

The NZDF explanation of Operation Burnham, in the first year and a half after the book *Hit and Run* was published, was a simple story in which a number of positively identified armed insurgents who were seen gathering weapons and climbing to a high point to launch an attack against the coalition forces. It was, NZDF said, entirely lawful and consistent with the SAS's rules of engagement for attacks to be directed against these insurgents. But, gradually, a more complex picture has emerged, including that there were five separate attacks during the operation.

I am going to discuss the nature of rules of engagement, some of the specific rules of engagement in force that night, and then the question of whether those five attacks were consistent with the rules of engagement and international law.

I would like to thank the Inquiry and its document reviewers for arranging declassification of the NZSAS rules of engagement that covered Operation Burnham.

## 1. Overview of ROE

First, I will discuss the nature of ROE. I don't pretend to be an expert on this so I merely want to note some elements that seem relevant to the current Inquiry.

As the NZDF speakers discussed clearly yesterday, rules of engagement are not some sort of parallel military laws. They are simply orders, approved by the Prime Minister and issued by the Chief of Defence Force, telling military personnel what they can and cannot do on military operations. It is a practical system for conveying these orders to military personnel.

This of course does not mean they are always good orders (although in many cases I assume they are). This means that in a case like Operation Burnham there are two levels of responsibility: first of the military officers and Prime Minister who came up with and approved the more or less appropriate Rules of Engagement, and then of the military personnel who are supposed to stick to them.

While in a formal sense Prime Ministers make the decisions on Rules of Engagement, there are other major influences. First, it is the military itself that drafts the Rules of Engagement and which advises the PM that they are appropriate. Not all PMs take a lot of interest. I am told that Helen Clark used to worry over the wording of ROE and rewrite them herself. In contrast John Key – the person who signed off the ROE in force for Operation Burnham – was apparently not terribly interested and tended to sign off whatever he was given. New Zealand's ROE are also influenced by what the allies militaries want and expect from New Zealand.

In the case of John Key, he personally approved Operation Burnham and the ROE and should be held accountable for those decisions.

Here are some of the relevant issues relating to Operation Burnham.

There was not a state of international armed conflict in Afghanistan at that time and so, legally, the NZDF was required to treat everyone as civilians unless 1. they were known to be part of an “organised armed group” or 2. they were “directly participating in hostilities.”

The NZDF Narrative says the ROE basis for the NZDF attacks during Operation Burnham was that there had been “positive identification of individuals as direct participants in hostilities”. This also

corresponds with rule “H” in the 2010 NZSAS Rules of Engagement released by the Inquiry.

The concept of “Minimum Force” was mentioned in passing yesterday. It is another important concept. Minimum Force means troops are permitted to kill someone under the ROE, but they must use the minimum amount of force possible, including for instance warnings and taking action to avoid conflict. The non-deadly options should be preferred. This is relevant to Operation Burnham.

Standard Rules of Engagement also say that if you are not sure about whether someone is directly participating in hostilities “you must presume they are protected civilians.” This is also relevant to Operation Burnham.

Some Rules of Engagement and Law of Armed Conflict issues are complex and it is hard to reach clear judgements. But it seems that the ROE breaches in Operation Burnham, which I will discuss shortly one by one, are not at the grey or disputed edges of what's acceptable and what's not. They seem to be clear breaches.

Also, they are not about a lack of training or care by junior personnel. As we will see, it was the actions of the senior SAS officers, in particular the decisions of the SAS ground force commander, that appear to have caused all the problems. This may explain the SAS's determination to hide and deny what happened.

ROE might sound like purely military business. But, when used properly, they should express the values and beliefs of a country. What this means is, that they can be based on how New Zealanders want their military to act and also on what they wouldn't support their military doing.

There is one part of the SAS's 2010 Rules of Engagement many New Zealanders would be likely to have problems with. This is ROE number “I” in the May 2010 ROE document. It reads:

Incidental death and collateral damage ROE – “Action that could result in incidental casualties and collateral damage are permitted if the action is essential for mission accomplishment and the expected incidental casualties and collateral damage are proportionate to the concrete and direct military advantage anticipated.”

This is objectionable and out of sync with New Zealand values. I believe a majority of New Zealanders would not agree with it. NZDF should not have put this to the Prime Minister and John Key should not have signed it.

