

UNDER

THE INQUIRIES ACT 2013

IN THE MATTER

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

Brief of Evidence of Rian Geoffrey McKinstry

Solicitor acting:

JENNY CATRAN

Crown Law

PO Box 2858

Wellington 6140

Tel: 04 472 1719

jenny.catran@crownlaw.govt.nz

Counsel acting:

PAUL RADICH QC

Clifton Chambers

PO Box 10731

Wellington 6140

Tel: 04 974 5951

paul.radich@cliftonchambers.co.nz

1. I am Colonel Rian Geoffrey McKinstry. I am the Special Operations Component Commander within the Special Operations Command of the New Zealand Defence Force (**NZDF**).
2. I enlisted in the New Zealand Army in 1990, and entered the Officer Cadet School in 1992. Until 1999, I had various command appointments in the 16th Field Regiment, Royal Regiment of New Zealand Artillery. In 1999, I joined the New Zealand Special Air Service (**NZSAS**) and served until 2011, and then again, as Commanding Officer of the NZSAS, between 2013 and 2015. While in the NZSAS I was deployed to Kuwait, and to Afghanistan on a number of occasions.
3. I have a Master's Degree in International Relations from Deakin University in Australia, a Master's Degree in Strategic Studies from the United States Army War College, and a New Zealand Diploma in Business.
4. In 2006 I was made a member of the New Zealand Order of Merit for leadership on operations in Afghanistan.

22 August 2010

5. In August 2010 I was the Senior National Officer (**SNO**) of the NZSAS in Afghanistan. I exercised National Command in theatre.
6. On the night of 21/22 August 2010, I was in the Operations Room in Camp Warehouse, in Kabul. The Operations Room consisted of two containers put together. There were a number of television screens and a number of clocks on one wall. Facing that wall were workstations with computers. Behind the row of workstations were some chairs where I was seated alongside the then Chief of Defence Force, Jerry Mateparae (now Sir Jerry Mateparae).
7. There were at least three other people in the room: an Operations Officer, a Signals Officer, and a Joint Tactical Air Controller (**JTAC**) who communicated with the person controlling the unmanned aerial vehicle (**ISR**) that was above Tirgiran throughout the Operation.
8. One screen displayed the live feed from the ISR, another displayed the Concept of Operations document, and another displayed the ongoing communications between the JTAC and the pilot of the ISR in written form.
9. The Operations Officer kept a written log of what he observed on the ISR screen, which was later used to draft the Operation Summary.

10. We could not hear anything taking place in the Operation except for when the Ground Force Commander (GFC) provided situation reports on the Command Radio Network.

Steps taken during and immediately after Operation Burnham to ascertain who had been killed and injured

11. I was aware that the NZSAS marksman, located on the ridge with the GFC, had engaged a person. I saw on the screen displaying the ISR live feed that a couple of NZSAS personnel searched across very steep terrain for approximately 20 minutes for the person who had been engaged.
12. For this team of two, the first priority would have been to check whether he was injured and requiring medical attention. I understand that they sighted the insurgent's body but given the terrain and limited time, no further action was able to be taken.
13. My understanding is that the NZSAS ground forces checked for casualties around the three buildings that had been searched, but did not undertake a broader battlefield clearance because of the nature of the terrain, the hostile environment, and the need - to avoid a daytime battle - to get out of Tirgiran valley before first light.
14. When the New Zealand contingent returned to Camp Warehouse in the early hours of 22 August 2010, the troops separated out into their operational groups - the helicopter landing zone security team, the Explosive Ordnance Disposal team, the team that searched the buildings, and the GFC's team - to conduct a "hotwash".
15. The purpose of the "hotwash" is to enable the groups to discuss what happened, and to evaluate what was done well, what could be done better, and what lessons could be learnt in time for the next operation, which often took place the following day. In fact, I believe there were two more operations that week.
16. Following the "hotwash", the commanders of each of those groups came together for a fuller debrief. I participated in that session. There was no discussion of civilian casualties at that time. It was not on our minds; we had no way of knowing that some rounds from the coalition air support may have impacted a building near the helicopter landing zone. In particular, the members of the New Zealand ground force themselves were not aware of helicopter rounds having impacted a building during the Operation; it was not visible in the ISR footage that I had been viewing in real time; and we had not been able to debrief with the coalition forces who provided air support because they were located an hour away in Bagram and were involved in operational duties more or less on a daily basis.

