

UNDER

THE INQUIRIES ACT 2003

IN THE MATTER

**A GOVERNMENT INQUIRY INTO**

**OPERATION BURNHAM AND RELATED MATTERS**

**Date of Hearing:** 17 September 2019

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**TRANSCRIPT OF PROCEEDINGS**

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TUESDAY, 17 SEPTEMBER 2019

SIR TERENCE: Good morning everybody. Just to check, the issue about the diary notes has been sorted?

MR RADICH: It has been Sir Terence, and the only point is to remove phone numbers, which I think is being done. So thank you for that, otherwise it's all in.

SIR TERENCE: Good thank you very much, that's great.  
All right we'll get underway then. Thank you.

**COLONEL RIAN GEOFFREY MCKINSTRY (Sworn)**

EVIDENCE-IN-CHIEF BY MR RADICH

MR RADICH: Thank you Colonel McKinstry, now your full name is Colonel Rian Jeffrey McKinstry?

A. Yes.

Q. And you are the Special Operations Component Commander with the Special Operations Command of the New Zealand Defence Force?

A. Yes.

Q. You have a Brief of Evidence before you, do you have your brief there?

A. Yes I do.

Q. Thank you very much, if you'd read it out to the Members of the Inquiry please starting at paragraph 2?

A. Sure.

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 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 New Zealand Special Air Service, between 2013 and 2015. While in the NZSAS I was deployed to Kuwait, and to Afghanistan on a number of occasions.

I have a Master's Degree in International Relations from Deakin University Australia, a Master's Degree in Strategic Studies from the United States Army War College, and a New Zealand Diploma in Business.

In 2006 I was made a member of the New Zealand Order of Merit for leadership on operations in Afghanistan.

22 August 2010:

In August 2010 I was the Senior National Officer (SNO) of the NZSAS in Afghanistan. I exercised National Command in theatre.

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. And behind the row of workstations were some chairs where I was seated alongside the then Chief of Defence Force, Jerry Mateparae.

Q. And just pause there, excuse me for a moment, and I think you are looking to make an adjustment to your evidence there Colonel McKinstry by deleting the balance of that sentence, "and the then Minister", is that the case?

A. That's correct.

Q. Thank you.

A. There were at least three other people in the room: An Operations Officer, a Signals Officer, and a Joint Tactical Air Controller or JTAC who communicated with the person controlling the unmanned aerial vehicle (ISR) that was above Tirgiran throughout the Operation.

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.

The Operations Officer kept a written log of what he observed on the ISR screen, which was later used to draft the Operation Summary.

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:

I was aware that the NZSAS marksman, located on the ridge with the Ground Force Commander, 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.

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.

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.

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 Ordinance Disposal team, the team that searched the buildings, and the Ground Force Commander's team - to conduct a "hotwash".

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.

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.

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 AH-64s and the AC-130.

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.

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 10.20 pm, and 25 August 2010, at 5.33am, "wildly inaccurate" and "still very raw". I refer to the bundle at pages 15 and 19.

Q. Just pause there if you will, at your right-hand is a bound bundle, yes, that one, if you could look at those pages

please, 15 first of all? Do you see the email that begins "Monday 23 August 10.20pm"?

A. Yes.

Q. Is that the email that you're referring to?

A. Yes, it is.

Q. Could we just have a look at it for a moment please, in the first paragraph, would you read out the second sentence please, "around 1500"?

A. This work starts "We have reinforced"?

Q. No, just the one above that if you wouldn't mind, "around 1500 I received"

A. Oh, I'm sorry. "Around 1500 I received reporting that the insurgents had reported that there had been an attack in Tirgiran and that 20 houses were burned and 20 civilians had been killed."

Q. And if you would just read please the next paragraph that begins "Throughout the day"

A. "Throughout the day we had been receiving HUMINT", or human intelligence, intelligence "...from [redacted] and reviewing ISR feeds etcetera so we can fuse together an accurate picture of the true Battle Damage Assessment of the operation. It is early days and reporting is wildly inaccurate. The attached cut is my attempt to let you know what we have at this stage from the human intelligence side."

Q. Just pause there, you refer to the attached, would you turn over please to page 17, is that the attached document?

A. Yes, it is.

Q. And just if we could look at this for a moment, in the first paragraph would you please read out the second sentence, "Reports have indicated..."

A. "Reports have indicated that a number of Taliban insurgents and a small number of civilians, most likely family members, have been killed or wounded. At this stage the reporting is from uncorroborated human intelligence."

- Q. Could you explain the two words please, "uncorroborated human intelligence"?
- A. What that means is that we don't necessarily understand the sources and we have to work with our partners and those who are managing the sources to understand the reliability of their claims.
- Q. All right. Thank you.
- And as you look at the table on that page, can you explain just what that is in general terms?
- A. Sure, there's four columns. There's those that we believe are likely killed. Those that are possibly been killed, and that would be a differentiation potentially on how well we trust the intelligence that we've received at this point. And then likely injured, and then there's a missing column. And this is our first attempt to start to populate what we think we know into some semblance of order.
- Q. Okay. Can you tell me generally the level of information you would have received at this stage to create a table of this sort?
- A. It would be anything from, as I say, some uncorroborated human intelligence reports, other sources of intelligence, open source reporting, and what our partners are reporting, including what we've reported coming off the target, and so what we think we know and sort of starting to try to put together into a picture.
- Q. Yes. And would a table like this remain in this form or what would happen to it subsequently?
- A. Subsequent to this what would occur is that we would continue to monitor the sources, look for more sources, start to put things together, including flying ISR over the objective some more to understand what we're saying and what we're hearing and to --
- Q. When you say "flying ISR over the objective", would you just explain a little more?



A. Sure, including following -- follow-up missions where we would look from above at the objective area. We were observing a funeral at one point. And these are sorts of things to start to see whether or not what we're hearing of killed and wounded on the objective is aligning with what we're seeing on the objective, what's happening in the hospitals in the region and the likes, yeah.

Q. All right, thank you for that.

Now can I take you back to page 15 please, we were looking at your email, and you'd dealt with the sentence that referred to the attached cut, and would you mind reading out please, if you go down from that sentence to the next, two sentences further on that begins, "I am anticipating that"?

A. Sure.

"I am anticipating that early reporting and insurgent information operations may get some people excited about the conduct of the operation and the outcomes, particularly where reporting of any possible non-combatant casualty reporting is concerned, as this is likely to contradict reporting that all those engaged by friendly forces were insurgents. I want to reassure you that establishing these outcomes is my highest priority. At this stage I have yet to establish any action by friendly forces that would indicate a less than robust application by the Rules of Engagement."

Q. Thank you Colonel McKinstry. So if we can go back to your Brief of Evidence now and begin at paragraph 20.

A. The information was inaccurate and at this early stage, because some of the information was obtained from open sources, some of the sources of human intelligence (that is 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.

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, and you see the bundle at pages 15, 19, 27, and 31.

Q. And we referred to 15 and 19, could we go please to page 27 of the bundle?

A. Yes.

Q. Oh I'm sorry, I've just been -- we haven't done 19, could I ask you to look please at 19?

A. Sure.

Q. Do you see page 19 there?

A. Yes.

Q. And this is an email chain. Could we start from the bottom please, which is on page 20?

A. Yes.

Q. And can you describe please the email at the very bottom of the chain and who it's from?

A. So this -- it's from is redacted.

Q. Oh yes.

A. But I would consider that would be from the Intelligence Officer for the task force.

Q. Yes.

A. It says:

"Sir, please find attached update 2. We will continue to monitor reflections over the next few days, then we will possibly be able to make a final assessment."

Q. And if you look at page 21, is that the update?

A. Yes, it is.

Q. Can you please, just looking at this describe, having had regard to the update we looked at a moment ago, what is changing?

A. What we're seeing changing, and if you allow me just to reflect back?

Q. Yes please, back to page 17?

A. We're seeing a number of extra names being moved to the likely killed list.

Q. Yes.

A. We are seeing the injured has changed from "likely injured" in the first update, to "injured" in the next update, we're seeing a few more names on that. And we're starting just to see effectively a few more names appearing on this list as we have understood a little bit more.

Q. Yes, and if you have a look please at the paragraph immediately under the table, if you cast your eye over that, could you explain what is being said there?

A. Would you like me to read it?

Q. Perhaps you read it first, thank you.

A. "[Redacted] have reported that the remains of four men have been recovered on a hillside near Tirgiran village. Two of them were the sons of [redacted] and one was the son of [redacted]. The fourth individual remains unidentified. [Redacted] were unaware of the actual names of the deceased, but confirm that all four were insurgents under the command of Abdul Kalta.

Q. Thank you. All right, if we go back to the email chain please which began on page 20?

A. Yes.

Q. And if you look then at page 19, who is this an email from?

A. From Wātea Senior National Officer, which was myself.

Q. Yes.

A. And it's looking to the Director of Special Operations, DSO.

Q. All right. And would you please read the second paragraph which begins -- there are a number of redactions I know, but it begins "Tonight we".

A. "Tonight we, myself [redacted] Ground Commander, Corporal [redacted] JTAC and [redacted] attended a VTC meeting with

Major General [redacted] from ISAF Headquarters DCOSPA". And I couldn't recall for you what that job title would be "Also involved in that videotel conference was the IJC Ops Chief, ISAF SO FOPS, and Brigadier General [redacted] US Air Force IJC Air Plans Project Officer. The aim of the videotel conference was to establish the facts as they are known around the conduct of Objective Burnham. The meeting was convened to keep key ISAF leaders apprised of this Afghan claimed CIVCAS event."

Then there is a large redacted part.

"Not an easy task, and I understand that in the past a payment may not necessarily mean an acknowledgment of fault, rather a strategy of counter insurgency to do the right thing if the facts are unclear. Over the past 48 hours the Task Force has worked hard to develop post-action product to understand our actions and those of other contributing forces. This definitely played out well with [redacted]".

Q. All right, I think we can leave that one there.

And then if we just deal with the last two in this paragraph, so 27, do you see the email there?

A. Yes.

Q. Who is that an email from?

A. That's from myself to the Director of Special Operations.

Q. Thank you.

And if you would please just read it out, it's short?

A. "Hi boss, a little more clarity today has emerged, see attached brief. No word yet on when we might see the gun tapes. We will keep tracking that. Otherwise, there are no significant developments to report today."

Q. And if you look please at page 29, is that the attached brief that you refer to?

A. Yes, it is.

Q. And looking at that, and also flicking back to page 21, are you able to describe what is happening with the information, how it's developing?

A. Well yes, I can describe that the names in the missing column have all disappeared, because we think we've accounted at this stage for those that we -- particularly Abdul Kalta, and Naimatullah, because we were very interested in the location of those two, so at this point in time I believe we've accounted for their whereabouts. We are seeing the what's happening, most of the names in the "possibly killed" line have moved across to the "likely killed" line, or been, or to the injured line.

Q. Yes. Below the table, would you please read the first two sentences, in fact -- yes, the first two sentences?

A. Yes:

"Reporting has been received from four sources plus intelligence pass from [redacted]. All sources are assessed as being Charlie 3."

Q. And please just explain what Charlie 3 means in "C3".

A. Yeah, it's specific to the human intelligence and the information that the intelligence team would be processing. It's a level of surety of how accurate we think the information is at. So there's a -- one axis has alpha through I think it might be delta or echo, D or E. And the other axis has numbers 1 through 5. So an alpha 1 source would be very very highly regarded and believable. Whereas an Echo 5 source would be --

Q. The bottom of the list?

A. Probably wouldn't trust that information. So Charlie 3 is sort of a middling assessment.

Q. All right. Thank you.

And would you please read the last sentence on page 29, "A report"?

A. "A report from [redacted] states that only one civilian may have been injured and that all others killed/injured were insurgents."

Q. Thank you.

If we go to the next and last in this chain please at page 31, if we start at the bottom of that chain, which begins on page 31, can you see who that is an email from and to?

A. From myself, Wātea Senior National Officer to Headquarters NZDF Director of Special Operations and to Chris Parsons.

Q. Yes. And if you have a look at the email itself, could you just please read the first two paragraphs?

A. "There have certainly been some developments today. Firstly, yesterday I put you wrong in that I stated an investigation was being conducted. In fact, what has been occurring has been an IAT, Initial Assessment Team, has been convened to look at the operation and decide if an investigation into a CIVCAS incident needs to occur. Yesterday the IAT interviewed the District Governor of Tala wa Barfak [redacted]".

Q. Yes thank you. I think we'll come to the balance of this email later in your brief, but just to have identified it now, thank you.

So if we go back to your Brief of Evidence please at paragraph 22.

A. 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 page 43.

Q. If we have a look at that please, do you see the email there?

A. Yes.

Q. And can you tell us please who it's from and to?

A. From Wātea Senior National Officer, that's myself, and to --

Q. It doesn't tell us?

A. It doesn't tell us. But looking at that I believe that would have been to the Director of Special Operations.

Q. All right. Would you look please at the first paragraph you can see there, and if you'd read that first paragraph out "I have also included..."

A. "I have also included the post-op report from Objective Burnham and the latest INTSUM. I do not think we will get much more fidelity on the Battle Damage Assessment. The

Incident Assessment Team has produced a report on this op [redacted] on the issue of CIVCAS claims. The report has found that there is no case to answer for Task Force 81 here. One AH-64 had a gun that was not firing true and if any CIVCAS has occurred it is here that any blame will probably lie.

Q. And then just the beginning of the next paragraph that you can see?

A. "This type of CIVCAS claim is not new and is an insurgent strategy to undermine ISAF operations. Regional Command North are holding a Shura with District Governor on this tomorrow with IJC representation as well to try and get further to the bottom of this."

There is a redacted part, and it reads:

"I have asked for a copy of the completed report from IJC and will forward this when received."

Q. Thank you, you mentioned the word "Shura", S-H-U-R-A, could you just tell us what that is?

A. Now I don't want to get the exact understanding wrong.

Q. No, generally speaking?

A. But as I understand it to be it's an Afghan word for a meeting.

Q. Yes, thank you.

And just to identify it please, would you look at page 45?

A. Yes.

Q. Is this the post-op report? No?

A. No.

Q. No, all right. Thank you. No we'll leave that and come back to it.

Okay, so if we can go back please -- can I ask you please, yes, to go back, let's do this while we're here, to page 33?

A. Yes.

Q. And can you identify this document?

A. Yes.

Q. And would you explain what it is please?

A. I think this is our -- I believe this to be our final summary report that I was referring to when I say that I don't think we're going to get any more clarity.

Q. I see. And looking back, just to clarify for the record, is that your email on page 31?

A. Yes.

Q. Thank you.

So now back to your evidence please at paragraph 22 -- in fact, I think we were part-way through 22, can you begin please at the second sentence?

A. 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:

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.

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 and I was also aware that claims of civilian casualties are sometimes made for the purpose of seeking financial compensation from ISAF.

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 and see the bundle at page 15.

Q. We've gone to that one, so please just carry on.

A. The following day, on 24 August 2010, I, together with the Ground Force Commander, 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.

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.

This is what I relayed back to the DSO from that meeting, in an email of 25 August 2010, at 5.33am and see the bundle at page 19.

Q. And if you just, without going to the bundle, read the extract which you didn't read earlier?

A. Okay:

"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 Task Force 81 actions. I am confident our actions and tactics on the objective were sound and in accordance with Rules of Engagement, Laws of Armed Conflict and the Commander ISAF's 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."

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 AH-64s and the AC-130. I reported back to the Director of Special Operations 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 page 31

Q. And if you'd read that quote which we didn't read earlier?

A. Okay:

"All in all for Task Force 81 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, (possible CIVCAS caused in potential accidental impact of rounds onto house identified in slide 1) ... any CIVCAS caused by the Air Weapons Team 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 Task Force 81 and now having reviewed the tapes, we are both reassured that Task Force 81 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 AH-64 weapon problems rather than incorrect application of force."

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.

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 AH-64's gun not firing true. I asked the Commander if he could send me a copy of the report once it had been completed and I refer to my email of 30 August 2010 at 6.59am, which is in the bundle at page 43.

Q. And we've looked at that, so we'll carry on.

A. 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 and see the bundle at pages 57 and 59.

- Q. Just have a look please at those pages, first of all at page 57.
- A. Yes.
- Q. Do you see the email there and can you explain please who it's from and to?
- A. Yes, it's from myself and it's sent to the Director of Special Operations, the deputy Director of Special Operations, and it is cc'd to the liaison officer that I had established within ISAF SOF Headquarters and to -- I've cc'd myself in that email.
- Q. All right. Thank you.
- And would you read the first sentence of it please? You can use the name.
- A. It says:
- "Chris Parsons is here. The handover is progressing okay. We head to Bagram tomorrow, then in the pm [the afternoon] I will transfer authority to him and he will have the CON [meaning control] from 07:00:01 local."
- So that's from midnight.
- Q. Yes. And when you say "handover", what do you mean by that please?
- A. Chris Parsons and I had been undertaking a command handover whereas the Senior National Officer, I was coming to the end of a seven month tour and we spent -- I can't recall the exact time, maybe four or five days handing over responsibilities, including all the things that I was working on, so that he could carry -- you know, try to be as seamless as possible in the transition from one commander to the other.
- Q. All right, thank you very much.
- And would you please just read the first two sentences I think in the next paragraph "attached is".
- A. "Attached is the latest correspondence we have received on Objective Burnham. This email from [redacted] the ISAF SOF CJ3 to [redacted] commander ISAF SOF confirms that [redacted] Commander ISAF Joint Command has been briefed on the findings

of the Initial Assessment Team and he concurs that Task Force 81 has no case to answer. ISAF SOF will be taking no further action in this matter. However, there may still be some fallout for the aviation elements. [Redacted] continues to monitor the status of the IAT report, and we are looking to get a copy of this report when and if it is released."

Q. Thank you, and just stop there. The next email you referred to in paragraph 32 is on page 59?

A. Yes.

Q. Just to identify, do you see it there and can you describe who it's from and to?

A. Which part, because it actually moves through a whole number of people?

Q. Yes it does, so if we start at the bottom please of the chain, on page 60?

A. So, at the bottom of the chain it's from the ISAF SOF Operations Officer to the ISAF Joint Command Legal Officer, Legal Ops Law. And it's reference to the civilian casualty investigation of TF81.

It then moves through from then to -- it's then sent from the ISAF Legal Operations Law to the ISAF SOF Operations Officer.

Q. Is that at the top of page 60?

A. That's at the top of page 60.

Q. Okay, thank you, then you go back to 59 please and carry on the explanation?

A. And then back to 59, it goes from the ISAF SOF Operations Officer to the ISAF SOF Commander, Brigadier in Command of ISAF SOF. And it's cc'g the Deputy Commander and the Task Force 81 Liaison Officer in ISAF SOF.

It then goes from the ISAF SOF Liaison Officer is sent to the Task Force 81 Officer Commanding, and myself, and it is cc'd to our operations room and our Intelligence Officer.

Q. Yes, thank you.

- A. And then the last email is me asking them to send it to me on a system that I can send it back to New Zealand.
- Q. All right thank you. Looking at page 59 at the probably the third email down, so you see "Please send it to me on ..."?
- A. Yes.
- Q. And then one below that, and then one below that again with some text, could you just read that text please? "Sir, an official..."?
- A. Yes, it says:  
"Sir, an official update on the civilian casualty allegation against Task Force 81. LEGAD [or legal advisor] has confirmed that [redacted] has been briefed on the IAT findings and agrees that Task Force 81 have no case to answer. It appears that the air support aspects of that op in Regional Command North is part of an ongoing investigation. No further action from ISAF SOF".
- Q. And when the phrase "ongoing investigation" is used, can you help us with your understanding of what that meant?
- A. My understanding at the time was that because we hadn't seen the IAT report yet, that that was still part of the IAT process.
- Q. I see. Thank you.  
All right, now we move back please to your Brief of Evidence at paragraph 33.
- A. 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.  
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 AR15-6 report that was released publicly by the Inquiry.

Before I left Afghanistan, I asked Chris Parsons, who took over as Senior National Officer 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:

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.

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.

As I have 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:

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.

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 page 241), which attached the ISAF exchange of emails.

Q. Just pause there please and have a look at page 241. And can you just identify the email and explain who it's from and to?

A. It's from me, and it's sent to the Headquarters NZDF DSO, the Director of Special Operations.

Q. And if you'd just read it please?

A. It says:

"Hi DSO, for your information, email was written by myself on the last few days in theatre on 6 September 2010. I have highlighted the place where it states we are still waiting for the IAT report. The attachment also shows that as of 3 September, ISAF SOF were still awaiting the findings also."

Q. Thank you, you can just leave it there.

And then paragraph 40, the last sentence please?

A. That emailed show that, at that point in time, we believed the IAT investigation had not yet come to an end.

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.

#### CROSS-EXAMINATION BY MR ISAC

MR ISAC: Colonel, at times I might simply refer to you by your surname. I mean you no disrespect; it's just I don't want to mangle your appropriate rank.

A. That's fine.

Q. I'd like to begin by talking about the first of the ISAF press releases, and if you're not sure about what I'm asking you at

any time, you tell me and I'll take you to a page and show you what I'm talking about, but just by my overview, you would agree with me that there are three press releases that are available that were issued by ISAF in relation to the operation?

A. Yes.

Q. And the first one, I believe, is dated 23 August 2010?

A. Yeah, I'd have to -- yeah, refer that.

Q. Take that from me perhaps? And, do you recall that they drafted that initial press release? It was actually available to Task Force 81 to the SAS unit prior to the operation?

A. I recall that we had a draft press release prepared, but it wasn't in relation to civilian casualties, that I can recall?

Q. No. No, that's right, and we'll come to it in a moment, but that press release, was that prepared presumably by your unit, because it was your operation?

A. No, we didn't have specialist information operations staff. ISAF SOF maintained an information operations team and it will have been done at our request as we did the joint planning for the operation.

Q. Yes. Right, so it was an ISAF --

A. Yes.

Q. -- draft, if you like, that was provided to you prior to the operation?

A. Yes.

Q. And what was the purpose of providing it to you before the operation? Just simply FYI, or was it actually so that you could check it, correct it?

A. Yeah, the process of preparing for an operation like this is very collaborative. The plan is to be briefed, before it can be approved, to the Commander of ISAF SOF and to the Operations Chief at ISAF Joint Command. So, we have to be clear that we cover off on every element of the planning cycle, and that includes information operations.



- Q. So, just as a slight digression, you confirm that, effectively, the SAS fell under the Special Forces umbrella within ISAF over there?
- A. Correct.
- Q. And so, while ultimate command of your unit rested with the CDF back here in New Zealand, effectively, you were working for ISAF's Special Forces as a group within the broader ISAF umbrella?
- A. Yeah, that was a critical element of the role of the Senior National Officer, was to be able to straddle what was happening within ISAF and also that national command line to ensure that Task Force 81 operations were aligned with the theatre plan, but also with the freedoms and limitations that were placed on us by our Chief of Defence Force.
- Q. Sure. If I can just refer you please to the large bundle in the ring binder, and turn please to page 4, 5, and 6. Just take a moment to have a look at that email exchange. You would confirm for me that this is an email stream from Sunday the 22nd of August 2010?
- A. Yes.
- Q. And this exchange is actually occurring before Operation Burnham begins, at 12.30am -- oh sorry, am the following day, the Monday morning?
- A. Yes, it's at the conclusion -- immediate conclusion of the operation.
- Q. So if we look at the bottom of page 4, we've got an email from Chris Parsons. He is the Commanding Officer of SAS back in New Zealand at that time?
- A. Yes, he was.
- Q. And he is emailing Wātea ops. That's your Operations Officer based in Kabul?
- A. Yes.
- Q. And he's emailing you?
- A. Yes.

Q. And this is at 12.22am on the 22nd of August, so eight minutes before the Chinook helicopters are landing in Tirgiran Valley?

A. I don't -- I couldn't clarify for -- that for you without sort of seeing the two timelines, but I'll take your word for it.

Q. Well, looking at the date on the email?

A. Yes.

Q. And the time 12.22am?

A. Yeah, so there's the crossover -- there's -- the different time stamp depends what location the email is written from.

Q. Yeah. So, you're quite right. So Afghan time, if you like --

A. Yes.

Q. -- this is the 21st of August?

A. So that point there, yes. That email from Chris Parsons to us will be during the -- as the operation is commencing.

Q. Yeah, and this is Chris Parsons saying, PM advised of kick-off, and has acknowledged?

A. Yes.

Q. So the Commanding Officer is briefing the Prime Minister on the operation at that time?

A. It may well have been; it could have been through Director of Special Operations or through the Chief of Defence Force -- no, correction -- or the Vice Chief who had been back here in New Zealand.