I suspect there are other parts of the ROE that many New Zealanders would be unhappy with as well. But as long as they are kept secret the public does not have a chance to object.

## 2. General Petraeus' Updated tactical directive

There was a hugely significant change to the Rules of Engagement in Afghanistan just a few weeks before Operation Burnham. This was an “updated tactical directive” issued by the US military commander in Afghanistan, General Petraeus, on 1 August 2010. This directive – like the ROE, an order – greatly altered what was and wasn't acceptable for all US-led troops in Afghanistan.

The change came after years of civilian casualty incidents, which had created increasing public anger and controversy, and political pressure to stop an endless succession of civilian injuries and deaths.

The updated tactical directive was issued when this had reached a crisis point politically in

Afghanistan. It was just three weeks before Op Burnham. It should have been very much in the front of everyone's minds. In a statement on the directive, Petraeus urged:

“We must continue - indeed, redouble - our efforts to reduce the loss of innocent civilian life to an absolute minimum. Every Afghan civilian death diminishes our cause. If we use excessive force or operate contrary to our counterinsurgency principles, tactical victories may prove to be strategic setbacks.”

And the new order said:

“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.” The only exceptions, which were classified, concerned risk to ISAF and Afghan forces, which sounds standard.

A note about the exception said “This directive, as with the previous version, does not prevent commanders from protecting the lives of their men and women as a matter of self-defense where it is determined no other options are available to effectively counter the threat.”

But the main force of the directive was, again, that “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.”

Petraeus concluded by saying:

“This is a critical challenge at a critical time; but we must and will succeed. I expect that everyone under my command, operational and tactical, will not only adhere to the letter of this directive, but - more importantly - to its intent.”

General Petraeus did not issue the directive for show. It was a deliberately *tightening* of the rules, a direct order restricting what could otherwise be done under the ROE. It was telling all troops that they should err strongly on the side of caution if there was any risk to civilians or even uncertainty about whether civilians could be at risk. This is relevant for two things I'll discuss today: 1. why NZSAS made the attack decisions they did (the evidence suggests too carelessly); and 2. why NZSAS did not change plans, when unforeseen events occurred, to avoid the risk to civilians.

### 3. Some context

None of the insurgents the NZSAS expected to find during Operation Burnham were in the two villages, and none of the claimed insurgents they encountered there (whom, we were told by trustworthy villagers, were innocent farmers) were people who had ever come to the attention of NZ intelligence staff before. The NZDF troops believed the little village of Khak Khuday Dad was safe, which was why they landed the big US troop carrying helicopters in the fields right beside the village. This means there's no way the people encountered there fit the definition of an “organised armed group”.

It also perhaps needs to be reiterated that the villages were not some kind of insurgent camp, or stronghold. It was two civilian farming villages. As we described in the book, some people in the insurgent group that attacked Tim O'Donnell's patrol came from those villages (ie they or their parents had homes in the villages, although they themselves mainly lived elsewhere). Nearly everyone was not an insurgent, including members of the families of the ones who were. As such, it is much like any New Zealand township, where a handful of people may be involved in crime but

that doesn't mean their neighbours and families are criminals. Nearly everyone isn't a criminal.

#### 4. New Zealand Special Forces attitudes

Military lawyers do not admit it, but there is an informal side to ROE that it is important to understand as well. It is seen in the US acronyms and slang used in the post-Operation Burnham intelligence updates that have been declassified by the Inquiry: MAMs, FAMs and Squirters. These terms show a mindset and set of assumptions about what are legitimate targets for the troops.

For instance, reclassified document no. 9 has a “TF81 S2 Comment”, (where TF81 was the SAS and S2 stands for a special forces intelligence officer) that says that a list of killed insurgents “are assessed to be FAM”. This stands for Fighting Age Male. Other documents refer to MAMs (for instance writing in declassified document no.2 that “All KIA [killed in action] MAMs”.) MAMs are Military Aged Males. This labelling of FAMs and MAMs has been widely discussed and criticised, as embedded within it is the idea that essentially any Afghan male encountered during military operations who is older than a child and younger than an elderly person is a possible Taliban. Many people have died because of that mindset and it is distasteful – and possibly relevant to decision made during Operation Burnham – that this language was actively in use.

