek any comment, clarification or response from the NZDF before publishing *Hit and Run*, notwithstanding the serious allegations made against the NZDF. The CDF provided an initial (unclassified) response to the allegations contained in *Hit and Run* within a matter of days following the book release. Additionally, the NZDF commenced a preliminary investigation into Operation Burnham, which included engaging with international partners. This

investigation obtained additional information that was not available to the NZDF in 2010. This information confirmed the earlier conclusions that the NZDF reached; that no civilian casualties were caused by the NZSAS.

The Commanding Officer of NZSAS also ordered a formal investigation into the allegations of ill-treatment of Qari Miraj by the NZSAS, as contained in *Hit and Run*. An investigation was conducted by a senior and experienced member of the NZDF Military Police, who concluded that the allegations of ill-treatment by the NZSAS were not supported by evidence. The NZDF Military Police's investigation records and report have been provided to the Inquiry.

7 November 2018

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