Q. It's unlikely that PM refers to anyone else, is it?

A. No, that would be the Prime Minister, yes.

Q. And then, we can see further up in that stream, so later on that morning, now 4.08am, it would be the 21st of August your time. So the Chinooks have taken off from the valley by this stage --

A. Yes.

Q. -- after the operation? And this is your CO, Chris Parsons, emailing your Ops Officer and you, as SNO, saying "know you're busy, but if you could advise of when tonight's activities hit the international Afghan media that would be useful. We're monitoring New Zealand media at this end. Hoping we still

have a fair amount of time up our sleeves, but also need to stay ahead of the power curve this end."

Do you know what he was referring to when he refers to the power curve?

A. Yeah, I would -- my read, when I read that, how I would understand that, is that, particularly with an operation like this one, with the recent death of Tim O'Donnell within three weeks of this, is that there's the potential -- we were assuming that had the potential for this to hit the media and be -- and move quite quickly, and we would want to be sure that we are not late with the information for those that would need to present the information.

Q. Sure. And then, at the top of the page, page 4, you have emailed Chris Parsons, copied in the DSO, that's Peter Kelly, at that time?

A. Yes.

Q. And you've attached an ISAF news release?

A. Yes.

Q. And you are saying:

"Hi Chris, as requested this is coming out today. Rian"?

A. Yes.

Q. Now, if you turn over the page, the draft ISAF news release is at page 6?

A. Yes.

Q. So that's the attachment you sent. I just want you to look at the bottom of that page and confirm that the final words, or sentence, of that is:

"The job of the partner operations will be continuing to actively hunt down these criminals."

It's talking about the targets of the operation.

And then it ends with the words:

"Joint Command Combined Joint Operations Centre Director", correct?

A. Yes.

Q. Now if you flick over the page to page 10 of the bundle.

A. Yes.

Q. This is actually not the draft; this is the actual ISAF press release, and you will see at the bottom of that page, an added sentence that's not in the draft. It says:

"No civilians were injured or killed during this operation."

Just want to get a sense of how that sentence was added, and if you don't know, say so. It's not in the draft; it's in the final release. Do you know who added that sentence?

A. No, I don't know who added it, but it's likely that it was added at the conclusion of the operation.

Q. Right. Is that the sort of thing that you might have been able to add, TF81, or would that have been left in the hands of ISAF SOF?

A. The release of the press release will be from ISAF SOF -- either ISAF SOF or through ISAF Joint Command. It would have been prepared at that level.

Q. Okay.

A. And so they would have been working from our reporting.

Q. Right. We know that there are two later ISAF press releases. Did TF81, the SAS in Kabul, receive a copy of those at any time in draft from ISAF, before they were published?

A. I can't recall. It's possible that we did.

Q. Yeah. I mean, the records that are available now, a decade later, are fragmentary, aren't they? There's no way that you or anyone else at NZDF can be sure that the Inquiry currently has all of the electronic material that was coming to TF81 in Kabul at that time. Do you agree?

A. Could you put that question again, please?

Q. Yeah, I'll put it more succinctly. Sorry, that's quite fair.

The records we have now, the documentary electronic records, are incomplete, aren't they? We don't have everything that was available to you, at the time, eight years ago in Kabul. Do you agree?

- A. It is my -- it would be my position that we've given you everything that we have; if it's complete or incomplete, I'm not entirely aware.
- Q. I'm not for a moment suggesting that you haven't. I'm simply saying that what we have today cannot, by any means, be seen to be a complete record of everything available to you at that time. Would you accept that?
- A. I think that's probably likely.
- Q. And part of the reason for that is that you weren't just using New Zealand's sovereign platform, right? You were using a Coalition platform?
- A. Oh, correct. That's correct, yes.
- Q. And they've had other information stored. Who holds it, whether it still exists, is not something within NZDF knowledge or its control now, correct?
- A. Correct.
- Q. All right, well, I just want to touch on some of the emails that Mr Radich spoke to you about, and the first one I'd like to discuss with you is in that bundle you have in front of you at page 61?
- A. Yes.
- Q. And, just to confuse you Colonel, there are identical emails in both bundles. So there is reasons we have to have duplication. So I'll principally refer you to our bundle, if you like, the Inquiry bundle.
- Now, can you confirm that this email, as you've indicated in your brief, is sent after you've gone -- you'd been summonsed or called to a meeting at IJC?
- A. Yes.
- Q. That relates to the IAT investigation, and this is where you and what -- others perhaps, from the unit, were able to actually view yourselves the AC-130 video footage?
- A. Yes.
- Q. And the Air Weapons Team, the Apache video?
- A. Yes.

Q. A small part -- well, a part of which is available now publicly.

Who did you meet with at that time? You don't have to name names, but was it -- Brigadier General Zadalis has been named in an ISAF press release as being a person associated with the IAT. Was it him, or members of his team?

A. Yes, I believe it was him. If my recollection serves me correct, I think there was also someone from the operations staff at ISAF Joint Command.

Q. Right.

A. A Major General, and then other staff who would form the basis of the IAT team.

Q. And presumably by this point, they've looked at -- they've been analysing this video footage. You haven't seen it yet, and they are -- they're showing you engagements which are of interest to them, in relation to allegations of possible civilian casualties. Is that right?

A. Yes.

Q. Did you have a Legal Advisor with you attending that session?

A. I had a Legal Advisor with me in theatre, but I do not recall if the advisor was with me at the time.

Q. Do you recall who else, don't name them, but do you recall who else from the unit might have attended with you?

A. No, I'm sorry, I can't.

Q. Unlikely you were on your own though?

A. It is unlikely that I was on my own, but it may well have been -- it may well have been the case, because we were busy planning for other operations. If I had of had anyone with me, it would have been the Officer Commanding, the OC, because he was the next person with the most critical understanding of events.

Q. And by this point, the IAT team are essentially telling you what their findings are going to be, aren't they? They've looked at the video; they've carried out largely their investigation, and they're essentially giving you the courtesy

of an indication about an issue that's been located on the video?

A. Yeah, certainly, at that time, it started to become clearer where the CIVCAS allegation may have some real legs, and that also became -- started to become clear on perhaps where the responsibility for that would probably lie.

Q. Sure. And equally, in fairness to you, confirmation that nothing they've seen suggested that there was a direct issue -- a direct issue, if you like, in terms of application of force by the SAS?

A. No, that's correct. I was also able, at this time, to hear the audio for the JTAC talking to the aircraft, which gave me also a very clear sense of what was being said to the aircrafts during the engagements.

Q. Sure. If you turn over the page to page 62?

A. Yes.

Q. You can see below your name "Rian" there are attachment file names. Do you see that?

A. Yes.

Q. One's the INTSUM that you've already discussed with Mr Radich, and then we can see below that, another file name "AWTINSIDPPTX". What I'm going to suggest to you is that that attachment, or attachments, are actually still shots that had been taken from the Air Weapons Team video?

A. Yes, I prepared those personally.

Q. Yeah, and that's consistent with the body of the text, I think there. It escapes me for the time being, but you refer -- oh yes, here we go -- page 62, middle of the first para, you say in parentheses: "Identified in slide 1". Yeah?

A. Yes.

Q. So just having refreshed your memory from that, can you confirm that when you left that meeting with IJC, you were actually provided with a copy of the Air Weapons Team video, the Apache video?

A. No, I think I was emailed it, because there wouldn't have been a situation where I would have been given a disk or a thumb drive for that.

Q. All right, so, however the means of communication, by the time you are writing this email, you've got a copy of the Apache video?

A. Yes.

Q. And that's downloaded -- what, onto the NZSAS system at Camp Warehouse?

A. At some point in time, it would have been taken off the ISAF secret system and transferred across to the NZSAS system.

Q. So from the 26th of August?

A. Yes.

Q. Yeah, all right. So, I just want to come back to the first page of that email, page 61, and you say: "Hi boss and Chris". So this email is going to Peter Kelly and Chris Parsons, CO?

A. Mmhmm.

Q. And we've got:

"Certainly been some developments today. Firstly, yesterday I put you wrong in that I stated an investigation was being conducted. In fact, what's been occurring has been an IAT, an Initial Assessment Team, has been convened to look at the operation and decide if an investigation into CIVCAS needs to occur."

Yes?

A. Yes.

Q. Now, ISAF had been operating in Afghanistan for nearly a decade by that point, hadn't it?

A. Yeah. Yes, nine years.

Q. Eight years, nine years? And, sadly, investigations into civilian casualties by ISAF wasn't a new thing, was it?

A. No, not at all.



Q. Yeah, and what ISAF -- big umbrella organisation, running for eight years -- what ISAF promulgated were documents called standard operating procedures, yes?

A. Yes.

Q. And they're available to all of the Coalition forces, including TF81, your unit?

A. Yes.

Q. And it was a requirement, in fact, that you, as SNO, certainly your legal advisor, would be familiar with what the SOPs provided --

A. Yes.

Q. -- in terms of procedure? And ISAF had a SOP that specifically dealt with how you deal with allegations of civilian casualties and investigations into them, didn't they?

A. Yes, they did.

Q. And you had a Legal Advisor, an acting Major who was available to give you advice about these documents and tell you how they work in practice?

A. Yes.

Q. And what your email there on page 61 is doing is unpacking, for your commanders back here, very accurately, what the process under the SOP was, correct? You have an initial -- or an Incident Assessment Team, carry out a quick assessment, correct?

A. Yes.

Q. If it finds that there is some credible evidence, it has legs, to use your term, then another investigation is commenced after that, isn't it?

A. Yes, however, I would just point to the key part here, where I have unpacked it a little bit and changed it -- the day before I had told them that it was an investigation, and then when I refined my understanding further, I saw that the "I" in IAT didn't actually represent investigation; it represented initial. So that was my attempt to correct that I had told

them it was an investigation, but it's not; it's actually the IAT part.

Q. Yep?

A. But I guess the point would also be that there's informal and formal investigations and this, effectively, was part of an informal investigation process to understand whether a formal investigation had to occur.

Q. I'll put this to you again, Colonel, because what I'm suggesting to you is that your email very accurately explains, in brief terms, what the ISAF process was. IAT. Quick investigation. Try and get to the ground, get the facts; is there something that really needs to be enquired into here? Yeah?

A. Yes.

Q. Quick report. Goes to IJC, yeah?

A. Yes.

Q. And then at that point, IJC will either say there's nothing to see here; there are no CIVCAS, or, mmm, there might be; there needs to be a detailed and thorough investigation into them, correct?

A. Yes.

Q. And that's what your email was explaining to your commanders back here?

A. Yes, I think it probably could have been even more clear than what I was.

Q. Sure, but that SOP that you were summarising accurately here, was no -- it's not a mystery this process, is it, to you, your Legal Advisor, or indeed your commanders back here. They've all got access to the ISAF SOP too, haven't they?

A. I would assume so, yes.

Q. Yeah, because it's essential, operating in that Coalition environment, that you've all got access to the correct framework, the directives, the frag orders and the standard operating procedures, right?

A. Yes.

Q. Yeah. So, if we move then, please, to your email of the 30th of August at page 80, this runs from page -- actually this is a string, Colonel, that goes from page 80 through to 83. Yeah? I want to take you firstly to page 82, if I can?

A. Yes.

Q. So this email is from Wātea SNO, that's you?

A. Yes.

Q. It's not clear, but it says "Gents"; I think before, when you were speaking with Mr Radich, you said that was likely to have gone to the DSO, Peter Kelly, and to the CO, Chris Parsons, right?

A. Yes, they're the standard two I would email.

Q. And just looking at the body of your email, first sentence, we don't need to touch on; it's the second sentence, you say:

"The IAT has produced a report on the SOP", yeah?

A. Yes.

Q. Past tense, produced a report, yeah?

A. Yes.

Q. That's what you'd been told? You've had a discussion, clearly, with someone from IJC to be able to report this, right?

A. Yes.

Q. You haven't seen the report?

A. Haven't seen it yet.

Q. But you've been told they've produced it, right?

A. Yes.

Q. And then it says: "The report has found", past tense, yeah?

A. Yes.

Q. ".. that there is no case to answer...one AH-64s gun that was not firing true and if any CIVCAS has occurred it's here that the blame will probably lie." Yeah?

A. Yes.

Q. So, what you've done is you've had a conversation; you've had the briefing on the 26th. You've been given the verbal, this

is the issue; it's not with you. It's with the Apache's, yeah?

A. Mhmm.

Q. And then by the 30th, you'd been told, we've written it up; we've issued the report. Right?

A. Yes.

Q. And you are reporting that back to commanders back here. So they know that the IAT investigation is complete, report has been produced, and it's from that point that you, and then Chris Parsons, are trying to get hold of that IAT report, right?

A. Yes.

Q. Yeah. So, I'll come back to this email a little bit later, but will you confirm that what you are reporting here, about the process, that the IAT report's been prepared, it's been produced, and that the report has found. That's entirely consistent with the process as you understood it, and explained it on the 26th. IAT first, if it has legs, into another investigation, right?

A. Yes.

Q. And it's also consistent, isn't it, with the ISAF press release that was basically issued simultaneously, which is at page 83 of the bundle, yeah?

A. Do you -- I'd have to read that to confirm, or I could take it from you that it's consistent.

Q. Well, have you read that ISAF press release? It's the second one.

A. I have; I have previously.

Q. Yeah, and again, it's in past tense, isn't it, saying that there has been a full assessment carried out?

A. Yes, that's consistent.

Q. Yeah. Yeah, so the short point is your email saying they've issued a report, ISAF press release saying, we've carried out the investigation; this is what we've found, right?

A. Yes.

Q. You accept that. Just in terms of this investigation process, yeah, IAT, first preliminary investigation, then a national investigation is usually commenced, yeah? That would usually be undertaken under the national command of the country whose armed forces were suspected of having caused civilian casualties. Is that fair?

A. Yes.

Q. And the most common form of a national investigation, for the US, was an investigation called an AR15-6, wasn't it?

A. I have learnt that subsequently, yes.

Q. All right. The name of their investigation, the name of the report?

A. Yes. Yes, I've learnt that an AR15-6 is, as I understand it, to be similar to what we would call a Court of Inquiry.

Q. Right, yeah. So I'm going to take you now then to the email at page 80, this is part of that string, and the name of the person who it's from has been redacted?

A. Yes.

Q. I can indicated to you that it's a Sergeant Major within the unit, right?

A. Yes, I know who's written this email.

Q. Okay, and it's sent to Chris Parsons?

A. Yes.

Q. And you?

A. Yes.

Q. And we can see now it has an attachment, doesn't it, CIVCAS media?

A. Yes.

Q. And in fact, that attachment is what we see at page 83, all right, which is the ISAF, the second ISAF press release of the 29th?

A. Yes.

Q. Which basically indicates that errant rounds had struck buildings and there may have been civilian casualties?

A. Yes.

- Q. And what the Sergeant Major says, "Gents, the attached report" -- that's the ISAF press release, second one, "Differs from Rian's feedback below re Objective Burnham. And therefore, any CIVCAS is yet to be proven"?
- A. Yes.
- Q. What was the Sergeant Major getting at? What was he trying to say with that comment?
- A. I think what he's getting at is a general feeling amongst those involved in this operation, is that it's one thing for the allegations to be made, and it's another thing for the allegations to be proven, and this is an individual who's spent many many tours in Afghanistan, very experienced in the environment, and who understands the nature of how sometimes these allegations can be made, and so, it's very much -- the way I read it, very much focused on the proven aspect of it. It's not to say that they may or may not have occurred.
- Q. Can I put it to you, the way I suggest, and you can just agree or disagree? It's an indication of some doubt about the ISAF press release, isn't it?
- A. No. No, no, I would disagree. It would be a doubt with some of the content, particularly around the allegation, as whether it's proven.
- Q. Well, it says, "The attached report differs from your feedback". So, he's saying what ISAF are saying is different from what you're saying. Isn't that doubting what the ISAF press release says?
- A. Well, yes. I guess I would agree with that, an element of it.
- Q. All right, well, can we move then to the email on page 84 of the bundle, which is just over the page? So this is an email from Peter Kelly, the DSO?
- A. Yes.
- Q. It's on the 31st of August, so these are all in New Zealand dates by the look of it, so 30th of August in Afghanistan calendar. And it's to you?
- A. Yes.

Q. The XO, is that the Executive Officer?

A. X -- that is potentially the Executive Officer of the SAS regiment, I believe.

Q. Okay, and then the DSO, which is the Deputy Director of Special Operations, who was Karl Cummins at that time?

A. Yes.

Q. And then, is there another address, HQ NZDF?

A. Yes, that is our Special Forces Liaison Officer in the Joint Headquarters.

Q. Right.

A. Here in New Zealand.

Q. In New Zealand?

A. Here in Trentham.

Q. And the headline, the subject is "CIVCAS reporting by international media". The attachment is the CIVCAS media file, which is the ISAF press release we see on page 85, yeah?

A. Yes.

Q. And it's -- the text of it is:

"Rian, this doc [so the ISAF press release] refers to an interview given by [and we know who it is because he's named in the press release, but it's been redacted. It's Major General Zadalis, Brigadier General] about the findings from the assessments into the op in Tala wa Barfak. MFAT picked this up off the wire this morning. Given that he's speaking publicly can we now expect to receive a copy of the assessment or at least a copy of the findings [past tense] so we can report back to the Prime Minister", is it?

A. Yes.

Q. "Minister of Foreign Affairs and the Minister of Defence. They are quite excited [that should probably be quite exercised] by this, and are very keen to hear the official outcome." Yeah?

A. Yes.

Q. So, this is an indication of concern at a government level about an ISAF press release, not about TF81 having been

responsible for civilian casualties, but actually about the AWT being responsible, yes?

A. Well, about the understanding of the entirety of the report, is how I would understand that.

Q. Yeah. What it indicates is that, in terms of understandable concern from Government and possibly the public, the issue wasn't just whether TF81 directly had been responsible, may have been responsible for civilian casualties. It would certainly be a concern if it was a New Zealand operation inventory Coalition partner had been responsible for possible civilian casualties. Do you agree with that?

A. Yes. Yes, I agree.

Q. And then, "CF updated them last night", and then, "Grateful if we can get our hands on the report sooner rather than later". Yeah? "ie the next 24 to 48 hours please."

So, disagree with me if you think I'm wrong, but doesn't this indicate that Peter Kelly understands there's a report; it's been completed. Get a copy please urgently, and that's essentially the message?

A. Yes, and that's what I understood too.

Q. All right, well, can we just touch briefly on the 6 September email that my learned friend Mr Radich touched on, page 92 of the bundle? So this is really, you're wrapping up now. This is, you know, the final report and checking out, essentially, isn't it?

A. Yeah, I think it's probably my last email.

Q. Yeah, and so this is you emailing the liaison person, I think? Possibly? Certainly, the DSO, the Deputy DSO, and the Liaison Officer, I think? Is that right?

A. Our Liaison Officer at ISAF SOF, who would be the person who's looking out for the report.

Q. Yep. And, there we can see in the second paragraph, you're referring to the attached email that you got from ISAF SOF?

A. Yes.



Q. So it says, "HOM IJC has been briefed on the findings of the IAT". Yeah?

A. Yes.

Q. And then you confirm, no case for you to answer, but then there may be some fall-out for the aviation elements, yeah?

A. Yes.

Q. And then you're talking about monitoring the status of the report and looking to get a copy?

A. Yes.

Q. If and when it's released to you, to TF81. Is that right?

A. So I'm saying, we're still looking out for it, and when we get it, we'll send it.

Q. Yeah, and if we come over the page to 94 and 95, this is the internal exchange between -- is it the IJC legal officer and the ISAF SOF person, who's on the hunt for the report -- well, effectively, you know, on your behalf, if I can put it that way -- and if you look at the bottom of page 94 -- or actually, top of page 95. Let's start with 95. So, bottom of 95, sorry. First email:

"We have the report on whether CIVCAS allegations/incidents to people this afternoon, can you get us some words, where we're at with the result on IAT?"

And then, the reply from the Legal Advisor just above that, top of page 95, "we'll chase it up"?

A. Yes.

Q. And then, bottom of page 94, here we have the Legal Officer emailing again to the ISAF SOF person, who's on the hunt for you, saying "just briefed". All done, yeah?

A. Yes.

Q. So what that Legal Officer is saying is that IJC have been briefed on the findings of the IAT report, right?

A. The way I read it, they've just briefed someone else on the findings of the report, yes.

Q. Yeah, because what would happen is the IAT do the report, and then that has to get briefed to someone in authority within IJC, right?

A. Yes.

Q. That's -- and that's what the Legal Officer is saying there, the findings of the IAT being briefed to someone in IJC?

A. Yep, I agree.

Q. And then the next email is consistent with that "LEGAD has confirmed that someone has been briefed on the IAT findings. No case to answer." And then, there's an ongoing investigation for the air assets, right?

A. Yes.

Q. Not the IAT investigation, the subsequent one?

A. Yes, as I understand it now, yes.

Q. Yeah. Well, that's how you would have understood it at the time, because that was entirely consistent with the ISAF SOF, and the process?

A. Yes, but I wasn't looking at the aviation investigation; I wasn't deeply understanding what was happening there.

Q. Sure. Yeah. What you know is that the IAT is complete; you're in the clear. Aerial assets aren't. They're subject to an ongoing investigation?

A. Yes.

Q. And almost certainly, a national investigation, yeah?

A. Yeah, and as I've explained previously, that understanding of the US investigation process now, yep.

Q. All right, thank you. The -- I just want to touch briefly on some of the intelligence reports that you've already mentioned, and just briefly, if we can summarise how these reports are compiled? So, you had available to you, trained Intelligence Officers and staff, now?

A. Yes.

Q. And they are expert, aren't they? They're the subject matter experts in sifting, analysing, and collating intelligence from a range of sources. Yeah?

- A. Yes.
- Q. Synthesizing it, and trying to discern from it, what's credible and what's not. Is that fair?
- A. Yes, it is. Yeah.
- Q. And those assessments, if you like, in order to be useful, need to exercise a measure of judgement around, you know, something that's ridiculous, patently so, known to be, and something that can be verified because it's consistent with what might be indicated by other sources of intelligence. Is that fair?
- A. Yes, it ultimately becomes the Intelligence Officer's assessment of what that person thinks the information is telling them.
- Q. And before, when you were answering questions with Mr Radich, I think you touched on what's commonly referred to as the Admiralty Code?
- A. Yes.
- Q. And I'm not going to -- I know you're not the Intelligence Officer, but briefly, you have under that code, and it's not a mystery, two forms of assessments for intelligence. Firstly, the reliability of the source of the intelligence. How reliable is the source? And then secondly, the accuracy of the data provided by that source. Is that fair?
- A. Yes, that's fair.
- Q. And the first measure, reliability, is alphabetical, A through to E, or whatever it happens to be, and the accuracy of the information provided by that source is numerical, 1 to whatever. Yeah? And the other thing that might be of some relevance to understand the reports that we have here that have been declassified is that, in the world of intelligence, you're not dealing with -- well, very rarely you're dealing with absolute certainties and truth, are you? You're dealing with probabilities, likelihoods, yeah?
- A. That's correct. Probability and likelihood, yes.

Q. And again, there are standardised and accepted measures of probability, or what are referred to as likely levels of confidence that apply to those assessments?

A. Yes, within our intelligence community, there is. Yes.

Q. And, if you look at page 56 of the bundle, actually the bottom of page 55, and just -- you won't be familiar with this, but I can tell you it's an intelligence summary from the PRT.

A. Mmhmm.

Q. I'm not going to ask you about the content; it's just one small part of it I want to refer you to. Bottom of page 55 is a -- the beginning of a table, and it has the words, "Levels of confidence"?

A. Yes.

Q. And if you flick over the page, it has those levels of confidence. It has "confirmed", which is a probability, or level of confidence, of 95% or greater, yeah?

A. Yes.

Q. "probable", and that's a level of confidence 75 or greater. So that would be between 95 and 75% for probable?

A. Yes.

Q. "Likely", between 75 and 50?

A. Yes.

Q. And "possible", between 50 and 15% level of confidence?

A. Yes.

Q. All right. Well, we also know don't we, that as a non-international armed conflict in Afghanistan, it's an insurgency, the requirements of International Humanitarian Law are such that unless an individual can be positively identified as being part of a hostile or armed group, yeah, so they're continuously attacking, if I can put it that way, that's one of them?

A. Yes.

Q. They're either in that camp, or they're a civilian, but who's begun to directly participate in hostilities, yeah?

A. Yes.

Q. If they're not in either of those two categories, they are presumed to be a civilian, right?

A. Yes.

Q. And they are entitled to all the protections, all of the basic human rights that one would expect in that situation?

A. Yes.

Q. And you don't get in one of those first two camps without a relatively high level of certainty that they should be in there, correct? PID --

A. Yes.

Q. Or DPH, I should say, Directly Participating in Hostilities, or member of an armed group.

Well, if we can just begin firstly at page 13 of the bundle, and you have touched on this already, briefly. But this is a -- what we call update -- update Objective Burnham?