“Squirters” is an even more distasteful piece of copy-cat US military slang for New Zealand troops to be using. It refers to local men running away to hide when a military raid or attack occurs. The implication is that they are enemy trying to escape; natural targets to fire at. But there is every good reason for civilian men to try to hide when helicopters arrive in the dark or explosions begin, since the local men will be well aware from countless cases across Afghanistan that they could easily be thought to be insurgents and harmed or taken away into detention.

I suspect that the NZSAS judgements were influenced by this type of language, which casts suspicion on every Afghan man purely for being a man between about 12 and 40-50 years old, and dehumanises people with a title like Squirter. The language brings with it negative attitudes towards the local people. For soldiers on the ground, this kind of thinking risks influencing their decision making.

For instance, declassified document no 8 says “Squirter from the first two contacts moving south up ridge to Sqn HQ position”, and “unable to determine is armed” and at the next moment the Squirter – an unarmed but dehumanised person – is killed by an SAS sniper. (Compare this to Petraeus' directive: “if unable to assess the risk of civilian presence, fires are prohibited”.)

#### 4. Applying the ROE to what actually happened on Operation Burnham

As I said at the start, NZDF has conveyed a simple story of a number of positively identified armed insurgents who were seen gathering weapons and climbing to a high point to launch an attack against the coalition forces. There were “numerous armed insurgents”. The people they killed and injured were “direct participants in hostilities.” Based on this brief and non-specific description, the actions are declared to be consistent with the Rules of Engagement and Law of Armed Conflict.

**SLIDE ONE** This scenario is represented by this NZDF powerpoint slide from Tim Keating's press conference in March 2017 to rebut the book. “Positively identified armed insurgents” to be got before they get us. As with all disputed subjects, we need to move away from this sort of “coherent word picture” and look at the specifics to reach a clear view.

I want to say first that a wide range of sources, Afghan villagers and New Zealanders, from during research for the book and since, have said that there were no insurgents in the villages that night. But of course it is possible that there were. As I said and we wrote in the book, a few insurgents came from those villages. But, even while keeping an open mind on that, a strong pattern of breaches of the ROE emerges.

It turns out that there was not just one aerial attack, in one place, against one set of people. There were several attacks each with its own characteristics. I will go one by one through those different attacks and who they were against, to show the different picture that results. **SLIDE TWO** The different attacks are shown on this slide.

A The 0054 Apache helicopter and AC-130 attack on an unspecified number of “armed insurgents” who had climbed part way up the side of a rocky ridge

B The 0119 Apache attack on a single “insurgent”, this being the attack when NZDF says “several rounds fell short” and went into a house where there might have been civilians

C The 0123 attack by “support aircraft” on “more armed insurgents” who were moving to the south

D The 0125 SAS sniper killing of an “armed insurgent” climbing the hill towards an NZSAS observation point; and

E The 0238 attack on four “insurgents” (who are not described as armed) who were located well to the south of the villages and began climbing up the side of the valley “with purpose”. AC-130 attack and a missile (presumably Hellfire) from an Apache helicopter.

I will go through these individually, leaving the first one, which is blurry and hard to assess, until last.

B The 0119 Apache attack on a single “insurgent”

First, B The 0119 Apache attack on a single “insurgent”, which is the attack I discussed yesterday that led to several rounds falling short and hitting a building.

This is the attack that appears to have caused all the injuries to women and children and the death of the child Fatima; overall, the majority of all the casualties. The main cause of this is obvious: a ferociously deadly helicopter gunship fired exploding cannon shells at a lone man who was standing in a group of civilian houses. This is the attack about which the NZDF Post-Operation Report of 30 April 2010 wrote: “Note for BG\_\_\_\_\_ this is the engagement that occurred close to residential buildings.” This is declassified document no. 10.

The first thing to notice is that NZDF has not said the man was an “armed” insurgent. Considering this was the most controversial attack, we can assume they won't have left this off accidentally. So they were probably firing at an unarmed man.

And where was this probably unarmed man? I will not give a full answer on this here – I am in mid-research on this – but I note that all the NZDF documents including the intelligence reports and NZDF Narrative are suspiciously non-specific about this. However former NZSAS commanding officer Peter Kelly (who I think was acting as the Special Operations Commander in Wellington at this time, or was maybe in Afghanistan) gives as a clue in a letter he wrote to all Army staff after the book Hit and Run came out, justifying the SAS actions. In that letter he wrote that the helicopter

engaged an insurgent standing “within 15m from the nearest building” – this building, he said, being the same one hit when some helicopter rounds fell short. NZDF has released a map showing which house this was: it is marked with a circle on the slide.