17. It was not until some days later, on 26 August 2010, that I became aware of the possibility of rounds from a coalition helicopter impacting a building, when I was given the opportunity to view some footage from the AH64s and the AC-130.
18. Immediately after, and in the days following, the Operation, New Zealand Intelligence Officers started gathering intelligence so as to determine the identities and/or affiliations of those engaged during the Operation. We wanted to know whether the insurgents that were the targets of the Operation were among those killed, and we were also concerned to get to the bottom of the reports of civilian casualties that had started to emerge, as I discuss in more detail below.
19. The Intelligence Officers gathered information from a range of sources, including individuals, the ISR feed, documents, and other sources. At the outset, the information received by the Intelligence Officers was, as I described in my emails of 23 August 2010, at 10:20pm, and 25 August 2010, at 5:33am, "wildly inaccurate" and "still very raw". I refer to the Bundle at pp 15 and 19.
20. The information was inaccurate, at this early stage, because some of the information was obtained from open sources, some of the sources of human intelligence (i.e. the people who were providing the information) were new and their veracity had yet to be determined and, at this point, nothing had been corroborated. In other words, the information coming in was being noted down without having been checked for accuracy or filtered in any way.
21. The changes to the list of casualties, over the course of the week, reflected the Intelligence Officers' evaluation of the reliability of the source and the likelihood of the information being accurate. I relayed this information to the Director of Special Operations (DSO) in New Zealand in a number of emails (see the Bundle at pp 15, 19, 27, and 31).
22. On 30 August 2010, I advised him that "I do not think we will get much more fidelity on the BDA [battle damage assessment]", see the Bundle at p 43. What I meant is that it was unlikely we could get more clarity and that, in those circumstances, we couldn't justify spending more time on the task. As I mentioned before, my recollection is that there were two further operations that week.

Participation in contemporaneous investigations

23. On 23 August 2010, I became aware of allegations made by local people that 20 houses had been burnt down and 20 civilians had been killed during the Operation.
24. I was cautious about the allegations. I was familiar with false or exaggerated claims of civilian casualties and damage to property being made by Afghan people in the past. It is a well-known Taliban "Information Operation" tactic. I was also aware

that claims of civilian casualties are sometimes made for the purpose of seeking financial compensation from ISAF.

25. Nevertheless, I considered the pursuit of clarity around these allegations to be my "highest priority", as you can see in my email to the DSO of 23 August 2010, at 10:20pm (see the Bundle at p 15).
26. The following day, on 24 August 2010, I, together with the GFC, and the JTAC, participated in a video teleconference with then Brigadier General Zadalis and two other senior officers from ISAF, who - in light of the allegations that had surfaced - were seeking to establish what had happened.
27. At that teleconference, we were asked a series of questions. We told them about the Operation. We answered every question in an unguarded way, without lawyers present. My headspace at the time was "let's get to the bottom of this". In short, we cooperated fully and openly because we too wanted to know what had happened.
28. This is what I relayed back to the DSO from that meeting, in an email of 25 August 2010, at 5:33am (see the Bundle at p 19):

Bottom line at this stage is that there may or may not have been some CIVCAS. This is to be determined by the investigation team in order to inform command action in the matter.

...

The intelligence coming off the OBJ is still very raw and this investigation is welcomed in order to help clarify ISAF and TF81 actions. I am confident our actions and tactics on the objective were sound and in accordance with ROE, LOAC and the Comd ISAF Tactical Directive. It will be saddening if there has been any unnecessary CIVCAS as a result but the reason for looking into this matter is sound. I will keep you posted.

29. On 26 August 2010, I was called in to a meeting at the ISAF Joint Command at Kabul airport, which is a 25 minute drive from Camp Warehouse. It was there that I saw the footage from the AH64s and the AC-130. I reported back to the DSO and to Chris Parsons, the Commanding Officer of the NZSAS, that night (by email of 26 August 2010, at 11:27pm, in the Bundle at p 31):

All in all for TF81 this is good news. It has to date verified that our actions were correct and in accordance with the threat presented. This will likely be looked at by IJC from two fronts. Actions by ground force, (no problems I can see) and actions by the Airborne force, (poss CIVCAS caused in potential accidental impact of rounds onto house identified in slide 1) ... any CIVCAS caused by the AWT would be collateral and unintended. This point is still to be verified.