A. Yes.

Q. Prepared by US2, the Intelligence Officer?

A. Yes.

Q. And his team, and at this point, as is noted at the end of the first paragraph, reports at that point are indicating number of Taliban insurgents and a small number of civilians, most likely family members, have been killed and wounded?

A. Yes.

Q. And it goes on to say, at this stage, the reporting's uncorroborated HUMINT, human intelligence. So someone's come in and said this is what's happened, right?

A. Yes.

Q. And then if we look at the paragraph below that, early reflections indicate between four to seven insurgents have been killed?

A. Yes.

Q. Five wounded. Four currently missing. Various names supplied, but again, these can't be corroborated.

And then we have a table. So, we've got likely killed, possibly killed, likely injured, missing, yeah?

- A. Yes.
- Q. And given those levels of confidence we've seen before, the people in the likely column, this is a level of confidence based on that PRT table of between 50 and 75%, yeah, for that? That's what the intelligence officers say at that point?
- A. Yes.
- Q. And the possibly killed it's 50 to 51%, yeah?
- A. Yes.
- Q. Now, these reports, I think as you've indicated before, were important for two reasons, weren't they? The first is you were doing a Battle Damage Assessment, and part of that was finding out have we actually killed or taken off the battlefield Abdullah Kalta, and Naimatullah, right?
- A. Yes.
- Q. Yeah, so identifying, have we removed insurgents from the battlefield, yeah?
- A. Yes.
- Q. And secondly, because of what had arisen by this point in time, is there any intelligence indicated there may have been civilian casualties, right?
- A. Probably more so establishing because we, at that time, had understood that nine -- we had killed nine insurgents, was our understanding. So it was to put our understanding around who we may have killed, and also, with the evolving understanding of a potential CIVCAS, it was putting all of that information together.
- Q. Where did that number nine come from?
- A. That number nine came from our understanding of the engagements, through -- I think that's a refined number. We may have initially reported 13, but then that came from the number of engagements and the -- from the ISR. We had been tracking some of the -- either the insurgents or the DPH personnel, on the ground, and we knew which engagements had been occurring, but we didn't understand -- we thought that maybe 13 killed at the time, but then that becomes refined to

number nine that we think are, killed and four or five that are injured.

Q. All right. Well, it's not nine at this point is it?

A. No.

Q. Because that's not what they're saying?

A. No, the table is quite unlike what our understanding was from observing actions.

Q. Okay. So, if we look at the table itself, everyone who the Intelligence Officer believes can be positively identified as an insurgent has the words -- well, the acronym "INS" but in parentheses after their name?

A. Yes.

Q. And, you know, quite a number of names that have been redacted have INS beside them?

A. Yes.

Q. We have in the "likely killed" someone described as a sister --

A. Yes.

Q. Given what we know about parts of Afghanistan, being a conservative Muslim country. Unlikely that women would be generally considered to be an insurgent, and that reflects that. Is that fair?

A. At that time, yes.

Q. And then we have "possibly killed" individual E and F, and probably assumed that they're males, because they're not labelled as women, or daughters, yeah?

A. Yes.

Q. And we've got the acronym in parentheses, "NFI". No further information?

A. Yes.

Q. And you've confirmed that means we can't positively identify them as an insurgent, right?

A. No, it means we don't know, yet.

Q. And so, in terms of that Law of Armed Conflict that I mentioned before, got to presume that they're a civilian, right?

A. No. No, no, it presumes we have a name, but we don't -- we can't link them to either being an insurgent or designating as participating in hostilities at that time. We need to find out more information.

Q. Okay. You're not suggesting that they're presumed to be an insurgent until proven otherwise?

A. No, I think it's sticking to, we just don't know. So the right approach is to say no further information.

Q. All right. Well, that report you will confirm, you'd send, this is page 11, you send that to the DSO --

A. Yes.

Q. -- on the 23rd. And then, it's also forwarded by you to Chris Parsons, as the CO of the unit, yeah?

A. Yes.

Q. And he's coming into theatre very shortly, so obviously an issue of concern for the unit. Important to keep him informed, both as CO and as the incoming SNO?

A. Yes, that would be the reason for him being in the loop.

Q. If you can now move to page 23 of the bundle. So this is update 2?

A. Yes.

Q. Second intelligence report. Appears to be 24 August?

A. Yes.

Q. Now, rather than relying solely on humans, uncorroborated HUMINT that was referred to in the first update, we can see from the first sentence there that this report's been compiled from various reports from a number of sources, right?

A. Yes.

Q. So the picture is starting to be rounded out, drawing on the intelligence, assets, and information that's available to the intelligence team at Kabul, right?

A. Yes.



Q. Again, repeats that there have been reports of a number of Taliban and a small number of civilians that have been killed or wounded, yeah?

A. Yes.

Q. And here it's saying:

"Early reflections indicate that between six and nine people have been killed, five people wounded, and there are a number, two to four, who are missing." Yeah?

A. Yes.

Q. And then if we look at the table itself, again we've got likely killed, possibly, injured and missing, yeah?

Number of names redacted, but insurgent put beside their names, yeah?

A. Yes.

Q. Possibly killed, though we still have individuals E and F --

A. Yes.

Q. -- yeah, as possibly killed, and then we have sister of, individual in G in the same column?

A. Yes.

Q. Possibly killed. And then in the injured column, we've got possibly, someone daughter of, yeah?

A. Yes.

Q. And possibly unknown female.

A. Yes.

Q. So, again, tables indicating, based on the intelligence with different levels of confidence, that there may be civilian casualties, right?

A. Yes.

Q. And then if we look at the final paragraph, 14 has been received from four sources, plus intelligence passed from redacted, yeah?

A. Yes.

Q. And then it says: "All sources are assessed as being C3."

And you'd agree that that C3 measure is actually quite important, isn't it, because it's essentially the level of

reliability, credibility, that you can use; you should use.  
Is that right?

A. Yeah, it's effectively -- I would see it straight down the middle. It's not certain, but it's not completely uncertain either. So we give some weight to it.

Q. You were involved with the JPEL process while you were over there and how individuals were assessed?

A. Yes.

Q. And you confirm that a level of C3 intelligence was acceptable as being sufficiently credible for the purposes of placing an individual on the JPEL list? If you don't know --

A. It would form an element of the -- one element of the process.

Q. Sure, but what I'm suggesting to you is that the level of confidence in the intelligence, which this office is putting together, is at the same minimum level that can be used to identify someone as an insurgent. Do you accept that, and if you don't know, that's fine?

A. I don't entirely accept that, because I think we're talking about two slightly different applications of the same level of certainty.

Q. Okay. It's the bottom line; I'm not suggesting it's A1, but it's at a level of confidence which is acceptable for a JPEL process?

A. It's at a level where we'd start to trust it, I would say.

Q. All right. Well, so this report, 24 August, this is sent by you, to the DSO, page 21?

A. 21? Sorry, was that page 21?

Q. Yeah.

A. Yes.

Q. And it doesn't appear to have been copied to Chris Parsons, but do you think it's likely he would have got it as CO?

A. If I haven't sent it to him, then it's unlikely.

Q. Would he have access to that information?

A. From -- to this email?

- Q. Well, to the report? I mean, is he hermetically sealed from this stuff back here? So, in other words, does he only get access to it if you email it to him? Or does he have a way into it directly?
- A. No, well this may be as an element of his programme, because if this is -- this is in the period just before he's deploying. So I may or may not have been aware if he was at his desk that day, because obviously he has a day job as well, a family to manage before deploying. So I'm starting to pad, I guess, here a little bit, except to say that if I haven't sent it to him, I would say that he wasn't at his desk, because this is on a classified system. So he can't read it on his BlackBerry while he's with his family or out of office.
- Q. Okay, but if the evidence is that he arrives in Afghanistan about the 1st of 2nd of September for handover, there'd be no reason to believe he didn't have access to all of this information while he was present?
- A. It's possible on the 25th of August that he was at his desk, but it doesn't look like I emailed it to him.
- Q. Okay. Well, perhaps we can go to update 3, which is at page 33, probably move through this reasonably quickly, but this is -- appears to be dated the 25th of August, yeah?
- A. Yes.
- Q. Again, first paragraph of this update confirms that the intelligence is from a number of sources?
- A. Yes.
- Q. Third paragraph, again indicating that reports indicate there had been a number of killed, wounded, or injured to date. In time more accuracy will be put to this list, as it's a priority effort. And then, if we look at the table, we can see individual E and F have moved out of the possibly killed column into the likely killed column, can you see that?
- A. Yes.
- Q. And they're still not labelled as insurgents; they're NFIs, yeah? No further information?

A. Yes.

Q. We've got a sister in the possibly killed, and then, rather than likely injured, we've now just got injured, haven't we?

A. Yes.

Q. Which indicates a higher level of certainty by this point?

A. Yes, I would think so.

Q. And we've got possibly, daughter of, and possibly, unknown female.

A. Yes?

Q. And that report you send to Peter Kelly on the -- what would have been the 26th in New Zealand, probably the 25th of August 2010, yeah?

A. Yes.

Q. Then if we can go to page 37?

A. Yes.

Q. This isn't a PR -- this isn't a TF81 intelligence document. You'll confirm that this is a document which is entitled a Battle Damage Assessment by the NZPRT?

A. Yes, that's what it says.

Q. So this is their own intelligence people doing their own analysis of the intelligence coming off Burnham?

A. Yes.

Q. And they're indicating this is correct as at the 26th of August, yeah?

A. Yes.

Q. If you turn through page 39?

A. Yes.

Q. Again, if you take a moment to orient yourself, you can see the PRT intelligence people have again designated individuals as TB, or Taliban, rather than insurgent in their analysis, but you can see in the probably killed column, a person who is unnamed BOI? Can you see that?

A. Yes.

Q. It just says "Unknown local national", yeah?

A. Is this the top left?

Q. Yeah, under the heading, "Probably killed", the last two entries under that heading?

A. It says local -- I read it as "Local national females", (females). So it's one or more.

Q. Yep, and then to the right of that, it's describing them as "possibly [redacted] daughter"?

A. Yes.

Q. But immediately above that LN females, there's a name that's been redacted, so it will probably be a man, yeah, male, and then it's got BOI. I don't know what that means?

A. I'm not sure either.

Q. And then -- but the description is simply "Unknown local national". You see that?

A. Yes.

Q. Yeah. So that person, male, hasn't been identified as a member of the insurgency by the PRT, yeah?

A. Yes, an unknown person.

Q. And then if we look at the bottom of that page, there's a heading "Conclusion"?

A. Yes.

Q. "Reporting very confused", so it says that, and then it says, "3x Taliban probably killed"?

A. Yes.

Q. "4x Taliban possibly killed"?

A. Yes.

Q. "Several local nationals killed". Yeah?

A. Yes.

Q. And the local nationals are differentiated from the Taliban, right?

A. Yes.

Q. And then, below that, "1 Taliban probably wounded. Several local nationals wounded." Yeah?

A. Yes.

Q. And then if you come over the page, to page 40, we can see a table in the bottom left-hand corner?

A. Yes.

Q. With name and then number of reports, and can you see that names two and three are individuals E and F?

A. Yes.

Q. So this is the PRT picking up the same names that your intelligence people have picked up in their reports?

A. Yes.

Q. And they're -- hopefully, I'm not putting you wrong, individual E, we can see on page 39, is the unknown local national?

A. Yes.

Q. And F is identified as a Taliban member. Is that right?

A. Yes.

Q. And then to the right of that, there's an NZPRT assessment box, and I just want to try and summarise that briefly with you, "4-5 KIA, 3x low level Taliban". Yeah?

A. Yes.

Q. So, disagree if you do, or say you don't know if you don't, but doesn't that suggest that the Intelligence Officer at the PRT is saying that there's between -- been one to two civilian KIA as a matter of deduction? If three of them are low level Taliban, the others, one to two must be non-insurgent civilians?

A. What I would say at that point is that the Intelligence Officer is making an assessment on what they understand from the intelligence. What we were also making our assessment on is what we understand from being on the ground, and actions that placed people in a designated participants in hostilities. Whether or not they are members of the Taliban or the insurgency or their actions at the time are taking them into a position of being DPH, that's a different understanding, depending on how you're looking at the information coming in.

Q. Sure. No, I understand that, and I don't take issue with it, but just coming back to my question, do you agree as a matter

of deduction, logic, that what the S2 is saying is that there have been four to five people killed in action, yeah?

A. Yes.

Q. Three of whom are low level Taliban?

A. Yes.

Q. So, as a matter of deduction, one to two people, on that person's assessment -- I'm not saying it's yours -- that person's assessment, are civilians?

A. No, I think that would be an incorrect deduction.

Q. Okay?

A. Because you're -- it's skipping over an entire class of combatant.

Q. Right. So you're suggesting that it might be someone who is directly participating in hostilities, who hasn't been identified as TB in this table?

A. Yeah, that's what I'm -- and as we've discussed already, we discussed that there were a number of different ways that you could be involved in the insurgency, whether you're a member of the Taliban, or for that period of time, you were conducting actions that placed you in a position in which you would be targeted.

Q. Sure. I accept that this is someone else's document --

A. Yes.

Q. -- and I'm asking you to give an interpretation, and you are?

A. Yeah, so --

Q. I have it?

A. -- I don't accept that.

Q. I have it. Okay. Look if we move then to page 63?

A. Yes.

Q. So, this is a document entitled Intelligence Summary Report, looks a bit different from the op summaries that we've been looking at, and the reason for that, isn't it Colonel, is that this is actually TF81's report to ISAF Special Forces, that's going to be used potentially by a SOF, yeah? HQ SOF?

A. Yes, look, it's not actually titled who it's being sent to. So whether or not it was prepared directly for ISAF SOF, or for our own understanding within the New Zealand community, I couldn't be definitive on.

Q. Just on that page 62, the second paragraph, second sentence, "the INTSUM above has been prepared for ISAF SOF staff"?

A. Okay.

Q. "To prepare a verbal brief for a Brigadier", yeah?

A. Then I will accept that that's how -- why it was presented.

Q. Yep. And then, if you look at page 64, paragraph 7 -- paragraph 6 perhaps first, there's a comment from the S2 embedded in that paragraph isn't there? So saying "Initial reporting from open source intelligence" is that right? "Indicated that up to 40 innocent local nationals had been killed by aerial bombardments" and then the S2 is commenting, "What's assessed to be circular reporting since has perpetuated initial reports of up to four women/children having been killed". Do you see that?

A. Yes.

Q. So, there's a repetition of the same, if you like, material that can get multiplied, but it's still ultimately what the S2 is saying, that three to five people -- sorry, up to four women and children having been killed or wounded?

A. Yes.

Q. Not the 40, yeah. And then at paragraph 7, the reference is made to consolidated reflections, yes?

A. Yes.

Q. And, I mean that's an indication that by now this has been -- this has been highest priority, yeah?

A. Yes.

Q. For the S2 and presumably for you, so a lot more intelligence, a lot more analysis, this is starting to look like really a more final picture in terms of what the intelligence is showing?



A. As final as I think we had the scope to achieve in the context of the Operation, that was Operation Wātea, because we had to sort of draw a line here, because we had a lot of work to do and we needed to -- I needed to reorient the staff towards future and ongoing operations.

Q. Sure. The table, I'm going to wrap up briefly because we're due to have a break I think, the first column no longer says "likely killed" does it? So the previous summaries had the column as "likely". Yeah?

A. Yes.

Q. This is now "probably killed", isn't it?

A. Yes.

Q. So, the level of confidence of the Intelligence Officers is actually shifted up another degree, hasn't it, yeah?

A. Yes.

Q. And here -- so that level of confidence, before the PR table, 75 to 95% level of confidence, we can see, can't we, that within that probably killed table we still have individuals E and F, yeah?

A. Yes.

Q. But they've not been identified as insurgents here, have they? They are still NFI?

A. That's correct.

Q. We have a sister, possibly killed?

A. Yes.

Q. And we have possibly daughter and possibly unknown female injured here too, correct?

A. Yes.

Q. Thank you that may be a convenient point, Sir Geoffrey and Sir Terence?

SIR TERENCE: All right, thank you. We'll take a break for 15 minutes and start again at quarter to.

(Morning adjournment)

CROSS-EXAMINATION CONTINUED MR ISAC

MR ISAC: The intelligence reports, the five reports that we've run through, they were indicating, as they do, the possibility of civilian casualties. That was also consistent with the briefings that you were receiving in theatre from the IAC, IJC team?

A. Yes.

Q. And they were also consistent with the ISAF press release that came out about the time of one of your last reports on the 30th, "May have been"?

A. Consistent in the possibility of, but not consistent with the numbers that we'd understood it to be.

Q. And also, in fact consistent, weren't they, with the viewing you had had of the gun tapes from the AC-130 and the Apache evidence seen, would that be fair?

A. Yes, that is consistent, yes.

Q. Because the video that you were shown, and it's not available to us, certainly not publicly, was able to show rounds from the Apache striking two buildings and those two buildings have been associated with women and children moving around, both before and during the relevant engagement by the Apache. Is that fair?

A. Yes, in the course of my involvement in the IAT, I have seen footage of rounds striking a building, which we would know as the cache house. At various times we saw women and children around that building.

Q. And, I think we touched on, in fact, the still images that you were able to take and send back to New Zealand? I think it was on the 30th of August, from the AWT video. And I just want to touch, if I can, on some of those images, and if you move in the bundle now to page 79?

A. Yes.

Q. And this isn't your document, but you will see if you move through page -- what should be labelled 79A and B, this is an intelligence brief provided by the Directorate of Special

Operations, Peter Kelly's office, effectively, to the Chief of Defence Force?

A. Yes.

Q. Do you confirm that?

A. Yes.

Q. And from 79B, little hard to see, but it's the 31st of August, 2010?

A. Yes.

Q. And if you move through that -- and through the letters, firstly to F?

A. Yes.

Q. This isn't a trap, but just want you to confirm that in the intelligence brief provided to CDF at that time, by Peter Kelly, we actually have the table from the final INTSUM, the ISAF -- sorry, the INTSUM of the 26th of August that we've got at page 63 of the bundle, so that's the final intelligence report?

A. Yes.

Q. That's where the likely killed column became the probably killed, and you will see that's the same with the briefing that happens on the 31st of August?

A. Yes.

Q. And we've got individuals E and F in that table in the probably killed column, sister, and then the injured daughter of an unknown female.

And then from G, page G through I, this is the update on the CIVCAS investigation, and we can see that various comments and reports that you've made to DSO have filtered into the briefing here, and we can see at H and I, these are the images that you've emailed back, have been uplifted and put into the briefing at this point?

A. Yes.

Q. And the image at I, that you describe as the cache house, we've got the image of armed people coming out of the building?

A. Yes.

Q. And then at the bottom of that page, the briefing has a couple of bullet points under PSR redactions. You see those?

A. Yes, I do.

Q. And what the briefing was, the information relayed by the DSO to the CF at that time, 31 August 2010, was, "Rounds from this engagement appear to impact on or over the roof of this house. And this is the likely location if at all that CIVCAS may have occurred. Earlier footage shows a woman and children in and around these houses". Is that what it says?

A. Yes.

Q. And then the point you made to me before, it's important also to note here, that the JTAC commentary, in it he is heard, "Clearing the FR5 with the caveat that there's no collateral damage issues". Yeah?

A. Yes.

Q. And that's essentially the information that you'd conveyed in your emails to Peter Kelly, being briefed up the chain of command to the CDF, yeah?

A. Yes.

Q. As well as the intelligence, as it stands, with the last declassified report we've got in the bundle here?

A. Yes.

Q. Now, those images, and we can see at I a picture of the two buildings, those are the two buildings you confirm that can be seen being struck by rounds later in the operation?

A. Yes.

Q. If I can take you now to the Defence bundle, the other one, the bound one, if you go to page -- around about page 140, I'll firm that up for you in just a moment. Actually, it begins, it seems, at page 90. Just to orient you, 89, 90, this is the AR-15 report, isn't it? The start of it?

A. Yes, it looks -- it appears that that's what it's called, Army Regulation 15.

Q. Which has been released to Mr Hager by the US Government under the Freedom of Information Act?

A. Yes.

Q. And quite a lengthy document, reflecting the national investigation that was undertaken at that time, but I want to take you in particular to some of the appendices starting at page 147?

A. Yes.

Q. So the image at 147, which is armed insurgents exiting the building, is very similar to the image at 79I that was in the CDF briefing?

A. Yes.

Q. I take it you were shown this, effectively. I'm not saying this particular image marked up like this, but when you are at IJC on the 26th of August, watching the video, this is what they were focusing on, the sequence of events?

A. Yeah, so my -- the image that I have cut into the brief to the Minister, or through the DSO --

Q. To the CDF?

A. For the CDF, oh sorry, is part of the same sequence that this is just a cut, maybe taken half a second later.

Q. Yes. And then over the page, in AR15-6, this is a still image showing two -- an adult female and two children and another adult female with children coming out of those two buildings?

A. Yes.

Q. With armed males also marked on there, yeah?

A. Yes.

Q. And then the next page, 149?

A. Yes.

Q. This is, and admittedly the quality of this image is pretty bad, but I think we can just make out some buildings, being those buildings, and there's what's described as a huddled group by building?

A. Yes.

- Q. And this is what the IAT have identified as what appeared to be a clutch of, like -- of civilians, essentially, near the engagement?
- A. Yes.
- Q. And then impacts in and around their location. It's virtually impossible to tell distances and I wouldn't suggest otherwise to you from that, but then over the page at 150, we can see again in fairly poor quality, this is now impact areas, which are the darker shaded part of the image, which are the Apache rounds striking the two buildings that we can see on the image on page 79I?
- A. Yes.
- Q. The huddled group is marked as another patch, and then it says targeted insurgents, who appears to be, based on this, reasonably close to those people?
- A. Yes.
- Q. And it's that moment or that particular part of the engagement that the IAT focused on, in terms of the possibility of civilian casualties, isn't it?
- A. Yes.
- Q. And you'd confirm for us, wouldn't you, that on the part of the video that's been provided by the US Government that's now publicly available, you can actually see the building that the Defence refers to as the cache house, not long before that engagement. Is that right?
- A. Yes.
- Q. And it's actually possible to see on the video what appears to be likely a child and possibly a woman, as part of that huddled group on that video?
- A. It's been nine years since I've viewed that video.
- Q. Right.
- A. And at the time I watched -- when I watched that video, I was very focused on the rounds striking the building, and my assessment was well, it's possible that there's some CIVCAS's occurred because we've seen women and children in and around

that building, and it became -- it's clear to me that the rounds have hit the building, so I can infer from that, that it's possible that civilian casualties had occurred. Now I didn't, at any stage, focus around -- to the area around the building, so the introduction of people on the outside? Yes, it's possible that they were -- were in that location, but at the time, that was not something that I had picked up on, because I was focused on where the rounds were striking, and because they hit the building, I thought that well that was -- it was entirely plausible that someone was inside that building.

Q. Did IJC at that time not point out to you that this is the building -- I mean, wasn't it obvious from the video?

A. No. No, no, well, I mean, we're talking hot -- looking at a video of hot spots and we're looking at a video of exploding hot spots. Your eye gets drawn very quickly to where the rounds are impacting, not everything that's around. I mean, you see rounds hitting a building, my inference was that, yes; there's possible CIVCAS because we saw women and children in and around those buildings.

Q. So unpacking that, even without you consciously being able to see on the video civilians right next to the building being struck, it was enough for you to conclude that there may have been CIVCAS by the mere fact that the building got hit?

A. Yes, correct.

Q. So, if at that time you've made the connection between the building and the civilians that can be seen in the video, that would have only reinforced what you already knew?

A. Yes.

Q. All right, well, thank you. Just moving now, really, to the end of the hand over process. Chris Parsons we understand arrives, and I'm not trying to trick you; I may have it wrong. Mr Radich might correct me, but around the 1st or the 2nd of September?

A. That would align roughly with what I understand.

Q. Five days to a week before you go, and this is part of a formal transfer or hand over process, right?

A. Yes.

Q. Of command, effectively? And, look, part of that, surely, must have been you introducing Chris to the ISAF SOF world?

A. Yes.

Q. I mean, presumably, you've taken him to SOF HQ and said this is my colleague, Chris Parsons?

A. Yeah, we would have had a hand over programme, where we would have met all the appropriate people that I felt he needed to meet.