The helicopter should not have been firing anywhere even vaguely near to this residential area. But if the 15 metres is correct, it means that the NZSAS ground force commander and NZSAS Joint Tactical Air Controller authorised an attack aimed right into the middle of a group of civilian houses.

There is no way that this attack would be legitimate under the rules of engagement and especially not once Petraeus' newly issued directive on protecting civilians is taken into account. There was no imminent threat to the NZSAS-led forces. There is no evidence that the man was a direct participant in hostilities. Even if he had been a direct participant in hostilities, the target was far too close to a known civilian area ever to approve a helicopter gunship attack. And, recall, this is the attack that caused most of the civilian casualties.

Next, the 0123 attack on more armed insurgents **SLIDE THREE**

There is very little detail about this attack. But based on what we know, this seems to be the attack described in Hit & Run where a man named Mohammad Iqbal and his son Abdul Qayoom left their home at the far southern end of the villages and walked south to get away from the raid.

Mohammad Iqbal (as we explained in the book) was the father of a known insurgent, Naimatullah, but was himself no friend of the Taliban. This seems to be confirmed by the “Insurgent Link Chart” on declassified document no 1, which includes no family associates of the insurgent Naimatullah; and also by the statement in declassified document no. 12 that “Names of casualties [which we know included Mohammad Iqbal and Abdul Qayoom] do not match the TB Orbat [Taliban Order of Battle]from 3 Aug contact.”

So what this means, if we have the right targets, is that two people had left the village and walked as far away as they could – walking *away* from the NZSAS-led forces. They were escaping, not threatening. Once we have separated them from a generalised “numerous armed insurgents”, it is very hard to see how killing them can possibly have been permitted under the NZSAS ROE and the Petraeus directive. Even if they were carrying guns, which has not been proven in any way, they were still going away. This appears to be another clear cut breach.

Then there's the 0125 SAS sniper killing of an “armed insurgent” **SLIDE FOUR**

I discussed this yesterday. It seems clear from the declassified intelligence reports and other sources that this “armed insurgent” was not armed. He was an unarmed man walking up a dark hill away from attacks and explosions in his village, presumably unaware that he was heading towards a high-tech group of heavily armed NZSAS commandos. There was no realistic threat to the NZSAS personnel. They did not try making a warning. The NZSAS commander ordered an attack and an SAS sniper just killed him. Only a hardened apologist would think this was a necessary killing and doubly so since they were supposed to be being utterly careful about not killing civilians. His killing does not appear to be lawful nor compliant with the ROE.

For the sake of thoroughness, I will mention the excuses made in an SAS report on the incident (declassified document no. 8). It says that as the “Squirter” approached, the SAS troops followed him in “to the last safe moment unable to determine if armed, squirter gave rapid chane (sic) to rte [route] which would have taken him into dead ground [ie out of sight] and then possible to outflank onto the high ground.... Gave order to fire one shot engagement.” There's a description for this kind of thinking: if you turn up expecting to find insurgents then everything looks like an insurgent. It wasn't the villager's fault that the NZSAS had faulty intelligence and came to villages when none to

their real targets were there. He did not deserve to die for that.

This is a good moment to mention another fact about that night, which is, as I raised yesterday and had to extract from NZDF using the OIA, that none of the various so-called insurgents, encountered at different times and in different places, fired a single shot at the NZSAS-led forces during the entire three hours of the raid. Numerous armed insurgents and not a shot.

E The 0238 attack on four “insurgents” **SLIDE FIVE**

This attack is still a mystery to me. NZDF says it killed nine insurgents and here are four of them that no one (including the villagers and the military intelligence reports) seems to know anything about. No one suggests they had weapons, but NZDF claims they were climbing a hill south-east of the southern edge of the village. Shortly before the attack they had been part of an eight person group and declassified document no. 8 said of them: “Suspected pos villagers approaching due to fire.”