...

I have to say that today has felt for the OC and I like a large weight has been lifted. We have both been personally feeling the weight of potential CIVCAS by TF81 and now having reviewed the tapes, we are both reassured that TF81 actions throughout the operation were of the highest calibre. This is not to say that a CIVCAS has not occurred, however, if verified it will be as a result of collateral activities from the AH64 weapon problems rather than incorrect application of force.

30. The sense of relief that I describe in this email came from the realisation that, if there had been any civilian casualties, it was due to an accident that was completely beyond our control.
31. On 29 August 2010, I was advised that the IAT had produced a report which found that the New Zealand troops had no case to answer and that, if any civilian casualties had occurred, it was due to the AH64's gun not firing true. I asked the Commander if he could send me a copy of the report once it had been completed. I refer to my email of 30 August 2010 at 6.59am, which is in the Bundle at p 43.
32. The Commander's verbal briefing was confirmed in an exchange of emails that was provided to me, and which I forwarded to the DSO on 6 September 2010, at 1:32am (see the Bundle at pp 57 and 59):

LEGAD [legal advisor] has confirmed that ... TF81 [Task Force 81] have no case to answer. It appears that the air spt aspect of that op in RC(N) [Regional Command (North)] is part of an ongoing investigation.

33. When I left Afghanistan two days later, on 8 September 2010, that was my understanding as to the status of the investigation into civilian casualties: that New Zealand troops had been cleared of any wrongdoing but that the actions of the coalition air support were still being investigated.
34. I now realise that the ISAF investigation had, in fact, come to an end on 26 August 2010 and that the "ongoing investigation" mentioned in this email was actually a separate investigation undertaken domestically by the United States. I only became aware of that investigation in the course of reading the AR 15-6 report that was released publicly by the Inquiry.
35. Before I left Afghanistan, I asked Chris Parsons, who took over as SNO in Afghanistan, to secure a copy of the IAT report once it had been completed. With the exception of events referred to in paragraphs [39] to [41] below, I had no further involvement with the matter from this time.

New Zealand investigation

36. We did not conduct our own separate, formal investigation into these allegations. Had I felt the need to do so or been directed to do so, I would have conducted a

Court of Inquiry. Such a step would require additional resources as it is a big obligation, but it is done when necessary. I imagine that if the IAT report had concluded that our troops were responsible for any civilian casualties, we would have been directed to conduct an Inquiry.

37. In Afghanistan we were a small part of a large coalition of international partners. By 2010, ISAF had a number of operating procedures and mechanisms for responding to allegations of civilian casualties, including the Incident Assessment Teams and a Civilian Casualty Tracking Cell. It is within that context that ISAF, together with representatives from the Afghan Government, investigated the reports of civilian casualties arising out of Operation Burnham, and issued the IAT report.
38. As I've said, we were taking steps to investigate what had happened. And although we did not need to conduct our own formal investigation, ISAF's procedures and mechanisms were applicable to New Zealand forces because we were part of the ISAF coalition and our operations were ISAF operations. In that sense, ISAF's investigation was our investigation too.

Native Affairs programme - July 2014

39. On 1 July 2014, the day after the Native Affairs "Collateral Damage" programme went to air, I was contacted by either the Chief of Staff of the Office of the Chief of Defence Force, Ross Smith, or the then Director of Special Operations, Jim Blackwell, to ask about the IAT report. I believe I was asked whether I had seen it and whether I had obtained a copy of it.
40. In response, I forwarded to the DSO my last email on this issue, namely, my email of 6 September 2010, at 1:32am (see the Bundle at p 241), which attached the ISAF exchange of emails. That email showed that, at that point in time, we believed that the IAT investigation had not yet come to an end.
41. I flew from Auckland to Wellington the following day to meet with Ross Smith to discuss this matter further. I do not recall what we discussed but I understand that Ross Smith has made notes from that meeting.



Rian Geoffrey McKinstry

13 September 2019

Date