Q. And you leave theatre on the 8th, according to your brief, 8th of September?

A. Yes.

Q. So Chris Parsons' evidence, have you read his brief?

A. No, I have not.

Q. He will say that he visited IJC on the 7th of September. Yeah, the day before you left?

A. Yes.

Q. Did you go to IJC with him?

A. At some point, I would have gone to IJC with Chris, but probably not on the 7th. Having handed over at midnight on the 6th, transiting to the 7th, I would have been very focused on packing my bags, getting everything ready to -- cleaned, to get it back home.

Q. I mean, IJC was obviously an important part of the ISAF command structure. Presumably, you would have wanted to introduce Chris to IJC?

A. I think we would have done that by -- by this -- before the handover was complete.

Q. Yeah.

A. That would be part of the process of handing over.

Q. Yeah. So, what do you recall about Chris Parsons going to IJC on the 7th of September?



- A. I have no recollection of that, other than what I have subsequently read.
- Q. So, you didn't know he'd been there?
- A. I may well have known. Chris would have commenced his own programme as Senior National Officer. It would have been important for me at that time to also -- to stay out of his way. Once the handover has occurred, it's really -- it's not -- it's not really military protocol to get under the feet of the new commander.
- Q. Sure. Do you remember him going?
- A. No, not clearly, no.
- Q. How common would it be for you, as SNO, to turn up at IJC, Joint Command, on your own?
- A. It's important, I guess, to understand the layout of ISAF Joint Command. ISAF SOF, which was our superior headquarters, was co-located with ISAF Joint Command and joined by a hallway, and you could walk from one to the other without any barrier, and so, quite common, but what would be uncommon would be to hold meetings with the senior operations staff, who are obviously very busy running operations in Afghanistan, so you would a -- it would be uncommon to meet with them unless you had a clear reason to do so.
- Q. Mmm. So, I'm not sure if I understood the answer. Would the Senior National Officer commonly turn up at IJC completely unaccompanied?
- A. Would be accompanied by a driver, but the driver wouldn't be working inside IJC. So yes, it would be common.
- Q. You wouldn't take an Operations Officer, anyone else from command with you?
- A. No, we had a Liaison Officer permanently located at -- with ISAF SOF, at the headquarters of ISAF SOF. So there's always a New Zealander permanently there.
- Q. At SOF?
- A. At the ISAF SOF Headquarters co-located with ISAF Joint Command.

- Q. Right. So, if you, as SNO, went to IJC, presumably you'd always catch up with your Liaison Officer at SOF? They're in the same office, effectively?
- A. Yes.
- Q. When Chris Parsons came back from IJC, did he talk to you about that visit?
- A. I can't recall if he did or not, but I would suggest that he probably would have, yes.
- Q. If he had read a paragraph of the IAT report, and that convinced him that not only the ground forces had been cleared, but also the air assets, he would have mentioned that to you, wouldn't he? I mean, it would have --
- A. It's possible that he would have, yes.
- Q. I mean it's not possible; it beggars belief that he wouldn't have passed that on to you, given how important that issue --
- A. Well, I can't recall him doing so. It would be for him to testify to that.
- Q. Right. When did you learn of Chris Parsons' visit to IJC that day and the -- his interpretation of the IAT report?
- A. The first time I could categorically say that I've learned of that is through the process of this Inquiry.
- Q. Okay.

CROSS-EXAMINATION BY MR SALMON

- MR SALMON: After you left Afghanistan in September 2010, what did you do for the following couple of years? It wasn't clear from your brief.
- A. Well, Chris Parsons was the Commanding Officer of the regiment, and because he had deployed into Afghanistan, the regiment was without a Commanding Officer. So, I returned back to Papakura and performed the role of Acting Commanding Officer through until December. At that point, around that point, Chris returned home, I think in early January, and I was posted here to Wellington, and I commenced work in the capability branch of Headquarters New Zealand Defence Force as the Land Combat Working Group lead.

Q. Which meant you were doing something other than being the head of the SAS at that point, does it?

A. Yes.

Q. Were you still closely involved in the Afghanistan operation, at least in an oversight sense, or not?

A. Not at all.

Q. Not at all?

And then I think you were again commander of the SAS between 2013 and 2015, correct?

A. Yes.

Q. What about after that?

A. By the time I took command of the SAS, we had closed our mission in Afghanistan, and so, I was very focused as CO at the time on rebuilding some of the capabilities and skills within the SAS that had been put on hold while we'd been operating in Afghanistan. I do not have any recollection of any sort of involvement in post-operational follow ups, with the exception of what I've already said in my Brief of Evidence.

Q. Right. What about involvement in the media dealings in 2014 or in 2017? Any involvement in those?

A. No, not at all.

Q. None at all. So does that explain your disappearance, I guess, from the record on Operation Burnham? You really did move on?

A. Absolutely. It's quite busy in the military at times, and when you're focused on one job, you know other people are focused on their jobs and you leave the work to them.

Q. And just before we move on then, you weren't curious about this operation with the CIVCAS allegations after that time?

A. I was certainly curious, yes.

Q. You weren't curious to see the IAT report, if and when it came out, that you'd requested?

A. No, not really, no.

Q. Well, that was the report that you'd asked for and were keen to see. Why did you lose interest in seeing it?

A. Because it was not -- now, no longer my responsibility to follow that to ground.

Q. Right, but you were interested in it?

A. Yes, of course.

Q. But not interested in reading it?

A. Well, when -- I wasn't interested in finding it so that I could read it, but when I knew of its presence and its presence was made known to me, of course I was interested in reading it.

Q. One of the few requests on the record that we know of for that report is yours. I think you'd be aware of that?

A. Yes.

Q. And we know that somehow NZDF acquired a copy of the report. You know that now too?

A. Yes I do.

Q. It's possible, isn't it, given that you moved on, that in fact you were provided with that report, or is that impossible?

A. No, that's not possible.

Q. You rule that out why?

A. Because I have never seen that report before -- I had not seen that report, I'm sorry, until it arose in the course of this Inquiry.

Q. Okay. You're sure of that?

A. No, wait. I'm just refreshing my memory. In 2014, I was called to Wellington to comment on whether or not I had seen that report, and I believe at that time, that might have been when I read the report for the first time.

Q. So you're not sure whether you read it then or not?

A. I'm going to -- no, I'm not sure, but if I was to make -- to be definitive on that, I would say that would be when I read it for the first time.

Q. Well, if you can't even remember whether you read it then, how can you not remember whether you read it before then or indeed received it before then, given you were one of the last to --

A. It was a very significant document.

Q. It is, but you can't remember whether you read it in 2014, this very significant document?

A. Well, it was significant from the perspective of looking back from 2017 onwards, yes.

Q. Well, whatever that might mean, can we talk about your memory generally then of earlier events? You've changed paragraph 6 of your original Brief of Evidence to remove Dr Mapp, the then Minister of Defence, from the room on the night of 21, 22 August, correct?

A. Yes.

Q. When you wrote your brief, you must have remembered him to have been there, because you wrote him in, or did you not write your brief?

A. No, I wrote my brief.

Q. Okay, so you wrote down a sentence saying that Dr Mapp was present when you first wrote it?

A. I worked with the investigation -- our lawyers to see that through, and in that process of doing so, that has been put in there, I think as an understanding that people had, but it's incorrect.

Q. Did you write it or someone else?

A. I was involved with writing my brief, yes.

Q. What's that?

A. I've written my brief, yes.

Q. Okay, so you wrote that sentence in that Dr Mapp was there?

A. That's what's been presented, yes.

Q. And you remembered him being there at the time you wrote it?

A. I remember both Dr Mapp and the then Chief of Defence Force being in Afghanistan for the period leading up to the operation, and I also -- after the operation.

- Q. Well, you originally said that you had them in chairs, Sir Jerry and Dr Mapp, in chairs where you were seated alongside them?
- A. What I would offer you -- well, what I would tell the Inquiry, is that I offered the opportunity for both the Minister of Defence and the Chief of Defence Force to be in the ops room with us and observe the operation, and I recall the Minister of Defence gratefully declining that offer.
- Q. You can recall that?
- A. Yes, and that we took -- "we" being some of my staff who weren't involved in the operation, took the Minister of Defence back to his hotel.
- Q. You remember all of that now?
- A. Yes, I do.
- Q. And yet in your first brief you wrote something contradictory to that, that he was in the room with you?
- A. Well, it's a mistake. It's been corrected.
- Q. All right. So you're confident you can remember it correctly now?
- A. Entirely confident.
- Q. And you remembered it when you wrote your brief?
- A. Yes, but a mistake was made.
- Q. Right. Well, that's a rare concession from the military --
- A. I don't think so, no.
- Q. -- (inaudible) Colonel.

Can we look then at your paragraph 14, which covers your experience on the night of the raid. You've said at your 14 that there was no way of knowing that -- sorry, it's not 14, somewhere in your brief, you said there was no way of knowing on the night that rounds were going astray. I just wanted to check that. You would have had some feedback from the Ground Force Commander or the JTAC of what was being seen on the ground, wouldn't you, or not?

- A. Yes, we had some feedback because we would get radio reports back from the Ground Force Commander, and understanding of the

engagements through viewing of the ISR feed that engagements were occurring.

- Q. Right, and I'd rather taken it from the way the rounds were going off target from the trouble with the faulty sights that this was something that would have been obvious to the operators on the ground and in the air at the time. Is that not right?
- A. It would have been obvious to the aviators flying the helicopters because they are the ones -- they're the only ones that are observing through their television screens in the AH-64's where their gunsights are and where their rounds are impacting. Everyone else is reliant on what we're being told by the Air Weapons Team.
- Q. Sure, but the JTAC is ordering in their -- and directing their strikes, and so presumably the JTAC would be told about off target strikes, or not? Or do you not know?
- A. I don't know exactly what the -- JTAC was told by the Air Weapons Teams, but I would not expect that that would have occurred unless there was a reason to say so.
- Q. Well, there was a reason, wasn't there, because rounds were going off into other buildings as we now know?
- A. Yes, but I'm not quite sure where that engagement occurred in the sequence of engagements. I do know, for example, that the Air Weapons Team subsequently changed from using their cannon to using a hell fire missile, and I make an assessment that that was because of accuracy issues with their cannon.
- Q. Right. You don't know though what the JTAC was told, as you've just mentioned, because you didn't ask for JTAC, what the JTAC was told at the time, correct?
- A. No, I had no reason to ask the JTAC at the time.
- Q. You had reason though once you saw the video on the 26th of August, and still, you didn't ask the JTAC that?
- A. When I viewed the video, I was also privileged to be able to hear the audio of the conversations between the JTAC and the Air Weapons Team, and I was very satisfied that the orders and

requests made by the JTAC to the Air Weapons Team were thorough, and had made assessments around guaranteeing -- or ensuring that there were no collateral damage issues before engagements were made. And I never heard -- I did not hear any commentary back from the AH-64s to suggest that there had been collateral damage issues.

Q. I'm confused though, because you said just a moment ago that you don't know what the JTAC was told, and now you're saying that you do know. Are you saying you've heard parts of the dialogue between the JTAC and the Air Crew?

A. I heard all of the dialogue of the Air Weapons Team footage that was provided to the IAT.

Q. Okay, but you haven't heard other dialogue that might have come to the JTAC outside what is in that footage that was provided to the IAT team?

A. No.

Q. Okay, and so that's why you don't know what was told to the JTAC?

A. I don't have the full entirety of what was said.

Q. Right. And you haven't asked the JTAC, as you've said, but I am interested in your involvement in the Gallantry Medal that I think the JTAC was awarded shortly after. Was that your recommendation or someone else's?

A. No, that was written subsequent, I think, by Chris Parsons and the OC.

Q. After you were gone?

A. Yes.

Q. All right, were you consulted on that?

A. Yeah, I believe I may have been. Yes.

Q. Did you refer to the off-target shots and the prospect that there may have been collateral damage from them when you were consulted on that?

A. No.

Q. Why not?

A. Oh, I wouldn't think that it was relevant.



- Q. So possible CIVCAS issues aren't relevant for a Gallantry Medal on the very operation?
- A. No, it would be as a different issue between the JTAC's actions and the actions and the -- of the Air Weapons Team. Quite a different issue, and I'm very satisfied through the verbal dialogue of the JTAC's actions throughout.
- Q. But only knowledge you have of the dialogue, and the only knowledge you have of the JTAC's verbal actions, is based on those parts of the tapes that IAT played you?
- A. I also understand, because the JTAC was co-located with the Officer Commanding throughout, and I spoke extensively with the Officer Commanding and on occasion with the JTAC, of their actions throughout.
- Q. Oh, you did speak with the JTAC about their actions now?
- A. In some process throughout, yes, and through the OC mainly.
- Q. Well, you seemed to be saying that you didn't, just moments ago?
- A. Well, you've inferred incorrectly from what I've said. I've inferred that you -- I have offered you something that's maybe incorrect.
- Q. Right. Well, we have a transcript to work that out.
- So you watched the video, and when my learned friend Mr Isac asked you about it, you used words to the effect of, that watching this it became clear that the CIVCAS allegations had, your words, quite "real legs". Do you recall saying that? Or will you take it from me?
- A. No, can you say that again, please?
- Q. You used the phrase "real legs". You said it became clear that the civilian casualty allegations had "real legs"?
- A. And when did I say that?
- Q. Earlier today?
- A. Yes -- then, and I think that is consistent with the emails that I've sent.
- Q. Yeah. So that remains your view today, doesn't it, because you've presumably seen the videos again more recently, or

maybe you haven't, but your view is that there were real legs to the civilian casualty allegations?

A. My view is, and stays, that the allegations are possible.

Q. Well, real legs is more than possible, isn't it?

A. No, I inferred -- I am inferring possible.

Q. You'd like us to read real legs as possible?

A. Yes.

Q. Okay. You haven't done anything further yourself to investigate that though, have you?

A. No.

Q. You've seen that the PRT reports make reference that put it somewhat higher than that, there being "several killed", their words and such like. You're aware of that sort of feedback, aren't you?

A. Yes, but I think that's already been covered.

Q. Well, it's been talked about, but you're not suggesting that you know that that's wrong, are you?

A. No, I'm suggesting that that remain, that CIVCAS is possible, but that we really haven't determined yet whether they were civilians or designated participants in hostilities.

Q. Well, you've seen footage, for example, of rounds striking a house and you've heard multiple reports from others about casualties, and references in documents that I'm sure you've seen in your briefing to a young girl, and female casualties. You're not suggesting you know that those didn't happen, for a moment, are you?

A. No, I'm suggesting that it remains unclear.

Q. Right, but from your perspective, part of the reason it remains unclear is that you didn't look at the issue again once you left Afghanistan, understandably?

A. No.

Q. That's not the reason?

A. No, I don't think that's the reason why it's unclear.

Q. You have looked at it more?

- A. You're asking me specifically do I think it's unclear because I haven't looked at it? The answer is no.
- Q. All right. In the reports that you did write, and in the SAS reports generally, there seems to be a gradual downgrading of the numbers of casualties, civilian casualties, which isn't happening in parallel in the PRT reports. Would you agree that there was a tendency by the SAS to try to downgrade or downplay the number of casualties?
- A. I think there's an element of where you stand is where you sit -- what you understand of an operation, from your own actions, and the actions of your partners, and the information that you're viewing, will give you a different view to whether you're sitting in Kabul making that assessment, or whether you were sitting in Bamyán looking at the operation from a different prism, and talking to different partners.
- Q. Well, and also you were naturally concerned and understandably concerned, and this is clear from your emails, about the possibility that some of your team might be implicated, and understandably relieved when it was clear they hadn't fired shots that had done any collateral damage. That's fair to say, isn't it?
- A. Yes, but the relief I think was not only from the shots, it was also from understanding and hearing my JTAC on the radio and talking to the aircraft, and having an understanding of that dialogue gave me a sense of relief too, that he had been thorough and professional,
- Q. Well, your big sense of relief was actually recorded when you heard that the IAT report had been completed and concluded that while the aviation forces may face issues, your ground force did not contribute to CIVCAS. That was your relief as you wrote it, wasn't it?
- A. Yeah, it's certainly not relieved about the idea that civilian casualties may still be possible, but from a perspective of our actions being of an irresponsible enough nature to have caused it, I was very relieved.

- Q. Right, well, what you were more saying is that your troops didn't fire the shots, wasn't it? You're not saying that the JTAC wasn't calling in those choppers or directing their shots?
- A. No, the JTAC was very responsible for ensuring that the aircraft were cleared to engage targets from the perspective of making sure that the threat was real and for ensuring that there were no collateral damage issues before engagement occurs.
- Q. Right, but are you saying you were comfortable that the JTAC nevertheless didn't carry the blame or the moral burden, I guess, of any collateral damage, because the commands you had heard and the parts you'd heard were appropriate?
- A. Yes.
- Q. And this was despite seeing those huddled civilians we've talked about?
- A. No, I hadn't -- I didn't -- as I've already said, I didn't have reference to those huddled civilians at the time. My reference was to the rounds striking the roof of a building.
- Q. But you watched this video, and others in the room have seen it; we don't need to spend time on it. You're not saying you didn't notice the huddled people?
- A. Yes I am, because we didn't watch it in stop motion. We watched it live, and as I have said, when you see rounds -- this is not clear footage. You're seeing hot spots occurring, and so when you're watching the engagement and you see the rounds striking a building, that naturally is where your eye gets taken. So my conclusion was that the CIVCAS could have occurred from inside the building.
- Q. So you -- right, so you were concerned about CIVCAS inside the building, but not concerned about CIVCAS from the people huddled?
- A. I hadn't twigged to the fact that there were people huddled.
- Q. Okay, so that I can imagine this, because I've not been in the field ever, you're looking at a sort of view of what the

chopper pilots are seeing, which is a confusing scene, which is made confusing by the fact that they're firing live rounds that are popping up on the screen?

A. Yes.

Q. That might distract them from the fact that there are huddled women and children in the middle of the photo, in the middle of the screen?

A. Very much so, and also understanding that when the aviators are flying their helicopters, they're looking at a four-inch screen, and the bigger the screen, the more clarity you see.

Q. But one of the problems with that is -- I'll put it to you, it's only a confusing picture because they're firing, and if they weren't firing, the most dramatic and noticeable feature on that screen would be the huddled women and children. That must be right, mustn't it?

A. I think that's one conclusion, yes.

Q. So you're saying you excuse, or can understand not noticing the women and children, because they were firing before they'd looked for the women and children? That's really what you're saying, isn't it?

A. They were engaging in an insurgent threat and so they would have been focused on the target that they were engaging, not necessarily the wider picture.

Q. Well, you don't know that?

A. No, I don't.

Q. Because you -- correct?

A. I'm speculating.

Q. Right, you are speculating. So let's focus on what you know. You weren't looking at any of the people in the shot because there were shots being fired -- in the frame, because there were shots being fired. You've told us that that was your focus, where the shots were going?

A. My focus, when I looked at the screen, was the engagement for the insurgent, and so I'm looking at an insurgent and then I

see rounds striking a building and you get -- and as I've said, your eye gets drawn to where the rounds are struck.

Q. Sorry, I'm confused, there's some huddled women and children in a frame, you say there was also an insurgent?

A. Yes absolutely, the cross hairs of the aircraft are aimed on the insurgent.

Q. You look only at the insurgent and then get distracted by the rounds scattered around the screen?

A. Yes, where the rounds hit.

Q. And that means, doesn't it, that no-one -- or you at least as an example of a serving soldier, didn't look at other persons in the frame before the shots were fired, it all just unleashed?

A. Bearing in mind I viewed this video days after the shots were fired; so no, I didn't look at the civilians on the screen when I was watching the video through.

Q. And that's even though you were watching it because there was a concern about CIVCAS issues?

A. Yes.

Q. So despite that being the reason to watch it, you didn't notice them?

A. No, as I said, because I didn't feel that I needed to because I'd seen rounds strike a building where women and children had been around through earlier footage. So it was clearly obvious to me that there was the potential for CIVCAS from that -- from those rounds.

Q. Right, and you must have been alarmed by that, but comforted when you found on the 29th, or 30th that IAT had concluded that the cause of those -- or cause of potential CIVCAS was air fire, not ground fire, correct?

A. Correct.

Q. The request for the report was something you made before Chris Parsons turned up. You've then told my learned friend Mr Isac that you and Mr Parsons had, as I took it, a fairly hurried handover and you weren't sure whether he would have seen

certain emails. I'd rather taken from the last time you and I spoke in a different context, that when Chris Parsons arrived he took control of your electronic files and had access to everything you'd received when he took over your position, that's right isn't it?

A. Firstly, I wouldn't call it a hurried handover. However, yes, he would have had access to my files. We had a shared email account, it wasn't in my name, it was the email account Of the Senior National Officer.

Q. Right. But when Mr Isac was asking you whether Mr Parsons would have had access to emails you'd been sent days before he arrived, the answer is he would have, because they were sent to your official posting address and that's what he would have inherited?

A. Yes.

Q. And when he arrived you would have made clear to him that there was this live issue about what you thought were potential CIVCAS from air fire?

A. Yes.

Q. That you couldn't rule out?

A. Well, actually what I would have told him at the time was that by the time the handover had occurred, that we had been cleared of allegations, as Task Force 81, and that there was an ongoing investigation into the Air Weapons Team, and that we would look out for the report, because it would be important to send back to New Zealand.

Q. By "look out for the report", what you mean is that there had been a report completed and that you were waiting for the copy you had asked for?

A. Yes.

Q. And so you knew it had been completed when Chris Parsons arrived and you told him it had been completed, correct?

A. Yes I believe I did tell him that, yes.

Q. So when I read your paragraph 31, which, and this might be the result of many hands, or too many cooks in the kitchen, you

begin your paragraph 31 by noting that you were told that the IAT had produced a report?

A. Yes.

Q. And that it said, as we know, that the troops weren't the cause, but if there was anything it was the AH-64's gun fire. But then you say you'd "asked the commander if he could send me a copy of the report once it had been completed." We can disregard the reference to "once it had been completed", because you knew it had been completed, correct?

A. The reference to completion I think will be around the fact that whilst the report has been written, it has to be briefed to the senior commanders of ISAF and they may find their own conclusions and at a point they may wish to send the IAT back to do some more investigation. So there's a -- there's perhaps a little bit of a gap between what we may mean when we say "completed", and actually been completed to a position where it could be released to us.

Q. Well, we know from your discussions from my learned friend that the process that was still live was a further and separate investigation, correct, leading to the AR-15 report?

A. Oh, as I now understand it now, yes.

Q. And I was a bit surprised to hear you say given what you'd been doing there and the importance of the issues that you might not have understood that at the time, surely that is something you broadly did know was the process?

A. The Americans' process for inquiries?

Q. Yeah.

A. No.

Q. Not at all?

A. There's no reason to.

Q. Okay. In terms of knowing that the IAT report was completed, your own email on 30 August, this is page 43 of the Defence bundle if you need it, refers itself to the completed report and just awaiting receipt. Again that confirms, doesn't it, that you knew the report was completed and that the



investigation into the air or aviation caused casualties was a separate process?

A. Yes.

Q. Right. Now as you and we know, a form of the report was received by NZDF, we just don't really know by whom. When you asked for a copy of the completed report, who did you ask?

A. I will have asked the ISAF -- oh, Task Force 81 LNO2 ISAF SOF to keep an eye out for that report for us. And he would have worked through the ISAF SOF operations desk to reach into ISAF Joint Command for that report.

Q. Right, and you asked for it, and he said okay or maybe, or what?

A. When you say who, the -- my LNO --

Q. The person you asked?

A. -- my Liaison Officer?

Yes.

Q. Right. Said, okay --

A. He would have understood his job to keep an eye out for that report.

Q. Right. And where would he have understood he should send it, to you or to Chris Parsons as your replacement?

A. To the SNO of Op Wātea.

Q. Right, so the natural place it would have been sent, if to anyone, was to Chris Parsons?

A. Yes.

Q. And do you -- have you ever asked Chris Parsons whether it was sent to him?

A. No.

Q. Were you aware of Chris Parsons' email shortly after you had departed Afghanistan saying that he'd seen a paragraph of the report?

A. I am aware of that, having seen that through the process of this Inquiry. I am not sure if I was aware of that at the time when I was leaving theatre.

Q. Okay. You can't remember that?

A. I can't remember that, no.

Q. All right. And when you say "leaving theatre" it was after theatre you might have become aware of that, wasn't it?

A. Yeah, it's through the process of this Inquiry that I've become aware of that.

Q. Okay. Given you were going back and taking over the DSO role you would have seen that then, wouldn't you?

A. No, I came back to the Commanding Officer's role.

Q. Commanding Officer of the SAS, surely you would have kept abreast, at least at first while you were doing that, of the allegations of CIVCAS?