Then the strangest thing about these four supposed insurgents. Declassified document no. 14 has a grid reference for the exact position where they were attacked. Here it is. **SLIDE SIX** It's not even anywhere near the two villages where NZSAS-led troops went. It's about two villages away up a lonely, rocky hillside. If this grid reference is correct, they did not pose any realistic threat to the SAS-led troops, much less the US transport helicopters which had a landing zone tucked safely behind a large piece of mountain. These four “insurgents” are not mentioned in the book Hit and Run and there is no evidence that they even come from the villages Naik and Khak Khuday Dad where Operation Burnham occurred. What exactly was the ROE basis for killing these people? There is a pattern of unnecessary and dubiously lawful killing that night.

This leaves one more attack, the one that happened first:

A The 0054 Apache helicopter and AC-130 attack on an unspecified number of “armed insurgents” on the ridge above Khak Khuday Dad. **SLIDE SEVEN**

As I said earlier, this is the least clear cut of the various attacks ordered by the NZSAS ground force commander. NZDF has refused my repeated requests for information on how many people were attacked at this stage, what, if any weapons each of them had and what their names were. Without this information it is hard to assess who these people were and whether it was justified to attack them. Our villager sources are emphatic that there were no insurgents in the villages that night and, as already noted, none of the known insurgents appear to have been in the villages that night or caught in these attacks.

Why won't NZDF say how many people and how many weapons are involved? And since when does New Zealand national security require the military to keep the names of dead insurgents from years ago in Afghanistan secret? They could be describing anything from a major armed group to some locals trying to hide weapons that some dodgy relative left in their house. We are lacking evidence from which to draw conclusions. I urge the Inquiry to keep open minds and help all of us to get more information. The judgement on compliance with ROE for this attack will have to await more solid facts.

I can say for my part that I am continuing fruitful research to piece together what happened to each person and where they were, which I am hopeful will help to explain what really went on.

**SLIDE EIGHT**

But, meanwhile, adding up this non-compliance with Rules of Engagement, we already have an important tally. We have firing exploding cannon rounds into a civilian residential area; shooting two men, probably opponents of the Taliban, as they fled *away* from the SAS-led forces; shooting an unarmed man who wandered in the dark towards heavily armed SAS and was shot; and four more apparently unarmed men killed ludicrously far from everything.

That is, currently four out of five attacks conducted during Operation Burnham that strongly appear not to be compliant with the Rules of Engagement and Petraeus' civilian protection directive. That's four out of five that include the vast majority of the civilian casualties and claimed insurgents killed. That four out of five may well not comply with international law either, nor, equally important, what New Zealanders would expect from their military. And the fifth out of the five may yet prove to be non-compliant as well when we get more information.

### How decisions could have been different

I asked a former SAS person what he thought the SAS ground force commander should have done when he believed they had encountered unexpected armed opposition in the small village of Khak Khuday Dad (the SAS landed in their helicopters next to this village because they thought it was safe). He was very clear about what the answer was.

“The last thing you want is a firefight,” he said. If that happens, “just pull back and try later.” Track down your targets when they have left the civilian area and you can find them in the countryside on their own. With other operations of this kind that he went on, the goal was to arrive so quietly that the person they were looking for didn't wake up until they were standing over his bed. The way it was done in Operation Burnham was neither normal nor sensible, he believed.

He was sceptical of his former colleagues. “You don't have someone die and send your own people in to get those believed to be responsible,” he said. “Everyone wants to pull the trigger.”

### Care for the wounded

As noted by others yesterday, collecting and caring for the wounded, whether friend or foe, is so basic that it doesn't have to be spelt out in ROE. But it is found in the NZDF Code of Conduct, as noted in the book, which is another kind of order that all troops must obey. NZDF avoids facing up to this subject concerning Operation Burnham. It was one of the decisively wrongful parts of what they did and it continues to be.

### Military justice framework and discipline

I believe it is essential that NZDF as an organisation is held publicly accountable for the civilian casualties, the lack of care and aid afterwards and the cover up of Operation Burnham. Aid should be given to the affected villagers: better late than never. There are also a range of important changes that can be made to NZDF and its oversight to make it less likely to recur. In addition, two former Chief of Defence Forces, some SAS officers and a former PM deserve public criticism, and the SAS Joint Tactical Air Controller who directed helicopter gunship fire into a civilian area should, at the very least, lose the medal he was awarded for this action. And, definitely, slash the NZDF PR staff.

But, personally, I am not calling for action against individual NZDF staff under the Armed Forces

Discipline Act. This is partly because it is not worth the bother: NZDF would let them off. But most of all it is because there are more constructive ways to improve that organisation.