A. It's an interesting dynamic, because the Commanding Officer of the SAS was actually in Afghanistan as the Senior National Officer. That was Chris. My responsibility was as the Acting Commanding Officer; you need to understand there is six squadrons in the SAS. I was very focused on managing the five squadrons in Papakura. What's happening out of Afghanistan is really for the CO -- is for the Commanding Officer or SNO of Task Force 81 and the DSO through into the Defence Headquarters.

MR SALMON: Thank you sir, that's nearly my time?

SIR TERENCE: It is your time.

MR SALMON: It is my time.

SIR TERENCE: Thank you.

MS McDONALD: Just before Mr Radich gets to his feet I just, I may be wrong, but I'm just conscious that the media are here and matters are being reported. I happened to make a note of an answer that Colonel McKinstry gave and I recorded it as him saying that civilian casualties had "some legs", rather than "real legs". There may not be much in it, but I just notice my friend Mr Salmon made quite something of that answer. The transcript that we're having will clarify the position, but I just wanted to note that I had recorded it slightly differently to the way Mr Salmon had; I do want to be fair to the witness.

SIR TERENCE: All right, thank you for that. So we will -- we can check that from the transcript.

RE-EXAMINATION BY MR RADICH

MR RADICH: Colonel McKinstry, greetings again.

A. Hi.

Q. I want to talk to you first of all, or ask you a couple of questions about exchanges you've had with both of my learned friends over the issue of what was known about the finality of the IAT process, that's the topic.

Now you've got before you the NZDF bundle, this is a bound one, could I ask you please to go to first of all to page 47. Do you see that page there?

A. Yes.

Q. Now, just to orient you, would you look please at page 43 and you'll recall this email we looked at together a little earlier?

A. Yes.

Q. And so from that email, can you tell us again what the document that starts at page 45 is?

A. The document at page 45 is a brief from the Director of Special Operations to the Chief of Defence Force.

Q. All right. And if you look at page 47 do you see the words in a box at the top of the page?

A. Yes.

Q. And if you look at the first bullet point, would you read that for us please?

A. "The Incident Assessment Team has produced a report on this op."

Q. Okay, and did that -- was that your understanding at the time?

A. At the time I left theatre?

Q. Well let me put it to you this way, would you look please at page 59 now, you'll remember this well from our exchange?

A. Yes.

Q. And can you remind us please of just generally of your involvement in this email chain, how are you involved with the acronyms and the to and from boxes?

A. So my involvement is to be sent it -- it's this -- at the second from the top --

Q. Yes?

A. Where -- yeah, second from the top where it is sent from the ISAF SOF Headquarters CJ3, to the ISAF SOF TF81 OC, and TF81 SNO.

Q. All right.

A. It's sent with no commentary. And then my involvement is to say "please send to me on...", which is our own system.

Q. Yes, and can you tell us the date of this exchange please?

A. It was on the 3rd of September 2010.

Q. Okay, can you keep your finger on that page and just go back to the one we were looking at which was on page 43, just to that email on page 43. And tell us the date of that email?

A. That is 30 August 2010.

Q. Thank you. Now if you come back, I'm sorry to move you around, but just to orient ourselves with the date, if you come back to page 59, would you read please the last two sentences if you can find them in the text of the email in the middle of that page?

A. "LEGAD has confirmed that [redacted] has been briefed on the IAT findings and agrees that Task Force 81 have no case to answer. It appears that the air support aspect of the operation in Regional Command North is part of an ongoing investigation."

Q. So your understanding please, Colonel, of the word "ongoing"?

A. That they're still looking into that.

Q. Okay. And what did you do with this email chain, where did you send it?

A. I asked for this to be sent to me on our system, and I will have emailed it back to New Zealand to the Director of Special Operations.

Q. Thank you. Now if you look please at page 73, and let's just orient ourselves with this, the document begins at page 65. So can you tell us what this document is please?

A. This is another brief from the DSO to the Chief of Defence Force on Operation Wātea.

Q. Thank you. And if you look now please at page 73?

A. Yes.

Q. And would you read please the second bullet point on that page?

A. "ISAF Initial Assessment Team IAT report still in progress. ISAF LEGAD assigned to IAT has advised that Commander IJC has been briefed by IAT and agrees that TF81 have no case to answer."

Q. Okay, thank you very much, I'll stop you there.

And just finally on that page, just before the last bullet point, much of which is redacted, could you read please the dash point?

A. "Investigation into RW close air support is ongoing".

Q. "RW" again please means?

A. Rotary wing.

Q. All right, thank you.

You were asked some questions by my learned friend Mr Isac about the intelligence reports and the tables that we've been looking at and your answer to a particular question was that the tables that you were looking at was very different to your own understanding from observing actions. Can I ask you please to expand upon that comment and tell us a little bit more about the purpose of the table versus your understanding from observation?

A. Yes, well from a position where I sat as SNO, the intelligence report really formed one part of my understanding of what's occurring. I've also been able to attend the debrief of the team on the ground. I have also had my engagement with the IAT. I have also been in a position to have an engagement with the Commander of ISAF SOF on occasion, and the staff at

ISAF SOF including my own Liaison Officer. We are watching out for what's coming through the process. And we're all -- we're trying to understand how much of -- because it's quite a noisy situation you have, and by "noisy" I mean cluttered with information. You have reports coming in through the media of significant amounts of CIVCAS, of buildings being -- 20 buildings being destroyed. This was a point that we knew point blank to be completely wrong. We understood that two buildings had been destroyed -- been burned in the process. And so, this was -- this was really, for me, just one small part of trying to see the whole picture.

Q. All right. And on that point, we've been able to refer in this Inquiry to material in these bundles, is there any other material that went into forming your assessment, your own assessment of what occurred?

A. Yes, well that's my presence in the operations room throughout the operation; the discussions that I've had with the team post-operation and having viewed the Air Weapons Team footage as well.

Q. Is there other written material to your knowledge that is unable to be used in a public inquiry?

A. Sorry unable to be used?

Q. Mmm.

A. I'm trying to think. I will have made contemporaneous notes in the form of emails back to the Director of Special Operations throughout that will form, that are able to help me recall and re-form what was occurring.

Q. Yes, just with regard to the notion of classified versus unclassified information, is there anything else?

A. Oh yes, also looking at classified intelligence reports and sources that we would be able to put together a picture and understanding of what we knew.

Q. Okay. You were taken to NZ PRT materials, intelligence, did you have access to those materials when you were SNO?

- A. No -- no I don't recall having access to that. It's possible that the S2, the Intelligence Officer had, but I don't recall it.
- Q. Had you seen the documents you were taken to previously during your time as SNO?
- A. No I don't have a recollection of having seen those previously.
- Q. There was an issue about when you might have first seen the IAT report and I can tell you, and again you probably haven't seen these, but let me just refer you to one thing in Ross Smith's notes, and this is just for the record, and I needn't get you to look at it, but it's page 254 of the NZDF bundle, he says and I'll just read it and ask for your comment on this, he's recording a meeting with you:
- "Had not seen the IAT executive summary until DSO emailed him a copy on 1/7/14"?
- A. Yes.
- Q. Do you have any comment on that?
- A. No, that appears consistent with my recollection of the IAT.
- Q. Thank you. My learned friend Mr Salmon said to you on a couple of occasions, or used the phrase and I just want you to comment on this please, "the JTAC was ordering in their strikes", talking about the aircraft?
- A. Yes.
- Q. Could I ask you to comment on that please? Comment further on the use of the phrase "ordering in their strikes"?
- A. Yes, so most, because of the operation's occurring at night, most of the commentary that's coming into the OC's ear with respect to the insurgent threat is emerging from the Air Weapons Team. So they're the ones who first see armed individuals exiting what we're calling the cache house and then maintaining oversight over those individuals throughout the operation. They're also providing an understanding and are relaying commentary to the JTAC of what they're seeing. And part of that commentary includes the location of those

threats in -- or the potential threat that's being posed by those individuals in response to where our people are on the ground. And seeking from the JTAC authorisation on a number of occasions to engage that threat. They are doing that from a number of tactical -- for a number of tactical reasons. One is to provide air cover to the forces on the ground to ensure that we're safe. But also, and perhaps most importantly, the presence of the Air Weapons Team is linked to the operation of the CH-47 helicopters, flying big heavy helicopters at night into low ground into an area that we know the insurgents are operating and that we know that they're operating with heavy weapons, and so they are very attuned to the idea that those heavy weapons may be used to engage an aviation asset full of soldiers and Afghan police, as it's coming into land, or to extract our people. So, they're very very focused on that, and they are taking the time to relay to the Ground Commander, to the OC, what they are seeing, and they're very very focused on ensuring that that part of their role is, particularly keeping those helicopters safe is carried out.

Q. Yes, and the helicopters you refer to are, describe the nature of the helicopter they're keeping safe?

A. It's called a CH-47.

Q. CH-47?

A. And it's a Chinook is its colloquial term. It's a twin-rotored helicopter. Holds upwards of 40 people. It's akin to a bus. And not very manoeuvrable. And a big target.

Q. Thank you.

Would you have a look please at the NZDF bundle at page 129? No I've got my page number clearly wrong. Let me get the correct number. Maybe I can do it off this one. Sorry, here we are, look it's 129 of the Inquiry bundle, sorry, so much paper. Could I ask you to look at the big bundle please at page 129? And again, just to orient you with what we're looking at, we might start at page 123. Do you recognise what this is?



A. It is the findings of the US AR-15 investigation into Tirgiran village.

Q. Yes, have you seen this before?

A. In the course of preparing for this Inquiry, yes.

Q. Thank you. You were asked some questions by my learned friend, Mr Salmon, about in the context of the JTAC about what was known about errant bullets at the time, could I ask you please to look at the bottom of page 7, that is to say page 129, it's page 7 of this report?

A. Yes.

Q. And would you please read out, if you can find this place, if we count up together from the bottom of the page, six lines up, and would you read please from the sentence beginning "However" through to the end of the paragraph?

A. "However, ground Battle Damage Assessment was not conducted on those buildings, so there is no way of knowing if the Air Weapons Team errant rounds caused civilian casualties. The Air Weapons Team and ground units were unaware that bullets had impacted the buildings until the time of this investigation. The IAT was also unable to confirm civilian casualties based on their review following the incident."

Q. Thank you Colonel McKinstry that's all I have, thank you for your time.

SIR GEOFFREY: Nothing.

SIR TERENCE: I have no questions either. Thank you Colonel McKinstry you are excused.

(Witness excused)

SIR TERENCE: It's 5 to --

MR RADICH: It is indeed, shall we stop?

SIR TERENCE: Yes. So we'll start again at -- we'll adjourn until 2 o'clock.

(The luncheon adjournment)

**BRIGADIER CHRISTOPHER JOHN PARSONS (Affirmed)**

EVIDENCE-IN-CHIEF BY MR RADICH

MR RADICH: Now your full name is Brigadier Christopher John Parsons?

A. Yes, it is.

Q. And you are the New Zealand Defence attaché at the moment, based in London?

A. Correct.

Q. Thank you. Brigadier, now you have a Brief of Evidence in front of you, please would you start reading it for the Inquiry Members at paragraph 2?

A. Since 1989 I have served in a number of roles in the New Zealand Defence Force or NZDF, including as an officer of the New Zealand Special Air Service (NZSAS) between 1998 and December 2011.

In 2012 I was appointed as the inaugural commander of the 1st New Zealand Brigade. I was Deputy Chief of Army between 2015 and 2017. I have served in South-East Asia, the Pacific, and the Middle East and I also served as a United Nations Peacekeeper in Africa.

I have a Master's Degree in Strategic Studies from the United States Army War College, where I was a Carlisle Scholar and a distinguished graduate; a Master's Degree in Management from the University of Canberra; and a post-graduate diploma in Strategic and Defence Studies from the Massey University of New Zealand.

In 2000, I became a member of the New Zealand Order of Merit for service in Timor-Leste. In 2011 I was awarded the Distinguished Service Decoration for service in Afghanistan and the United States Defence Meritorious Service Medal. The medal was awarded by General Petraeus to recognise my efforts, as the leader of the New Zealand SAS contingent, to advance the rule of law in Afghanistan.

When Operation Burnham was conducted on the 22nd of August 2010, I was the Commanding Officer of the NZSAS, based in Papakura, New Zealand.

As Commanding Officer, I was responsible for selecting and training new members, supporting expeditionary operations, commanding the NZDF domestic counter-terrorist group, looking after reservists and veterans, and supporting their families.

I was generally aware of what was going on in Afghanistan and ensured that the Senior National Officer, or SNO, in Afghanistan had everything he needed.

Rian McKinstry was the SNO in Afghanistan in August 2010. He sent me regular emails, and made regular, secure calls, to keep me informed about the planning, execution, and the outcomes of Operation Burnham (or the Operation).

I arrived in Afghanistan on 1 September 2010 to replace Rian as the SNO; he transferred authority to me on the 7th of September. We had a 'handover' week together before he left Afghanistan, and during which time he briefed me on a range of matters.

The emails from Rian and/or our conversations brought a number of matters to my attention:

That there had been a number of engagements of insurgents in the course of the Operation (see email 23 August 2010, at 1.53 am, including the Operation Summary, which is in the bundle at page 1).

Q. We might have a quick look at that just to identify it Brigadier. So if you'd go to the -- yes that's the bundle at page 1, is that the email that you are referring to?

A. Correct.

Q. Thank you. And just to carry on please with your 11b.

A. So 11b:

That a member of the New Zealand Task Force had been seriously injured when a wall and a roof of a building collapsed on him when an explosive entry was attempted (and

you can see this in email 23 August 2010, at 1.53am, including the Operation Summary, again bundle page 1.

That in the days following the operation, allegations surfaced that a number of civilians were killed and injured, and that a number of buildings had been burnt down, during the operation (email that refers is 24 August 2010, 4.43pm, in the bundle page 15).

Q. We needn't go there at this stage, thank you.

A. That the International Security Assistance Force or ISAF had commenced an investigation into these allegations.

That Rian, the Ground Force Commander, and the Joint Tactical Air Controller were assisting with that investigation.

That Rian was given an opportunity to view some of the footage from the Coalition AH-64s and AC-130.

That the footage showed that one of the helicopters had a gun that was not slaved correctly to its sight, which resulted in some rounds impacting on or over a roof of a building.

That it was not yet known whether there had been civilian casualties but, if there were, it was as a result of this 'sighting' issue and, therefore, collateral and unintended (and the email that is the 26th of August 2010, 11.27, and it's in the bundle at page 32).

Q. Just have a quick look at that one please, it actually begins on page 31. Yes, and do you see that there at page 32, and then over to page 31 effectively? And that's the email you're referring to and your name is in the "to" line?

A. Right.

Q. Is that correct?

A. Correct.

Q. Thank you.

Yes, so paragraph 11i.

A. That the New Zealand Task Force had 'no case to answer' (and the email that refers there is the 30th of August 2010, at 6.59, in the bundle at page 43).

- Q. Just to identify it quickly, please Brigadier, if you look at that email and can you confirm that that is the email you refer to?
- A. Correct.
- Q. Thank you.
- A. That the ISAF investigation was continuing in respect of the actions of the Coalition air support (the email that refers is the 6th of September 2010, 1.32am, and it attaches and ISAF exchange of the 3rd September 2010, in the bundle it's pages 57 and 59).
- Q. So just to identify them for us please, if you turn first of all to 57.
- A. Yep.
- Q. Is that email of 6 September?
- A. Yes, it is.
- Q. And again, to 59?
- A. And correct again.
- Q. Thank you. Paragraph 12?
- A. Paragraph 12:

On my first day as the SNO, on 7 September 2010, I went to the ISAF Joint Command or IJC headquarters to make a number of introductory calls.

As well as meeting prospective colleagues at the IJC, I was hoping to get a copy of the ISAF's report detailing the investigation into allegations of civilian casualties and its conclusions (the ISAF report).

I understand that the Director of Special Operations or DSO back in New Zealand had asked Rian to obtain a copy of the ISAF report so that the CDF and the Minister of Defence could be briefed. Rian tried to get a copy of the report but I believe he was unable to because it hadn't been completed when he asked. Before he left, Rian encouraged me to follow this up.

There was a lot going on in the IJC operations room at the ISAF headquarters. While I was there, I was introduced to an

officer I had not met before. I do not recall who he was but it is possible that he was part of the IJC legal team. We talked for a short time before I asked if I could see the ISAF report. He advised that it was not cleared yet for release to New Zealand. I was able to see the paragraph described as the key finding and I believed that this was intended as a demonstration of good faith on his part.

He retrieved a document and to my recollection the document was on the table and I was standing next to the IJC Officer. He turned to the final page of the document and, pointing to the first paragraph of that page, told me that that is what I needed to know.

I read that paragraph over his shoulder. I did not have the opportunity to read beyond that paragraph because I was not cleared to see the entire report. We then had a quick conversation which, in my mind, reinforced the sentiment expressed in that paragraph. I asked him for a copy of the ISAF report but he said he was not able to -- for it to be released to me at that time.

I was at the IJC headquarters for a while longer as I had more people to meet and other business to attend to.

After I had returned to Camp Warehouse, some 25 minutes away, I sat down to brief the DSO on the events of the day. My email of 8 September 2010, at 7.12am, which is in the bundle at page 77.

Q. And just pause there, and we'll look at the email itself please, page 77, do you see that there. And can you just tell us please exactly who you sent the email to, what are the acronyms there?

A. So it's sent to the Deputy Director of Special Operations and to the Director of Special Operations. And it's cc'd to the Executive Officer, so I assume that would be the Executive Officer in Papakura.

- Q. Okay, and if you just keep that page open, and we might ask you to read please from the email itself, beginning with the first paragraph?
- A. "Today I have sighted the Accident Investigation Team's (or AIT's) conclusion into the claims of civ cas in Baglan. IJC wasn't willing to release the report to us, so I cannot forward a copy. However, it categorically clears both ground and air call signs of any allegations. It states that having reviewed the evidence there is no way that civ cas could have occurred. We already knew that we were without fault, but the AWT have now been cleared which is good news."
- Q. Could I ask you just to continue reading the email?
- A. "You may recall that it was claimed that two females were injured and in hospital. When the IAT asked to see these persons the district Governor admitted that they were in fact military aged males. Nothing further to report."
- Q. And then the final paragraph also please?
- A. "The other alleged CIVCAS were reputed to be the sisters of Kalta or B1, and Naimatullah B2." Some of that's redacted. "...has not heard from either man in the last two weeks. Whereas a number of their associates are back". Some more that's redacted. "Moreover, it's improbable that B1 and B2 sisters would have been around manoeuvring around in the mountains in the middle of the night. The usage of 'sister' may in fact be INS or insurgent veiled speech to describe B1 and B2. In the absence of corroboration, there is no way to be sure at this point if B1 and B2 have been killed in action. We will continue to monitor. But at the very least they have been disrupted".
- Q. Thank you very much, and if you'd go back now please to your Brief of Evidence at paragraph 20?
- A. I did not have the opportunity to read the IAT report, beyond that single paragraph, until some time in 2018 (when I had access to the IAT report) and in preparing for this hearing.

I believe that what I relayed to the DSO was a faithful representation of the paragraph that I read.

The paragraph that I saw used the acronym "AF". My interpretation of the last sentence of that paragraph rested on the meaning of that acronym. I understood "AF" to mean Air Force. Therefore, my interpretation of that paragraph was that the investigation team was unable to find any part of the Air Force's operation where civilian casualties could have occurred. This is what I relayed in the email back to the DSO when I said that the report had cleared both ground and air forces of all allegations.

In the New Zealand Army, we are taught that "AF" means Air Force or audio frequency. I assumed that it would carry the same meaning in a NATO document as most of the acronyms we use in New Zealand tend to be the same as NATO, for interoperability reasons.

Q. Just pause there please and I think you're looking to make a change to your brief, or the original version of it, and am I right in saying you were looking to take out from paragraph 23 the words, "An extract of which is in the bundle at page 79" and to move that to the end of the second paragraph in -- second sentence I'm sorry, in paragraph 24?

A. Correct, yeah.

Q. Thank you, so would you confirm, you'd put a full stop after the word "reasons"?

A. "Reasons", correct.

Q. At 23. Thank you and if you could now read from 24, including the amended, or the moved transferred words?

A. In preparing for the hearing I consulted the NATO Glossary of Abbreviations Used in NATO Documents and Publications. AF is defined there as "Afghan Forces"; "Air Force"; "Audio Frequency"; and "Augmentation Force".

Q. Now would you pause please and have a look at page 79 of the bundle? Is this the document that you're referring to?

A. This is the document and it's the 22/09 document, yep correct.



- Q. And the heading of it is, if you just read it out please?
- A. "NATO Glossary of Abbreviations Used in NATO Documents and Publications."
- Q. And then if you turn the page over please to page 80, and can you point out where the extract that you are referring to appears?
- A. So it's the last one on the bottom left of page 80 where it says "AF" and then a small "2", which just means the second iteration of that word.
- Q. Thank you. So back to paragraph 24, third sentence?
- A. I also checked the US Department of Defense Dictionary for Military and Associated Terms, an extract of which is in the bundle at page 81, which defines AF as "Air Force" or "Amphibious Force".
- Q. Let's just for good measure go there to 81, and is this the document that you're referring to?
- A. Correct.
- Q. And please turn over to page 82, and do you see the reference there and can you point it out please?
- A. Middle of the page.
- Q. "AF"?
- A. AF, Airborne Force, Air Force, Amphibious Force.
- Q. Thank you. And then back to 25?
- A. In fact, it transpires, that "AF" had been defined in the first page of the IAT report, which I was not permitted to read, as "ground assault force". In my view, the accepted way in theatre to abbreviate ground assault force was "GF" or "GAF".

This changes the meaning of the sentence that I relayed to the DSO. It means that the Incident Assessment Team was unable to find any part of the ground assault force's operation where civilian casualties could have occurred. In other words, it clears only the New Zealand and the Afghan troops of any allegations.

When I finally saw the full report, I realised that other paragraphs that I had not seen previously concluded that there was a likelihood or a possibility of civilian casualties.

Had I read those paragraphs at the time, I would never have expressed the email of 8 September 2010 in those terms.

Rather, I would have confirmed that the IAT report had reached the conclusions - tentatively expressed in Rian's emails (and referred to in paragraph 11(h) and (i) above) - that civilian casualties were possible as a result of rounds falling short due to a gunsight issue, but that the New Zealand troops were not responsible.

As I say in my email, "we already knew that we were without fault". The only unanswered question, in my mind, was whether the Coalition forces were too.

My understanding that the ISAF investigation had cleared the allegations of civilian casualties was reinforced by two additional matters. In my discussions at IJC I learnt that the two females who were said to be injured and receiving hospital treatment were in fact military aged males; and that the suggestion that some "sisters" may have suffered casualties was likely to be a veiled reference to Kalta and Nematullah. I relayed this information back to the DSO as well.

I was not, in this email, attempting to 'cover up' the actions of our Coalition partners. There was no reason for dismissing the possibility of civilian casualties.

On the contrary, I would have been outspoken had there been any suggestion of wrongdoing or a 'cover up'.

I took very seriously New Zealand's commitment to reducing the levels of violence in Afghanistan and to increasing the respect for the rule of law. I viewed that as our whole, underlying purpose for being in Afghanistan.

Inquiry into the allegations of civilian casualties:

Far from trying to conceal anything, from the outset I have supported an inquiry into the claims made by Nicky Hager and

Jon Stephenson in their book *Hit & Run: The New Zealand SAS in Afghanistan and the Meaning of Honour*.

I refer to the bundle on page 277. This is an email that I sent on the 25th of March 2017, a few days after the book was launched.

Q. Just go to that page to identify it please Brigadier? And if you'd read it either from your brief or from the page itself, they're the same?

A. "I've been turning Mr Hager and Mr Stephenson's allegations and the circumstances of the operation over in my mind. I know you're meeting CDF tomorrow. In prep for that, I would like to reinforce the conversation that we had last night.

"Like you, I think it's important to have an inquiry, if only to get the facts on the table and to clear the soldiers' names. But constitutionally, I think it's important too.

"I am perplexed and not just a little concerned at the number of internal sources that have been alleged. I believe the unit has a culture that allows people to come forward if they feel something is amiss. So if there truly are internal concerns re CIVCAS would have thought they would have been raised. I have never known this team not to speak their minds. So it would be good to get to the bottom of this as well as to truly understand where the sentiment lies and what we can do about it. Obviously, we'd be completely gutted if we'd found out there had been CIVCAS, but I remain firmly of the belief that no SAS soldier or commander acted outside the Rules of Engagement or improperly in any way.

"All the best mate, good luck tomorrow."

Q. Thank you, there's just one further question, Colonel Karl Cummins will be giving evidence at this Inquiry a little later in the week, perhaps tomorrow, and he is going to, as the Inquiry knows, make an addition -- or seek to make an addition to his which refers to perhaps having had a conversation with someone like you, do you -- when the -- or before the 2011

release went out, would you like to comment on the point -- that point that he may raise?

A. I recall having a, I think it was a telephone conversation, I don't recall exactly who it was, but it was possible that it was Karl. And we were discussing the press release that was about to go out and my counsel to him was that we should not be definitive over the issue of civilian casualties in that press release. The reasons for that, and I know that might seem at odds with the advice that I -- or the reporting that I gave some seven months earlier, but was that the ISAF had already put out a report, or a press release, and it would be difficult for the public and for the media to understand the difference in our press release without us having to go into details about counter-insurgency strategy and perhaps the reasons why General Petraeus might have taken a softer line on his press release. Equally, if facts came to the fore in the future, things are always fluid in an operation, that changed our understanding of the time as we knew it, then we didn't want to be in a position where we would have to recant. So that was my views towards him.

Q. All right, thank you very much.

#### CROSS-EXAMINATION BY MS McDONALD

MS McDONALD: Good afternoon Brigadier. Would you be able to just help us with a bit of context? You were back in New Zealand, Papakura, prior to leaving to go to Afghanistan. You've told us in your Brief of Evidence that you were getting daily reports and receiving information; in communication with Rian McKinstry, and you were -- you would have had a sense of what the mood was and the environment was in New Zealand about the operation. So, it would have been clear to you, wouldn't it, that there was interest at a pretty high level about this particular operation, is that correct?

A. Correct.

Q. There would have been, in fact there was, wasn't there, an awareness and an interest by the Prime Minister and at a

political level, about the suggestion of civilian casualties -- the possibility of civilian casualties?

A. Yeah, I can't recall exactly when that came up in relation to when I left for Afghanistan, but certainly he was interested in the operation, that's correct.

Q. If you have a look please at page 84 of the bundle. That's our bundle, I'll take you to the black bundle. There are two bundles, let me just explain, I'm going to for the most part I imagine be referring to that large black ring binder. 84, and this you'll see, and I don't know whether you've seen this before, but it's an email that is dated 31 August 2010. It's from Peter Kelly to Rian McKinstry while he's in theatre; I'm not sure whether you've been copied into that or not, you might be able to tell us that?

A. No I'm not copied in on that.

Q. But you'll see, if you just cast your eye over it, and we've looked at it already with other witnesses, but -- I'll read it:

"Rian, this document refers to an interview given by ..." and that's Brigadier General Zadalis, "...about the findings from the assessment into the operation in Tala wa Barfak. MFAT picked this up off the wire this morning. Given that he is speaking publicly, can we now expect a copy of the assessment or at least a copy of the findings so we can report back to the Prime Minister, the Minister of Foreign Affairs, Minister of Defence? They are quite exercised [I think that's supposed to be] by this and are very keen to hear the official outcome."

And that is a reference to the media releases that are coming out.

Simply putting that to you to show you that there appears to have been a reasonable level of interest at a political level about the operation. Do you accept that?

A. Yes.

- Q. And it's true, isn't it, that from a New Zealand Inc point of view, and you'll know what I mean by that, the politicians were not just interested in the issue of the possibility of civilian casualties that might have come about as a result of the direct actions of the New Zealand military, but just generally the issue of the possibility -- long question, I'm sorry, civilian casualties that might have arisen as a result of an operation where New Zealand had been associated with that operation, is that fair comment?
- A. Fair comment, yeah.
- Q. So that's the sort of environment that you -- that was happening in New Zealand at the time that you deployed to Afghanistan, correct?
- A. Correct.
- Q. If you also come to the same bundle and you just have a look, staying with the same theme, page 4, starting on page 5 and then working back there's a string of emails. And these do have your name associated with them. They're from you for the most part. So you'll be familiar with them, but they show, "I suggest, that the Prime Minister is advised of the kick off of the operation", this is the bottom of page 4, Sunday the 22nd of August, it's from you to Rian McKinstry?
- A. 24th you say?
- Q. 22 August.
- A. Oh sorry.
- Q. "PM advised of kick-off of...and has acknowledged" and that's the kick-off of the operation, correct, Operation Burnham? Have you got page 4?
- A. I believe I'm looking at page 4, but I don't see that, I'm sorry.
- Q. Can you just go to the bottom of that page?
- A. Oh sorry, yes, here I've got it, yeah, "PM advised of kick off and has acknowledged".
- Q. So that's you?
- A. Correct.

Q. Emailing Rian in theatre, you're still back in New Zealand?

A. Correct.

Q. Telling him that the Prime Minister's been advised of the operation, correct?

A. Yes.

Q. And then come up a little further.

The next email in the middle of that page, that's another email from you a little later, still on the 22nd saying:

"I know you're all busy, but if you could advise if when tonight's activities hit the international Afghan media, that would be useful. We are monitoring New Zealand media this end. Hoping we still have a fair amount of time up our sleeve but also to stay ahead of the power curve this end."

What did you mean by "power curve this end"?

A. That would be so that we could keep Ministers informed as to what's going on.

Q. Right. So that's consistent with what I've been putting to you about --

A. And CDF obviously as well.

Q. -- the environment?

And I'm not wanting to labour the point, but to round this off, it suggests, doesn't it, that there's a direct relationship between the SAS operation unfolding half a world away in Afghanistan, and the political interest at a high level here in New Zealand about what was happening?

A. Correct.

Q. You then deploy, and I think you've told us that you arrive in theatre on 1 September 2010?

A. Correct.

Q. And you have this handover process with Rian McKinstry for a week, because he leaves, I think on the 8th, and you take over command on the 7th, so you've got seven days --

A. Right.

Q. -- give or take a bit to settle in and all of that, correct?

A. Yeah.

Q. A week. Yep. Okay.

Oh there's just one email I want to take you to that occurs that about this time, if you go to page 90, black bundle.

This is an email from Peter Stockwell and it's dated 2 September. Who was -- what position did he hold at this time?

A. I think he was the Vice Chief of Defence, I'm not -- Air Vice Marshal. In fact, sorry, either Vice Chief of Defence or he was the Joint Commander, one of the two, I think.

Q. Okay. Right. Did you see this email? Can you just read it out loud and then -- you may not have seen it?

A. So this is from Peter Stockwell to Rob Hitchings:

"So can someone tell me the difference between an insurgent and a civilian when they reside in an insurgent village and are they all related or connected? I could make some comment about my thoughts and concerns, but I will resist the urge, given the discoverable nature of emails."

Q. Were you aware of that email at the time, 2 September?

A. No.

Q. I can't tell from this, but were you copied into it at all? It doesn't look like it from this, does it?

A. I don't believe so, this is the first time I've seen it, I think.

Q. And you would have been in theatre at that time, 2 September?

A. Correct, yes, I would have been.

Q. We might come back to that later.

What did your handover with Rian McKinstry consist of?

A. So obviously all the personnel, making sure we understood who was forming what parts of the team; then there was how we were relating to the Crisis Response Unit, which is our -- the unit that we were mentoring, all the leadership meetings with them, understanding the state of play that they were at at the moment, we were always fighting for equipment for them. So there was a range of logistics and command things there.

Q. You would have been fairly well up to play before you hit Afghanistan though, because you'd been receiving those reports



on a daily basis, so you were well-informed before you got there, is that fair comment?

A. To a level, but there's obviously a different level of granularity when you're in country.

Q. Sure. And you were having phone calls regularly with Rian McKinstry on the secure phone line?

A. Correct.

Q. What, every day?

A. I wouldn't -- no, I wouldn't say that was necessarily the case but it was --

Q. Frequent?

A. Frequent, yeah.

Q. And you had seen and were aware of the media coverage about the allegations of civilian casualties --

A. Correct.

Q. -- before you left?

A. At least some of it.

Q. And you'd seen the ISAF press release about the Zadalis IAT investigation?

A. So I knew about the IAT investigation. I believe I'd seen that press release, but --

Q. I think we can show that you would have been on an email chain with it if you want me to do that, or do you accept from me that -- well?

A. I accept from you. I think it might also be useful to say there was an email I think from Rian at about that time that said -- it gave some of the thinking behind what he believed General Petraeus' point of view was in giving that press release, which was a part of the "hearts and minds" strategy.

Q. If you go to page 80 you will see there an email that's to you and we know that that's from a Sergeant Major in the unit. And you will see that that attaches at the bottom CIVCAS media document. And that attachment is shown at page 83?

A. Okay.

Q. And that is in fact the second ISAF press release?

A. Yep, okay.

Q. Which if you just want to cast your eye over it, is the one that refers to Brigadier General Zadalis' investigation?

A. Yes.

Q. And that's the one, just to be absolutely clear, where he concludes that the -- there may have been civilian casualties as a result of the rounds falling short?

A. Yes.

Q. So, you had that, you were aware of that, before you go to theatre.

And I think you went, didn't you, with Rian to meet -- to the IJC when you were over there, he introduced you to people?

A. He would have introduced me to some, yes.

Q. And is there quite a scripted handover process that goes on when an operation -- you know, when you're handing over command from one commander to another such as happened here?

A. No, I wouldn't call it scripted. There's certain things like taking account for the money, but otherwise, you know, it's what the situation demands.

Q. But pretty important for you to engage with the people that you'll be working with and liaising with once Rian goes, so that there's a seamless --

A. Yeah absolutely. But you would obviously appreciate that the IJC is a large organisation, it's not possible to meet everybody in that handover time. So there's always people you're yet need to meet.

Q. And you take over command I think at 12.01am on the 7th of September and Rian leaves not for another day or so, doesn't he, on the 8th?

A. On the 8th I believe, yeah.

Q. You had -- you were aware, weren't you, that Rian McKinstry had been told or asked to obtain a copy of the IAT report?

A. Correct.

Q. And that's been confirmed in Rian McKinstry's evidence, but if you also look at page 84, the page that we were just looking

at, that email from Colonel Kelly that you read out, or we read out a few minutes ago, that also confirms that New Zealand were wanting the report?

A. Correct.

Q. Can you explain to us why it took until the 8th of September before you asked for that report, you and Rian, do you know?

A. I believe we had asked for it and it wasn't available previously, we would have been, I assume keeping on ear to the ground to see if it was possible.

Q. Because you'd been in theatre since the 1st of September?

A. Correct.

Q. You knew that New Zealand -- there was a high enough level of anxiety back in New Zealand, that New Zealand wanted the report, it just strikes me as odd, and you might be able to help me, as to why you waited for a week before you asked for it. So you're now saying you did ask for it before the 8th?

A. I'm -- so my recollection is not clear on this, but there would be no time I would have thought where we would have just said oh well let's not continue to pursue searching for this document. But that was the first time that I was able to ask for it.

Q. So did you ask for it before the 8th or not?

A. I think Rian asked for it --

Q. But you didn't --

A. -- before and we were told that it was not yet ready. And so then we would be listening to see if it had been concluded.

Q. So who would have told you it wasn't yet ready?

A. I think there's an email from Rian which refers to that point.

Q. Okay, alright we might come to that when we go through the emails?

A. It says, I think -- you go, sorry.

Q. But you didn't yourself do anything prior to the 8th in terms of trying to track it, you didn't do anything about it?

A. I was doing a handover.

Q. All right. And you knew when you went to try and get it on the 8th that New Zealand was in the clear, if you like, that there wasn't any suggestion -- or that New Zealand had been cleared of any direct responsibility for civilian casualties?

A. Correct.

Q. And who went with you to go and get the report?

A. So, I was just trying to turn my mind to that. I think -- I would have gone from Camp Warehouse, which is where we were domiciled to IJC, there would have been a -- probably a soldier with me to drive, but then at the Headquarters, it might have been myself and possibly our Liaison Officer at IJC -- at the ISAF SOF.

Q. So sorry, can you just clarify for me when were you turning your mind to that particular question?

A. Just over the break, I was just --

Q. And why was that? Did one of the team ask you to -- discuss that issue with you? No don't look at them, Brigadier. I'm asking you the question, I'm not being -- I'm just really interested in that, because there's been an order excluding witnesses, so I'm just curious to know why you turned your mind to that particular question over the break?

A. Mmm.

Q. Were you asked that issue specifically over the break?

A. I was asked if I'd, yeah if I could remember.

Q. All right, well that's helpful to know, and you can't remember?

A. No, I think my -- yeah, no.

Q. So you might have gone with somebody?

A. Correct.

Q. Who would that be if you'd gone with somebody?

A. So that would have been our Liaison Officer at the ISAF SOF.

Q. And is that Mr Gillies?

A. Correct.

Q. And did he -- what did he do, did he go with you to the meeting?

A. So he introduced me to the officer.

Q. Who was the officer that you spoke to, you don't need to give us a name, but do you know the name?

A. No, I don't.

Q. And where were you, where was this meeting?

A. So, it was in the IJC Headquarters which is as I described in my evidence-in-chief, is a big sort of sort of large warehouse type building, if you like.

Q. And so you and Mr Gillies were with this person that you can't remember his name?

A. Correct.

Q. And what, in a big room, in a small room or?

A. Yes, so in a big room.

Q. Big room. As an office or boardroom or?

A. No, it's all -- fundamentally it's open plan, for the most part.

Q. And so did this person, did he go and get the report or did he have the report?

A. So he didn't have it initially. He went and retrieved it and then showed it to me as I described.

Q. Where did he get it from?

A. I assume it was a safe, but I can't be sure at this time.

Q. So where were you, were you sitting or standing?

A. Standing I believe.

Q. Standing you believe. What about Mr Gillies, was he sitting or standing?

A. So he would have been -- if he was still there, he would have been standing probably alongside me, or to the back of me.

Q. Well, Brigadier, I suggest to you that you must remember whether he was still there or not, surely? Was he there or not?

A. So, my sense is that he would have still been there.

Q. And so can you just tell us how this all unfolded? So this person, that you can't remember, came back with this document?

A. Correct.

Q. And how long after did that happen, how long had you been there before he went and retrieved the document?

A. Some minutes, perhaps. It was -- we had a conversation. And then I asked him if I could see the document. It was not cleared for New Zealand to see it, which is why he then effectively bent the rules to show me that --

Q. Why in your mind were you wanting to see the document?

A. Well, what I wanted to get was a copy of the document because I knew that this was something that New Zealand wanted.

Q. Did you ask him for a copy?

A. Yep I did.

Q. When did you do that?

A. So, probably at least once through the conversation, maybe more than that.

Q. So you arrive at this open plan building and you meet the person that you can't remember who it was. And just -- I'd like to get a sense of what this conversation was that you had with him. So you wanted to get a copy of the report; so you asked him presumably quite early on for that?

A. Correct, I would have thought so.

Q. And what did he say?

A. That it's not released to New Zealand, it was still a classified report, not releasable to New Zealand at that time. I think you'll find it's in my evidence-in-chief as well, I explain that.

Q. And then what was the conversation after that?

A. So, I wanted to ascertain if there had been any civilian casualties and specifically if there'd been any civilian casualties caused by anybody, but that the Coalition forces as well.

Q. So, you specifically asked him about whether there had been any civilian casualties caused by Coalition forces?

A. Yeah, that's my recollection.

Q. And what did he say when you asked him that question?

A. So my recollection of what I -- strong belief that I took from that was that he said no there was none.

Q. Why would he say that Brigadier when that's not what the IAT report said?

A. Yeah, I don't -- I can't answer the question.

Q. Doesn't make sense, does it?

A. So I asked him, it was clear to me from his answer that there was no civilian casualties. I said well I can't very well report that without having seen the report, it would be not the right thing to go back without having verified, at which point he then conceded that point, and showed me the paragraph that he was able to show me.

Q. So are you saying that this American, was it American, this person?

A. I think it probably was, yeah.

Q. This person who was probably American lied to you?

A. No I'm not saying that.

Q. Well you are, aren't you, because you're saying that he told you there was no civilian casualty?

A. I'm saying that what I understood from what he said was very clearly in my mind that there was no civilian casualties.

Q. It's not what the report says is it?

A. As I've found out since.

Q. Well, it's not what the report said at the time, either. So he was not telling you the truth when he said that, is that what you're saying?

A. So that would be one possibility.

Q. What's the other possibility if he told you that there were no civilian casualties, what is the other possibility, other than that's untrue?

A. Unless he'd potentially misunderstood my question and was referring specifically to us. But you know, I verified, I believe I verified, asked my question, got him to show me the report. And then got him to explain why in that case then there couldn't be any civilian casualties, and as I've said in

my evidence-in-chief, he then explained that the reputed women that were in hospital were in fact military aged males and that the other two possible sisters, as was -- had come through intelligence were referring, they thought at least to Naimatullah and Kalta.

Q. Well, let's just unpack all of that.

So you go -- you're having this conversation with this person because you say you want to establish whether there's civilian casualties, that's what you said to me?

A. Correct.

Q. And whether the American Coalition force was responsible or involved in any way, that's what you said. And you're saying he told you no civilian casualties and there was no fault on the part of the US Coalition force?

A. That's what I understood him to say.

Q. Right, and that is we know completely contrary to what's in the IAT report. So he's either mistaken or misleading you?

A. Correct.

Q. There's no other explanation is there?

A. No, not that I can think of.

Q. How likely is it do you think that he would -- well, why -- can you think of a reason why he would want to mislead you?

A. I mean, you're asking me to speculate.

Q. You don't know?

A. I don't know.

Q. Can't think of a reason? No.

And you wanted to see the report and you're saying that he's telling you that you're not allowed to. And then ultimately, he shows you a part of the report?

A. Correct.

Q. So how did you cajole him into letting you see a part of the report that you're not allowed to see?

A. Kiwis are generally well regarded.

Q. Sorry?



A. Kiwis are generally well regarded, so I played on that.

Q. So how did you do that?

A. The logical reason that I couldn't just take his word for it, I did need to see something if I was going to report that back to capital.

Q. And he willingly showed you that despite the fact that on your evidence he's told you something that's not what the report says, is that right?

A. Correct.

Q. It doesn't make much sense does it? So having misled you about what's in the report, then you're saying he willingly showed you a part of the report?

A. Correct.

Q. Does that seem logical to you?

A. I can't speculate, he just -- that's what happened.

Q. And how did he do that? How did he show you that?

A. So he showed me the paragraph that referred and said this is the part that I need to see.

Q. What did he do, did you have the report in front of you?

A. So I believe it was on the table, he was, I think, sitting down and I was standing up and he pointed to the --

Q. Did he cover up the rest of that page?

A. Not explicitly, I don't think.

Q. Right, so that whole page was open, available to you to look at?

A. Yes.

Q. But he pointed to the top four lines, you say?

A. Yeah, top three lines.

Q. Top three lines?

A. It's the first paragraph on that page with which -- I think, you may have it, I think it's only a three sentence paragraph.

Q. And you're standing looking over his shoulder?

A. Correct.

Q. And where was Mr Gillies at this time?

A. I assume in my proximity somewhere, somewhere.

Q. Did he read the same four lines?

A. I haven't asked him, to be honest.

Q. Brigadier you travel back to the camp with Mr Gillies, it defies belief, I suggest to you, that you wouldn't have talked to him about this, so surely you would know whether he read that report or not with you? Did he see it?

A. So to clarify, I didn't travel back to the camp with him.

Q. All right. You had no more conversation with him?

A. We may well have done, but that would have been in the confines of the IJC Headquarters, and what I'm saying here is that I don't recall what that conversation was.

Q. You don't recall what conversation you had with Gillies?

A. No.

Q. This American person didn't cover the rest of that page; so why do you say in your brief -- sorry I just need to find the right paragraph, that it was under -- the paragraph described as a key finding? Why do you say that?

A. I was led to believe that that was the conclusion of the report that I was reading, so key finding, conclusion.

Q. It wasn't under any heading saying "conclusion" or "key finding", was it?

A. Not that I've seen the whole report now, that's on the previous page which I think --

Q. Well, even the heading on the previous page doesn't say conclusion or key finding?

A. Right, so that would have -- my understanding would have been based on our conversation that we had that this was the conclusion of the report.

Q. So you're now saying that this American person told you that this was the conclusion of the report?

A. Correct, this is what the report concluded.

Q. Is the reason that he was saying to you, you can look at this bit and no more, because this bit related to issues that you had a particular right to know about, namely New Zealand's

conduct and how New Zealand had been, the conclusions relating to New Zealand, is that right?

A. I would think that's pretty reasonable.

Q. So we know there's no heading saying conclusion or key finding. And we know also, and you've commented in paragraph I think it's 27 about the findings of the IAT report. The paragraph immediately below the one you're talking about is the paragraph that makes the findings that you've referred to in paragraph 27 of your Brief of Evidence, doesn't it, about the likelihood or possibility of civilian casualties?

A. Yeah if you -- I mean, if you've seen that paragraph it's a long paragraph and it makes that point at the very bottom of -- or the lower part of that long paragraph.

Q. It's still the paragraph immediately below the four lines that you say are the only four lines you looked at, is that right?

A. Yeah, correct. If my eyes had skipped to the next one, and I can't say that they did, but if they'd skipped to the top lines of the next -- of the paragraph you're referring to, it continues to go on in the same vein that there was -- the Air Force did things in accordance with the Rules of Engagement.

MR RADICH: If I might just interrupt, we're possibly just getting a little close to getting into detail about what the report says. I am just a little hesitant Sir Terence, Sir Geoffrey. Happy to speak very generally about it, and I don't mean to interrupt my learned friend, but make that point.

SIR TERENCE: Yes that's been exercising me a bit too. Yes, so we'll just have to keep it rather general.

MS McDONALD: Well, I'll keep it as general as I can, of course sir, but I am actually referring to the passages in this witness' Brief of Evidence where he refers to the content of the report, and this witness has put that very much in his evidence at paragraphs 27, and indeed when he talks about the acronym AF and the passages that define the acronym AF in the report, which I am proposing to go to. I'll do that by reference to this witness' own Brief of Evidence.

SIR TERENCE: Well what about that Mr Radich? The witness does open up the report and does refer to its content and I must say, one of the things I had wondered is whether NATO and the US had consented to that use of the report in that way? So what, your point is that Ms McDonald is going further than is appropriate given the content of the brief?

MR RADICH: Look, yes, I understand it's a very fine line and I do hesitate to interrupt the flow very genuinely, and I acknowledge that it's referred to very generally in here. I think we might all have hoped there might have been a mechanism to enable us to deal with it more fully, but there isn't. And look I can't say to you of course that the Brigadier doesn't refer to it at all, and therefore, nobody should. But -- and I don't make that submission to you. But I think perhaps when we start talking about what's in each paragraph as we go down, we're almost without anyone seeing the report revealing it in the evidence. I'm just concerned about the line.

SIR TERENCE: All right, well thank you.

Well, Ms McDonald's heard the point, but nevertheless you've got to be able to pursue the line of questioning. But just keep it in mind.

MS McDONALD: Thank you sir.

And you've said in your Brief of Evidence that the mistake you made in all of this was concluding that the paragraph that you read referred to air assets, that's correct, isn't it?

A. Correct.

Q. And it's your evidence that this person showed you all you needed to know, presumably because it related to New Zealand's assault force, that must have been what you were thinking was the reason why you were only being shown that paragraph?

A. That's -- I mean -- I can't speculate what was in his mind. In my mind he was showing what I needed to know because I had asked to understand if there had been -- you know, what the conclusions of the IAT report were.

Q. But surely you've got a report that's secret that you're being told you're not entitled to have because there's no clearance for you to have it. For some reason this person, you're able to convince him, cajole him, despite the fact that you've never met him before, into showing you -- or first of all he tells you something that seems to be completely at odds with what's in the report. Then he shows you something that he says, presumably is all you need to know, you're here, you're a New Zealander, you're a Coalition partner, this is all you need to know. Now why would he be showing you something that related to American air assets, I don't understand that Brigadier? Why did you think that? Did you not -- why did you conclude that the reference was for air assets when you were only being shown a bit of the report, in your evidence, that he thought you were entitled to see. Because you wouldn't be entitled to see something that related to American air assets presumably?

A. No I don't think that's -- you can presume that I wouldn't be able to see something about American air assets per se. So sorry, your question was why would he?

Q. I'm questioning the logic of your reasoning?

A. Right. So in my mind we'd had a conversation about the conclusions of the IAT. I asked -- I principally went there to get a copy. We said a -- he said he couldn't give that to me. He explained that the finding had -- was that there was no civilian casualties. I said to the best of my recollection I can't go back to New Zealand with that assertion without having seen something written down myself. He was persuaded on that point and showed me the portion of the report which he felt -- explained to me answered my question. I said okay. So if that's the case, then what about we thought there was potential for up to four civilian casualties, how would -- how has that been addressed -- or not addressed, but how do you now understand that they didn't occur? And that's when he -- I believe he described the folks that were in the

hospital were military aged males and the discussion around the veiled -- what I believe, or what he explained to me as the veiled speech of the two sisters.

Q. It sounds that you're, in effect, you're telling us that the American man was effectively misleading you, or lying to you about the outcome of that report, is that really what you're saying?

A. No, I think just to recap what we've --

Q. Well it does, but it is quite important Brigadier, because the upshot of what you're telling us is that you're being told in this discussion by this man that the outcome of this IAT report was no civilian casualties and no fault of the American assets, and then you want confirmation of that, and you're saying that he only showed you four lines to confirm that. Now we all know that that's not what the report's conclusion was. Now, I just, think very carefully about this, but is that what you're saying? Because that's reasonably significant isn't it. If you're saying you're being misled at this time by the Americans?

A. So I'm not asserting that.

Q. Well, what are you saying?

A. As we said before, I think there's two possibilities, one is --

Q. That he was misleading?

A. -- as you've described.

Q. He was mistaken?

A. That's one -- or two, with maybe a communications issue, he misinterpreted what I was saying and I misinterpreted what he was saying. So that would be the other possibility.

Q. That there's a complete misunderstanding as between the two of you?

A. Correct.

Q. How long was the conversation you had with him at the beginning before you saw this report, the one that you refer to at paragraph 31 in your brief?

- A. It's been some time since. I would -- so this would be a guess, but I think it was maybe some minutes.
- Q. Did you say to him, goodness that's a miraculous outcome given what we knew about the allegations of civilian casualties; given what we've known about Zadalis, what he was saying, the press report said; given what we know from our end intelligence reporting and BDAs, did you say what an amazing outcome? All of a sudden this has moved within a matter of days from where we thought it was, to no civilian casualties and no problem with the American air assets. Did you say that to him?
- A. So as you will recall, I must have questioned him as to how that could possibly be the case, and the explanation I believe I gained was as described, that the potential for civilian casualties were explained as I've described. But it's not out of bounds --
- Q. Sorry, just before you go on, I'm not meaning to stop you short of answering fully, but I just don't want to lose the point, so you're saying that you did test him about that?
- A. Correct.
- Q. Because you were surprised presumably given everything else you knew?
- A. Correct, which is why I also asked to see the report.
- Q. Right. And he then went on and explained to you how they got to the point of no civilian casualties and no fault with the Americans, did he?
- A. Yeah, that's my recollection.
- Q. All right, well pretty hard given that then to suggest that there was a misunderstanding between you or a miscommunication isn't it? So you must be saying he misled you?
- A. I'm not going to assert that because it's possible that that's not the case.
- Q. Well how is it possible, because you've just said -- Brigadier, come on, you've just said to me that you tested him because you were so surprised by the outcome. And

he justified that by this explanation. So you are saying he misled you surely? How can it be a misunderstanding if he's then gone and replied to your surprise and explained it and justified it? He's compounded the lie, hasn't he?

A. I'm certainly not going to accuse him of that.

Q. Brigadier, you're getting yourself in a bit of a tangle here, did you actually see the report?

A. Yes ma'am.

Q. Are you sure?

A. Of course I am.

Q. Did you see all of the report?

A. No, I did not, as I've explained to you.

Q. Are you sure about that?

A. Of course I'm sure.

Q. And why did you say in your email that the report had "categorically concluded nothing CIVCAS occurred"?

A. Because of the line which I think is in the next one down from the email, so quote's "as close as I could get it from the report", which says that there's --

Q. Doesn't use the word "categorically" and we can't get into the detail, but that's your word, I'll put it that way?

A. That's right.

Q. "Categorically" is your word, isn't it?

A. Yes, which refers to the line in the report which says there's no chance that CIVCAS could have occurred.

Q. As a result of the New Zealand operation?

A. That's now what that reads, correct.

Q. And you can't recall having a conversation with Mr Gillies afterwards, is that correct?

A. Correct.

Q. But you do recall with some precision nine years later the four lines that you read, is that what you're saying?

A. Because since then I've read the IAT report in full.

Q. All right. Go to page 104 please of the bundle. This is your email of the 8th. Up until this point, and we can go through



the emails if you want to, I can take you to them, but up until this point Rian's communications back to New Zealand and copying you in and all the rest of it, are showing and saying that New Zealand looks to be in the clear. Jury's still out on the Americans. Possibility of civilian casualties. Correct?

A. Correct.

Q. Broadly.

Why did you not copy Rian into your email, if I'm right about that, this email of the 8th, it doesn't seem to have Rian McKinstry copied into it?

A. He would have been getting ready to go back to New Zealand and then on a flight. So I was reporting to Peter Kelly.

Q. The reason I ask that is I wonder whether maybe you didn't want Rian to know where you'd got to, because it was completely contrary to where he'd got to, wasn't it?

A. No I don't think that's true, on either account.

Q. Why did you not say in your email:

"I only had a fleeting glance at the report. I was only able to look at four lines out of a report that spans for whatever it is, four pages or something of that size"?

A. Yeah.

Q. "And I wasn't allowed to read any more."

Why didn't you say that?

A. Good question. So I allude to it, and clearly not well enough. But you'll read in there I say "I sighted".

Q. Yes, well the other way of interpreting that is that you sighted what you say, is that I have sighted the accident investigation IAT conclusion?

A. Which is --

Q. So what's the significance of saying "sighted" what are you saying to me?

A. I think I'm trying to remember back now nine years, but in my mind that would have been slightly different from I sat down and read the report, it's I've sighted the report, the

conclusion of it, this is what it said. And then I believe, having sent that, I had a sense oh I haven't maybe been clear enough. The next opportunity to communicate was the secure call that I believe I would have had with Peter Kelly later that night or morning depending on time zones and it's my sense that I would have spoken to him and just clarified that all I saw was the paragraph that I saw.

Q. Right, so let's just have a talk about that from a minute. So are you saying that your sense is that you would have told Peter Kelly that you'd only seen four lines and had a fleeting glance at this report?

A. Correct.

Q. So when you say "your sense is", are you telling us that you did say that to him?

A. I'm saying that in the normal run of things I would have had had a conversation with him, which I'm sure I did. I would have discussed the day's events. And I'm sure I would have certainly spoken about this, and just tried to clarify what I saw, what I believed, why I believed that.

Q. So when would that have been?

A. It would have been at the next opportunity that the time zone's availed.

Q. So, this was the 8th of September at 7.12am, how long after would you have spoken to Peter Kelly do you think?

A. I don't know.

Q. Well, you were talking to him daily on the phone?

A. It would have been within 24 hours I would have thought.

Q. Okay, so did you say to him then "what I've said in my email may be misleading and in fact I only had a fleeting glance at four lines of the report and I can't really tell you any more than that?" I mean is that the sort of thing you were meaning when you say you clarified?

A. Yeah, I think I would have clarified that I only saw that one paragraph.

Q. Why didn't you say that in your email?

- A. So, I sent the email probably just a fraction too quickly, would be my recollection, we had a range of other things to go on with. But I remember as I pressed send, I thought oh I could probably say that a little bit more clearly. In hindsight, it might have been nice to have followed up with a second email, I wish I had. As it stood, I believe I clarified over telephone.
- Q. Well, I suggest to you Brigadier, when you say, "it might have been nice", given the importance that your email assumed, and that it formed the basis it seemed for ministerial reporting that was wrong and years of confusion; perhaps "nice" doesn't quite cut it? I mean, your email is wrong, isn't it? It's misleading and it's led to on all the evidence that we're hearing, considerable misleading reporting, correct?
- A. So I realise that you work on emails and discovery and things like that, as commanders in the field that's not the only -- we don't communicate in terms of -- so that you can find emails later on, we communicate also verbally. And so I felt that that was a sufficient way to communicate or clarify.
- Q. Well, what are you saying though Brigadier? I mean, are you now saying that you told Mr Kelly that in fact what was in this email wasn't actually accurate; so that he in fact knew within a day of this email that the report didn't categorically clear both ground and air assets?
- A. No that's not what I'm saying.
- Q. Well what did you tell him?
- A. So, again it's -- I don't have a clear memory of the conversation, but it would be my belief that I would have just clarified that I'd only seen the one paragraph.
- Q. All right, so you would have qualified, clarified it, meant that things weren't so definitive, is that what you're saying?
- A. That he would have been able to take that into consideration.
- Q. Well, that then raises other issues perhaps for Mr Kelly, but why did you put in bold, "It categorically clears", why did

you put that in bold, what were you trying to do by saying that?

A. I think it was probably a sense of relief.

Q. But you already knew the New Zealand SAS were cleared of any problems, weren't you? What was the relief?

A. Relief that there will be no civilian -- well I believed that there had been no civilian casualties.

Q. Right, so that takes us back to where we started perhaps, so you had a sense of relief when you were reporting back to New Zealand, so you are telling New Zealand, the same New Zealand that you'd left, heightened level of anxiety, political -- Prime Minister exercised about the possibility of civilian casualties. You go over there, go to the IJC and you report back categorically, it's all okay guys, nothing to worry about, nothing to see here. Is that really what was going on here? Are you trying to reassure New Zealand that there was nothing to worry about? Were you enthusiastic and keen to do that?

A. No, I was keen to get to the facts of the issue and I thought that I'd established them.

Q. I suggest to you before we move away from this email, that the proper and professional thing to have done would have been to have qualified this email in the way that you should have, to say that you only had a fleeting glance of four lines of a report, and what you were told was whatever you were told by the American man. Would that not have been better?

A. It certainly would have been a better construction of that email.

Q. I was going to go through some detail of the information that was held and that you would have seen, at least to some extent about the Battle Damage Assessments and the intelligence reporting about the possibility of civilian casualties at the time, but I may not need to if I put the matter to you this way, do you accept that you were aware of the possibility of civilian casualties that was coming through the reporting,

through the BDA and the intelligence network? Do you accept that, when you went over there, and before you left New Zealand, that that was -- you knew that that was the sort of --

A. Yeah, it was our understanding --

Q. -- that was coming through?

A. -- there'd been claims that there was a gunsight issue and if there was any possibility of civilian casualties it was there where that issue would arise.

Q. Yeah, so I think you probably misunderstand my question, that the New Zealand reporting, the intelligence reporting coming through to Camp Warehouse was showing that the intelligence was showing there was a possibility of civilian casualties, do you accept that?

A. Yes.

Q. I just want to go to another matter now, and that relates to what you've said in your evidence about the fact that you read the acronym "AF" and took that to mean Air Force, correct?

A. Correct.

Q. I assume that you knew that this was a US Army unit and not a US -- not US Air Force, is that correct?

A. So there were two, there were Air Force and the AWTs were Army, correct.

Q. Right, and the Apache helicopters, they're not used by the Air Force, are they?

A. No.

Q. They're used by the Army?

A. Correct.

Q. And an Army unit wouldn't describe itself as the Air Force, would it?

A. But if you talk about the ground force and the Air Force, and you think about them in those conceptual terms rather than the organisational terms, then that would make sense.

Q. The Apache helicopters weren't used by the American Air Force, they were used by the army unit, weren't they?

A. Correct.

Q. And isn't it the case that your own unit, the SAS, regularly used the expression "assault force" when it was talking about its ground troops?

A. As in the ground assault force?

Q. Yes. Well assault force, used the term and description "assault force"?

A. Yeah, sure.

Q. Yes, sure --

A. Yes.

Q. -- is that what you're saying? So you're familiar, and at that time were well familiar with the use of the term assault force?

A. Yes.

Q. And the SAS used that term, yes?

A. Yes.

Q. And they abbreviated it to "AF", didn't they?

A. Not that I am aware.

Q. I want to take you to some documents, and these are all documents that are declassified, most of them -- I think all of them are in the bundle -- no not all of them, but most of them, can we give those out please and one to the witness?

The first one I want to take you to is dated 12 August 2010 and it relates to the Operation Rahbari Mission. It's the Operation Rahbari Mission approval and just we haven't used that term here previously, can you just tell us what Operation Rahbari was?

A. I think that was the Operation Burnham, was it.

Q. Operation Burnham. And you'll see over on the second page of that document, if you turn it over, "Operation Rahbari, Objective Burnham, TF81 mission Con Op", correct?

A. Correct.

Q. And if you turn to the very last page where the map is shown, that's the one, that one there, and if you go to the printing on the side under the heading "Method" you will see there in

the second line "isolate the COI prior to assault force clearing", correct?

A. Correct.

Q. That's a reference to assault force in relation to TF81, isn't it?

A. Yes.

Q. If you have a look at the second document for me now, if you go to the next document, which is the OPSUM, the operations summary for this operation, this very operation, have you got that document?

A. Yes, I have.

Q. And if you come down the front page to 22:00:53, got that?

A. Yes.

Q. What does it say?

A. "Assault force made entry through EMOE to A1".

Q. So that's a reference, isn't it, to assault force?

A. Yes.

Q. In relation to this operation for TF81 in the Operations Summary?

A. Right.

Q. Yes?

A. Yes.

Q. Turn the page please. 22:01:49, another reference to "assault making entry into A3, clearing A3, BDA commenced"?

A. Yes.

Q. Go down to 22:02:03, "assault force moving back to A1", correct?

A. Correct.

Q. Through references to assault force in the very Operations Summary for this operation.

Come to the next one, which is the Operation Burnham brief, 22 August 2010. It includes, it's a larger document than these two pages, it includes a story board and intel summary and map, but if you go to what I think is slide 4, it's that dark page, have you got that? And you'll see there a diagram

and in a little blue box the words "assault force" showing the assault force position during the operation?

A. Yes.

Q. And again, this is operation, the one we're talking about?

And then if you come to the next which I think should be the summary of incident, have you got that?

A. Yes, I have.

Q. And that's a summary of this incident, the 22nd of August?

And second paragraph, the assault force, do you see that, second sentence in the second paragraph?

A. Yes.

Q. And interestingly it defines assault force with the acronym "AF", doesn't it?

A. It does, yep.

Q. Have you not seen that before? Any reference to AF?

A. Look to be honest I don't --

Q. Have you got the right document?

A. Yes, I do. I'm sure I have seen that document, I don't recall that acronym though.

Q. Another three lines down, further reference to "AF", same paragraph a few sentences down "AF conducted a call". All references to assault force and using the acronym "AF".

Come to the next document which is the Rahbari orders document, and over the page, it's headed up "task org" have you got that, if you turn it right over it's on the very back of where your hand is?

A. This one?

Q. No, come back one more, it's that page. Yeah, that's right. And you'll see three boxes along the bottom, green, grey and red?

A. Yes.

Q. The red one's assault force?

A. Yes.



Q. And then come to the next one, it's the last page, really under -- CO MD and SIGS, that page, and it too talks about assault force.

And those last two documents, they're the orders that are given to the troops, aren't they?

A. Yes, that's right.

Q. Just one further document, can you turn to page 79h of the bundle and I understand that this is Mr Peter Kelly's brief to the Chief of Defence on the 31st of August 2010 after the operation, does that line up with your understanding of the document?

A. I'd have to read it sorry.

Q. Well that's the start of it there, if you go to page b you'll see that's headed up "Directorate Special Operations CDF Brief Op Wātea", right?

A. Right.

Q. Correct?

A. That's -- yeah.

Q. And if you go to 79h, slide 1 shows insurgents circled hiding in a tree line, in fact I think this might have even been a page that Mr Radich took a witness to earlier in the day, just under that reference, still with the heading "slide 1" it reads "proximity to our assault force" doesn't it?

A. Yes.

Q. So, what we have Brigadier, is the Ground Force Commander, the troop commander and the ops officer all using the term "assault force" in relation to this very operation, don't we?

A. Yes.

Q. And as well as that -- so we've got the pre-action approval to the CDF and after the operation we have your direct superior, Mr Kelly also using the term when briefing the CDF. And he's an SAS man, isn't he?

A. Yes he is.

Q. So it seems Brigadier that you are the only person in the SAS who thinks AF means Air Force, is that right?

A. No.

Q. It's correct though, isn't it, that the acronym "AF" is in fact used in New Zealand to describe assault force, it's obvious from the documents I've just shown you, correct?

A. So, yeah, it's correct that it has been used that way.

Q. Well, and not really so -- those are all documents, and a number of them, in relation to this very operation used by a variety of people, who have control of this operation, and in their reporting. So that shows, I suggest to you, that assault force is very commonly used by your own unit, correct?

A. Yes.

Q. And you maintain the position that you thought it meant Air Force?

A. That's the only logical explanation that I can see.

Q. It's completely contrary to all of that documentation, and how the term was used by your own people, and you never even sought clarification for that, from this American man?

A. I can't recall, I just explained what I read, what I took from that. It's obviously clear that that was an incorrect understanding now.

Q. I have to put to you Brigadier that what you've told us is an elaborate explanation about reading these four lines and misunderstanding them. It's now become confused with some apparent assertion that the American person mislead you or at the very least was almost inexplicably confused, and that what you've told us is in fact not true. You're on oath. I'll ask you now, to please confirm is what you've told us today correct?

A. So, my understanding of everything I recall is absolutely truthful.

Q. Are you sure?

A. So I think you're putting some words in place that I don't -- so I haven't accused anybody of lying. And I've said already on the stand that it's possible that myself and the American officer misunderstood each other in terms of when we

were communicating. He may have thought that I was just referring to the New Zealanders and the Afghans.

Q. But you've told me -- that doesn't make sense with respect, you've told me, you've told this Inquiry, that you questioned him and he went on to explain how they reached this remarkable outcome to clear the Americans and to clear any finding of civilian casualties. Now that's not a misunderstanding Brigadier, is it, it's either he's telling you an untruth, or you're not telling this Inquiry the truth?

A. So, I mean -- just, okay so we talk about those two things, the casualties, and he's explained them, I think that's still reasonable, we know from the Governor in Tala wa Barfak that the people that were in the hospital are -- were believed to be military aged males, so I don't think that's in question. The reporting around the two alleged females being missing was certainly an explanation that I got at that time, it was contemporaneous with my email. So that was my understanding at that time.

MS McDONALD: I'll just pause you there, sir, I've probably only got five minutes, if I could just -- could I just finish off?

SIR TERENCE: Yes.

MS McDONALD: Brigadier, who did you talk to about this conversation that you had with the American once you got back to theatre?

A. I can't recall, I think I went to my office and then wrote the email.

Q. Who did you share an office with?

A. The lawyer.

Q. Who else? Mr McKinstry?

A. He was -- he would have perhaps come in and out, but he was getting himself ready to leave theatre.

Q. Did you suggest to anybody else in theatre that they should report back to New Zealand that the IAT had concluded that there were no civilian casualties? Think about that before you answer please.

- A. I don't think so.
- Q. Did you discourage anybody from reporting accurately back to New Zealand about this?
- A. I can't imagine why I would do that.
- Q. Are you sure you never told anybody in theatre not to report back to New Zealand about what the IAT had concluded?
- A. I can't see why I would do that.
- Q. Is the answer no?
- A. Well, as I say, I can't see why I would do that.
- Q. I'm asking you whether you did, or whether you didn't, or whether you don't remember?
- A. So my recollection is, of course not.
- Q. Your recollection is what?
- A. My recollection is that I would not have done that.
- Q. Brigadier, I suggest to you that what really happened here is that your 8 September email -- well, I'll go back one-step, that you knew that New Zealand were concerned about the possibility of civilian casualties, and that that was a big deal back here. And that you went into theatre and you were taking over. And whether you saw, read, or were told about that IAT report, whatever the position was, that when you sent that email back to New Zealand on the 8th of September you wanted then to shut down any suggestion of civilian casualties, and that you thought that that report would probably never see the light of day, and that you were actually giving New Zealand what you thought they wanted to hear. No problem. Nothing to see here. No issue for New Zealand or NZDF. What comment do you want to make about that?
- A. I think that's completely incorrect. And if I'd thought there was a chance of civilian casualties then I would have reported that faithfully, as I reported what I believe faithfully what I saw. I'd also say that throughout my career I have always on a number of occasions stood up and confronted things that I thought were wrong.

Q. How did that report get back to New Zealand, do you know?

A. I've got no idea.

Q. Well, there's only a limited number of people that would have access to that report, correct?

A. The IAT report?

Q. Yes.

A. At the time we're talking about, no-one.

Q. No-one had it. Who would have had it in at least the beginning of September 2011?

A. I don't know, probably --

Q. Did you have a copy?

A. I can't recall that.

Q. You can't recall whether you did?

A. No, I don't think I did.

Q. Well, surely you'll know whether you had a copy or not in 2011?

A. Yeah, so again according to my -- as per my evidence, I haven't -- I don't believe I've seen it until 2018.

Q. Can you answer my question directly Brigadier, just take it one-step at a time, did you have a copy of the IAT report in 2011?

A. No.

Q. Are you sure?

A. Yes.

Q. Do you know who did?

A. No.

Q. Somebody in theatre must have obtained it?

A. Presumably.

Q. It didn't fly back to New Zealand by itself, did it?

A. I mean, I can't answer that question I'm sorry.

Q. Well, it either was brought back by somebody or it was emailed back from theatre?

A. Correct.

Q. And are you telling me that you don't know who got a copy of that report in theatre?

A. Correct.

SIR TERENCE: We'll take a 15 minute break and then resume.

(Afternoon adjournment)

CROSS-EXAMINATION BY MR SALMON

MR SALMON: (Audio begins)...watched the aerial video footage of the attacks in Operation Burnham, or not, did you?

A. No, I did not. Can you hear me?

Q. Yes I can. Did you watch them before you sent your 8 September email?

A. So what I saw was the, I believe the gun tapes showing the insurgents on the hill, but I did not see rounds hitting any buildings.

Q. And when you're saying you didn't see those, you didn't see them before 8 September and you've never seen them since?

A. I have seen them since in preparation for this Inquiry.

Q. Earlier today Colonel McKinstry confirmed that when he watched those, the aerial footage, it was "clearly obvious to me" that there may have been civilian casualties, did he share that view with you?

A. I'm sure we discussed it.

Q. And you'd respect his view, wouldn't you?

A. Yes I would.

Q. And take it on faith that if it's clearly obvious from him viewing one video once that there may be civilian casualties, then there really may be?

A. Correct.

Q. And that would have been your operating understanding throughout the times you've been asked about it today?

A. Correct.

Q. The second point is my learned friend asked you whether you had had the IAT report back in 2010, or 2011, and you initially said, "I don't recall" before deciding that you probably didn't. That first reaction was the honest one, isn't it?

- A. That first reaction was to make sure that I didn't say anything that would -- could be possibly incorrect.
- Q. Right, and if you don't recall whether you had it or not, then it was an honest answer, but it's not right for us to then move to you deciding that you didn't have it, or probably didn't have it, because if you don't recall, you don't recall?
- A. Correct.
- Q. So we can take your evidence as being that you don't recall whether you had it or not back in 2010 or 2011?
- A. I certainly don't recall having it then, and it's my belief that I did not have it then.
- Q. But you don't recall?
- A. Correct.
- Q. And again to be fair on you, and the problem's probably harder than when we last discussed recollection and memories in the High Court hearing you were in with me, many years have passed and a lot of what you've had to do here is really reconstruction of events, isn't it, in the sense that you don't remember every detail as we've heard today?
- A. So you're making an honest attempt to do that, absolutely.
- Q. The wording you've used often is to the effect of "I would have" or "I believe I would have", and that's because on those occasions you don't in fact recall what did happen and its precise sequence or context, or words used, correct?
- A. I think that's the nature of memory.
- Q. And if we can take one example, when I read your Brief of Evidence from paragraphs 14 through to 17 I read you as describing your visit to the IJC operations room and no substantive discussions before, this is your paragraph 15, you asked if you could see the ISAF report and were told it wasn't cleared for release, but you were able to see a paragraph described as a key finding, which was shown to you as a demonstration of good faith, correct?
- A. Correct.

Q. And only then after you'd looked at that paragraph at 17 you say:

"We then had a quick conversation which in my mind reinforced the sentiment expressed in that paragraph."

Correct?

A. Correct.

Q. So I'm rightly taking that as being your memory when you wrote this brief was that the substantive discussion about what ISAF IAT may or may not have concluded and what might be in the balance of the report happened after you'd been shown that first paragraph, that's right, isn't it?

A. Look I think that's probably how it reads. But as I've described to your learned friend, I believe there was a conversation, followed by view of the paragraph in question, followed by further explanation.

Q. But the conversation about what was in the report came after you were shown that first paragraph?

A. I don't think I could say that definitively, I believe, as just described, there was conversation. I saw the paragraph, and then there was a further conversation.

Q. And when you say you don't think you can say that definitively, what you mean to be fair to you, is this short encounter in 2010 is something you don't remember well at all, now. That must be what you mean by you can't say definitively?

A. Well I think if I asked you to recall something precisely word-for-word in 2010 you'd struggle, so this is to the best of my memory, correct.

Q. So it may be right then that as your brief reads, the discussion about anything substantive was after you saw the paragraph?

A. I mean, again for the reasons we just said, I don't think I could say that.

Q. Okay. Just don't know?



- A. As I've said, there was a discussion before, I saw the document, and then there was a further discussion afterwards.
- Q. All right. And it is a long time ago and you then didn't look at these issues for a long time. I take it you've only actually seen the text of that page of the ISAF report in the course of preparing for this hearing again, you haven't gone and read it repeatedly in-between, because you didn't have a copy, correct?
- A. Correct.
- Q. And so, you certainly wouldn't have if I'd approached you a year ago, remembered what you'd read, in terms of the words used and so on?
- A. No, no I wouldn't have.
- Q. And thus, if we'd asked you how you could have misunderstood it, we would have never heard this story about what AF might have meant at all, would we?
- A. So, having read it, obviously you recall things to mind, that seems to me the only logical reason that I could --
- Q. Right, and that's the crux of it, isn't it, you don't remember reading "AF" and thinking Air Force at all, you're looking at it now seeing the letters "AF" and back-solving an explanation that's not embarrassing?
- A. I don't think -- so, again, I faithfully reported what I believed I'd took from that discussion and from viewing that document.
- Q. That's not what I'm asking you, I'm asking about your AF theory, if I can put it this way, nowhere will we find you having written or recorded your theory that AF meant Air Force then, until you provided your Brief of Evidence for this hearing, that's correct, isn't it?
- A. But AF is a very common term in the military.
- Q. Nowhere will we find you saying that that was a component in how you misread the ISAF report, you've not written that down anywhere until your Brief of Evidence, ever, have you?
- A. Correct.

Q. And it's not something you can remember doing, it's just something that you've said is an explanation that might be accepted?

A. I believe that as I've explained it, is as correct as I can get it as memory serves.

Q. And that's your evidence?

A. So again, my evidence is that I reported faithfully what I understood the situation to be.

RE-EXAMINATION BY MR RADICH

MR RADICH: Brigadier, I'll be brief, as well as being short. You were asked by my learned friend Ms McDonald if you -- if there had been enquiries about the existence or the availability to see the IAT report previously. Can I just ask you to look at the big bundle, which you have right in front of you at page 82? Do you see the email there on that page and do you see the second to last paragraph, and can you just explain for the record who the email is from and to and what that paragraph says?

A. So the email is from the SNO.

Q. Who was?

A. At that time it would have been Rian McKinstry. And it doesn't give who it was sent to, sorry.

Q. No, that's all right.

A. The second to last line, or second to last paragraph?

Q. Yes.

A. "I have asked for a copy of the completed report from IJC and will forward this when received."

Q. Thank you. The second point I want to raise with you is in relation to the questions and answers with my learned friend Ms McDonald about your reference to a prospect of a misunderstanding. And if I've recorded this correctly, you referred to the fact that there might have been a misunderstanding that you -- you were -- it was reinforced by getting the report, and there might have been on ongoing misunderstanding. Now can you just explain in your own words

again for us, because I'm not quite clear we concluded on that, when you say a misunderstanding, first level, and second level, can you just explain a little further what you meant by that?

A. So my recollection is that I went and asked for a copy of the report. When told that wasn't possible, then asked to understand the conclusions of the report, because we believed up until that point that the report had not yet concluded, but was ongoing.

Q. So had it been concluded?

A. Yes.

Q. What was the finding?

A. And then, so potentially I -- where the misunderstanding may have arisen, if one did, was that I was asking in regards the whole operation, and perhaps the IJC officer thought I was asking in relation specifically to the New Zealanders and Afghans.

Q. Thank you. The only other matter I wish to raise with you is in relation to the acronym, the "AF" acronym. Were any other acronyms used to your knowledge in the paragraph that you read?

A. Yes, there were.

Q. Just explain them for us?

A. So the paragraph was --

Q. I'm sorry, I'm conscious when I asked that question Sir Terence, Sir Geoffrey, that we do tread a fine line?

MS McDONALD: Well given that I was stopped from going into this I do have some concerns.

MR RADICH: Yeah, no, as I say that -- and I wonder Sir Terence, Sir Geoffrey whether there is any prospect procedurally for, at some stage, for this witness to be able to have a private session to do that, or whether or not that might be contrary to your views? It's so difficult to -- as we know.

SIR TERENCE: Well we'll reflect on that. But on the particular question, I think in the light of the point you raised earlier you should leave it.

MR RADICH: Yes, I accept that entirely. Thank you, yes, as I said it out loud, I could sense that.

Can I just ask you this, how often generally have you seen AF used as an acronym for Air Force?

A. Yeah, frequently.

Q. Have you seen it used as an acronym for assault force?

A. Apart from what Ms McDonald has shown, so that was it seems obviously part of what we sometimes did in briefings, but in the context of the IAT report that -- I don't believe that would have been sort of normally relevant.

SIR TERENCE: Thank you Brigadier. We're conscious that you've come from the UK for this and we're most appreciative of that. You are excused. Thank you.

(Witness excused)

**MAJOR GENERAL (RETIRED) PETER TE AROHA EMILE KELLY (Sworn)**

**EVIDENCE-IN-CHIEF BY MR RADICH**

MR RADICH: Now your full name is Peter Te Aroha Emile Kelly, and you are a retired Major General from the New Zealand Defence Force?

A. That's correct.

Q. You are presently the Chief Executive Officer of the Upper Hutt City Council?

A. Yes I am.

Q. Please would you start reading the Brief of Evidence you have from paragraph 2?

A. Okay, thank you.

I enlisted in the New Zealand Army in 1985 and graduated into the Royal New Zealand Infantry Regiment. I served in the 1st New Zealand Special Air Service Regiment (NZSAS) between 1990 and 2000, as Commanding Officer of the NZSAS between 2004

and 2006. In my time at the NZSAS, I was deployed to Kuwait in 1998, East Timor in 1999, and Afghanistan in 2002 and 2005.

I have held a number of staff appointments at the New Zealand Defence Force (NZDF), including Director of Special Operations (DSO) between 2009 and 2011. I represented the NZDF as the Military Attaché to the United States. Before leaving the NZDF in 2018, I was Deputy Chief of Army and, subsequently, the Chief of Army.

I have a Bachelor of Administrative Leadership from the University of New England, Australia in 2003; a Masters in Management and Defence Studies from the University of Canberra, Australia in 2011 --

Q. Just pause there for a moment, is that -- is 2011 correct? It just occurs to me as I --

A. No, that date is wrong, it is 2001.

Q. Right, I wondered, thank you.

A. And a Masters in Art in International Security and Strategy from King's College, London in 2012.

The basis for briefings to the Chief of Defence Force and the Minister - August to December 2010:

I was the DSO, based in Wellington, during the planning and execution of, and in the months following, Operation Burnham. In this role I was responsible for the NZSAS, and their provision of Special Forces capabilities to the New Zealand Defence Force, and for keeping the Chief of Defence Force informed of the activities and operations of the NZSAS. I also assisted the CDF in drafting, along with staff from the Assistant Chief Strategic Commitments and Intelligence Branch, the Notes to the Minister of Defence, the Hon. Dr Wayne Mapp in 2010.

After Operation Burnham (the Operation) was conducted in the early hours of 22 August 2010, I received daily email updates from Rian McKinstry, who was the Senior National Officer (SNO) at the time. We also spoke regularly on the secure telephone line.

These communications between me and Rian, and later between me and his successor, Chris Parsons, formed the basis of my briefings to the Chief of Defence Force. Those briefings were sometimes provided in written form, and presented by way of a projected slideshow but, more often than not, the briefings I provided to the CDF were verbal briefings at our weekly meeting in the Chief of Defence Force's office.

The information derived from the communications with Rian McKinstry and Chris Parsons also served as the basis for the CDF briefings to the Minister. The CDF met weekly with the Minister to keep him informed about NZDF business, including NZSAS matters. Additionally, when sought, the CDF provided written Notes to the Minister. As I have already said, I assisted in the drafting of those Notes.

Within hours of the 22 August 2010 Operation, Rian sent me a copy of the storyboard and an Operation Summary for the Operation. And I refer to the bundle, at page 1-9.

Q. Just pause there for a moment. Now you've got the bundle, I think it's slightly buried, at your left-hand, at the front of the desk, not that one, but --

A. Oh yes.

Q. -- buried there there's a spiral bound bundle, we'll work off that one.

A. Okay.

Q. Thank you. And I needn't take you through it, but could you identify please page 1 is the email that you refer to?

A. Yes that is correct, page 1 is the email I am referring to.

Q. And are the attachments to which you refer at pages 3 through to 9?

A. Yes.

Q. Thank you?

A. That is correct.

Q. And if we go back then to paragraph 9, your second sentence?

A. The Operation Summary indicated that some insurgents had been engaged; that one member of the NZSAS had sustained an injury; and that there were no civilian casualties.

At the same time, I received a copy of the ISAF press release of 23 August 2010, which is included in the bundle at page 13.

Q. Let's just go to that if we can. Is that the 23 August press release that you refer to?

A. Yes.

Q. Thank you. Then back to your paragraph 10, second sentence.

A. The press release confirmed that insurgents had been killed and that "no civilians were injured or killed during this operation".

You will see in my email of 23 August 2010 at 8.42am, which is in the bundle at page 11, that I wrote to Rian asking if he could try to delay the ISAF press release so as to enable the Prime Minister to make a statement first. In that email I asked Rian "Has any [Taliban] TB media come out about the incident at this time?"

Q. And just pause there and have a look please at page 11 of the bundle, is this the email that you're referring to?

A. Yes that is correct.

Q. And you've just mentioned I think the acronym "TB ", used the word Taliban?

A. That's right, Taliban.

Q. Thank you.

All right, back to your paragraph 12 please in your brief.

A. I am referring here to "information operations" conducted by the Taliban; the Taliban were known for disseminating exaggerated or false reports about civilian casualties, and about damage to property, with a view to weakening the local people's support and trust in the Coalition forces.

Some hours later, in an email of 23 August 2010 at 10.20pm, which is in the bundle (with the attachment) at page 15-17, Rian relayed to me the allegations had surfaced that 20

civilians had been killed and 20 houses burnt down during the Operation. Rian went on to say, in that email, that reporting of possible non-combatant casualties is likely to contradict reporting that all those engaged were insurgents, and that establishing the correct outcomes was his highest priority.

By email of 25 August 2010, at 5:33am, which is in the bundle at page 19, Rian provided an update about the allegations of civilian casualties. In this email he explained, amongst other things that ISAF had initiated an investigation into reports of civilian casualties; and that he, the Ground Force Commander, and the Joint Tactical Air Controller had attended a VTC meeting with the ISAF investigation team.

All of this information was conveyed to the Minister in CDF's Note to the Minister of 25 August 2010 and I refer to the bundle at page 23-26.

Q. If you'd open the bundle please at those pages, I needn't take you through them because Sir Jerry Mateparae has done so a little earlier, but can you confirm please that pages 23 to 26 that you see are the documents to which you refer, or document?

A. Yes that is correct.

Q. Thank you. Then on to your paragraph 16?

A. On 26 August 2010, at 11.27pm, Rian provided another detailed update. I refer to the bundle at page 31-38.

Q. Just pause there to identify it please. Again, we've been through it earlier, but to -- can you confirm if you look through those pages that they are the pages that you're referring to?

A. Yes.

Q. Thank you.

A. Rian advised that it was likely that if civilian casualties had occurred, this would likely have been as a result of a weapons problem rather than incorrect application of force.



I refer now to the bundle, at page 43. This is an email of 30 August 2010, at 6.59am, from Rian in which he advises that:

"The Incident Assessment Team has produced a report on this Op ... on the issue of CIVCAS [civilian casualty] claims. The report has found that there is no case to answer for Task Force 81 here. One of the AH-64s had a gun that was not firing true and if any CIVCAS had occurred it is here that any blame will probably lie."

In that same email chain, I responded to Rian, see page --  
Q. If you just pause there and let's have a look at them please. I won't take you through Rian's, but if you have a look at page 43, ask you to confirm that that's the email that you refer to from Rian McKinstry?

A. Yes, that's right.

Q. And the email that you are referring to in your paragraph 18, is that the email that's on page 41?

A. Yes that's correct.

Q. And if you'd just read your email, which you've also reproduced in your paragraph 18, so either source is fine?

A. Yeah.

"I will brief these updates tomorrow at the Chief of Defence Force's brief. I will have to draft another note to MINDEF informing him of the IAT work and outcome but will wait for CDF direction as to whether he wishes to wait for the final report, or he may require an interim note drafted."

As foreshadowed in the response to Rian, the following day I provided a briefing to the Chief of Defence Force in which I relayed these updates. I refer to the bundle, at page 45-47.

Q. And if you'd do that now please? So just to identify it, and then I think we'll go back to your paragraph 19, but if you look at pages 45 to 47, is that the document?

A. Yes that's right.

Q. Thank you, and if you'd now read from your third sentence, second line of 19?

A. This is an extract from the briefing to the CDF. The relevant information is set out under the heading "CIVCAS INVESTIGATION UPDATE":

- The Incident Assessment Team has produced a report on this Op
- The report has found that there is no case to answer for TF81
- One of the AH-64s had a gun that was not firing true and if any CIVCAS has occurred this is most likely the cause
- Despite the public claims, no CIVCAS have yet been seen or produced and the two claimed females in hospital have now turned out to be fighting aged males with probable links to INS.
- This type of CIVCAS claim is not new and is an INS strategy to undermine ISAF operations.

Q. I think you might have used the acronym before, but just to be clear, "INS"?

A. Stands for insurgents.

Q. Thank you.

A. On 31 August 2010, at 8.40am, I received an email with a copy of the ISAF news release of 29 August 2010. This is in the bundle at page 53.

Q. Just turn over to that page please to check for the record. Is that the document that you refer to?

A. Yes.

Q. Yes, thank you. And then perhaps go back to your paragraph 20?

A. The ISAF news release advised:

"In response to the Baghlan Provincial Governor's concerns about civilian casualties, a joint assessment team composed of representatives from the Ministries of Interior and Defence, and International Security Assistance Force officials, conducted a full assessment of an operation on August 22 in Tala wa Barfak district, Baghlan province.

The team determined that several rounds from Coalition helicopters fell short, missing the intended target and instead striking two buildings, which may have resulted in civilian casualties."

On the back of that, I asked Rian by email of 31 August 2010, at 1.05pm (which is in the bundle at page 49) whether he could get a copy of ISAF's findings "sooner rather than later" so that "we can report back to the PM [Prime Minister], MFA [the Minister of Foreign Affairs) and MINDEF [Minister of Defence)". I also noted, in that email, that the "CDF updated them last night ... and is up to date".

Q. And just pause to go turn to page 49 please, just to confirm for us that that is the email?

A. Yes that is right.

Q. Thank you. 22?

A. On 2 September 2010, at 8.17am, I emailed Rian to request the ISAF report again, noting that "there is a degree of urgency around this" and it needs to be sent "across the road to the PM, MFA and MINDEF." This email is in the bundle at page 55.

Q. Just turn to that please? Can you confirm that that is the email?

A. Yes that's the email.

Q. Thank you. 23?

A. I was briefing the Chief of Defence Force and he, in turn, was briefing the Prime Minister and the Minister of Defence as promptly and comprehensively as possible, on the basis of all information received.

On 6 September 2010 at 1.32am, Rian forwarded the latest correspondence he had received on the operation. I refer to the bundle at page 57-60. Attached to Rian's email is a chain of emails from ISAF, dated 3 September 2010, the last of which states (at page 59):

"An official update on the CIVCAS allegation against TF81. LEGAD --"

Q. Which is an acronym for?

A. For Legal Advisor.

Q. Thank you.

A. "...has confirmed that [blank] has been briefed on the IAT findings and agrees that TF81 have no case to answer. It appears that the air support aspect of that op in RC(N) [Regional Command (North)] is part of an ongoing investigation."

After reading this email, and seeing the phrase "ongoing investigation", I assumed that the IAT investigation was still in progress, at least in relation to the actions of the air support.

It was on that basis that on the following day, the brief to the Chief of Defence Force (which is in the bundle at page 61-75), under heading "Other Issues" (at page 73), says --.

Q. And just pause there, let's just orient ourselves with the document, so if you go please to 61?

A. Yes.

Q. Can you just describe to me what that page is?

A. Page 61?

Q. Yes, please.

A. Okay so page 61 is normally the attendants for the Special Forces sort of compartmentalised brief during the deployment Operation Wātea and subsequent deployments, that occurred every Tuesday morning, normally, in the secure ops room.

Q. All right. And who is this page telling us was in attendance, if you just run through it for us?

A. Okay, so of course, Chief of Defence Force, the Secretary of Defence or if she was away, or he was away, the Deputy Secretary of Defence, the Vice Chief of Defence, the Deputy Secretary, the Service Chiefs, or their Deputies, our Senior Defence Legal Staff Officer, Assistant Chief Strategic Commitments, and the two principal staff of that branch, the Deputy Director Special Operations, and either in attendance or at the other end of the secure VTC was Headquarters Joint Force New Zealand, being the Commander Joint Force

New Zealand, the three component commanders of the maritime, land and air component, the Chief of Staff, and here we have the intelligence J2, the operations J3, and the planning J5 senior staff. And of course, another Directorate Special Operations representative.

Q. Thank you. And then if you turn over to page 63 and 65, what are these the cover pages for?

A. Okay, so 63 is just the fact that prior to the SAS briefs, this slide would come up just as a reminder of the classification of what was to follow. And the 65 is just the first part -- first slide of the slide deck that talks about Operation Wātea and the Chief of Defence Force's brief.

Q. All right, thank you. And if you just go through, if you just thumb through the documents and go through to page 75, do you confirm that this is the document to which you refer?

A. Yes, that is correct.

Q. Now, in your paragraph 26 you're looking at page 73 of the bundle, would you just read please, perhaps from your paragraph 26, the inset quotation?

A. Yep.

"ISAF Initial Assessment Team (IAT) report still in progress.

ISAF [legal advisor] assigned to the IAT has advised the Commander IJC has been briefed by the IAT and agrees that Task Force 81 have 'no case to answer'.

Commander ISAF has been briefed on the progress of report. And an investigation into the rotary wing casualties is ongoing."

Q. Thank you.

A. I never saw an ISAF media release of 30 August 2010 and, therefore, did not know that the "ongoing investigation into the Coalition air support's actions - referenced in the ISAF email exchange - was, in fact, a new investigation.

Q. Just pause there, can I ask you please to look at the other bundle, the one with the lever arch file in front of you?

A. Oh yes.

Q. It's the Inquiry bundle, and would you turn please to page 70?

A. Yes.

Q. I just want to orient us, when you refer to an ISAF media release of 30 August 2010, now you'll see if you look at pages 70 and 71, two media releases?

A. Yeah, that's correct.

Q. Are you able to tell us which of those two was the one that you hadn't seen?

A. Okay, the one I have not seen is this one on page 70 titled "Investigation ordered into Baghlan civilian casualty claims".

Q. Now, that's got the date in this document hasn't it 29 August?

A. That's right.

Q. Are you able to help us on that, I think you in your brief you refer to 30 August?

A. Yes, well, so the brief I'm referring to on 30 August is the ISAF press release on page 71 of this bundle titled "Afghan civilian casualties in Baghlan confirmed" that's the title of this particular --

Q. Just to make clear, if you look at your paragraph 27?

A. Yes.

Q. You say, and I'll just read your words for expediency:  
"I never saw an ISAF media release of 30 August."  
So perhaps now that you see those two pages in front of you, can you just provide a further explanation?

A. Yeah. Okay.

Q. Do you recognise one of them?

A. Yes I do.

Q. Which one do you recognise?

A. So, this one on page 71 --

Q. Yes.

A. -- I've seen this one, now whether it's because it's in the bundle of my notes, this one here on page 70 --

Q. Yes?

A. -- I have not seen this one.

Q. So might it be that we correct the date in your paragraph 27, or?

A. Yes, this here "Investigation ordered into Baghlan civilian casualties" is -- I haven't seen this in my bundle of notes either. This one here, because I am familiar with the comments here, I believe -- was this the one that Lydia Bloy sent me in the email correspondence?

Q. I can't provide you with information I'm afraid.

A. I'd have to go -- I mean -- I have it here in my bundle of --

Q. Yes, let's do that, I can help you with this. If we go -- if you go to page 73 of the bundle you've got in front of you, the same ring binder bundle -- I am being pointed at, helpfully by my learned friend Mr Isac, that the dates, both releases are in fact dated 29 August, so if you have a look at --

A. Ah yes.

Q. So if you have a look at page 71, do you see that?

A. That's right, yep, so the -- the start of the press release says 08/29/2010 Kabul.

Q. Yes.

A. That's right.

Q. And have a look please at page 73?

A. In this bundle here?

Q. In the same bundle, the lever arch file, yes. Will this provide some assistance to you perhaps? Now I know that the names there are all classified?

A. Yeah, well this is the -- this is the email press release that I am familiar with, which --

Q. All right, and another way of assisting might be if you look at the other bundle, the spiral bound bundle, at page 87. Sorry there's just a sea of paper here isn't there? 87?

A. Yeah, no that's fine.

Q. This might in fact be assisting you in terms of the name you mentioned, you mentioned Lydia Bloy, and if you just have a look please at page 87, starting from the bottom?

A. Yeah, so that's right, so Lydia highlighted this message -- this press release to me at the time, and it was subsequently reconfirmed -- oh I guess, this is the -- that's the email I'm seeing with the redaction.

Q. All right. And just when you look at page 87, just to go over to 88, is that part of the same document, the same email?

A. Yes, yes, it is.

Q. All right, thank you.

A. That's right.

Q. So having just done that and going back please now to the large file, the lever arch file, and looking at pages 70 and 71, had you seen the email on page 70?

A. No, no I have not seen this email on page 70, this "Investigation ordered into Baghlan civilian casualties." In fact, this is the first time I have seen it.

Q. All right, thank you for that.

We go now to paragraph 28 of your brief?

A. On 8 September 2010, at 7.12am, I received an email from Chris Parsons. And I refer to the bundle at page 77.

Q. I needn't take you there.

A. Okay.

He had just taken over from Rian McKinstry as the NZ SNO in Afghanistan. And the email read:

"Today I have sighted the Accident Investigation Team's (AIT) conclusion..."

Q. I won't, unless the Inquiry likes, because we've just read it out, I wonder if we could just move through?

SIR TERENCE: Yes.

MR RADICH: Yes, thank you. So we'll go to 29.

A. In my mind, Chris Parsons' email of 8 September 2010 signified two things: First, that ISAF's "ongoing investigation" had now come to an end and, second, that the report had concluded that there was no way that civilian casualties could have occurred. Accordingly, I regarded this information as



updating and superseding earlier information that had been conveyed by Rian.

Although I cannot remember specifically, I believe - for two separate reasons - that I must have briefed the Chief of Defence Force verbally about Chris Parsons' email. And the first reason is that it was such a significant development that I would not have waited until our next weekly meeting.

The second reason is that, by the time of the CDF's next written briefing, on 15 September 2010, which is in the bundle at page 83-85, the issue of civilian casualties had fallen off the radar.

Q. Just pause to look at that please, we're back into the smaller bundle now, page 83, and looking at 83 to 85, is that the document?

A. Yes.

Q. Thank you. 31 at your second sentence.

A. The only explanation for this is that we had all understood, by then, that the allegations of civilian casualties had been investigated and found not to have any substance.

On 23 September 2010, at 4.09 pm, I sent an email to the Minister's Military Secretary, attaching the ISAF press release of 29 August 2010. I refer to the bundle at page 87-88. In that email, I note:

"This [ISAF press release of 29 August 2010] was the last I saw from ISAF on this. I am not aware of any other releases since.

"It does note that the helicopter gun was slightly off, but we now know that no casualties were caused as a result.

"I am not sure how ISAF put the record straight further to what they have said here, where they state that casualties may have occurred, but we now know that none did."

This reflected my understanding of the situation at the time; while I was aware that the ISAF press release accepted the possibility of civilian casualties, I understood from Chris Parsons' email that the final report had in fact

concluded that there was no way civilian casualties could have occurred.

I wondered whether, in the spirit of winning the hearts and minds of the local people (which was one of ISAF's objectives), ISAF had - in the press release - softened its actual conclusions. In other words, it had found that civilian casualties had not occurred but was prepared to accept publicly the possibility of casualties so as to appease the local population. In the same vein, ISAF would sometimes pay compensation to villagers in the absence of proof of harm, as a gesture of goodwill.

The information contained in Chris Parsons' email formed the basis for the advice that I drafted from the Chief of Defence Force to the Minister, contained at paragraph [7] of the 10 December 2010 Note (which is in the bundle at page 163-166).

Q. Just pause there to look at the bundle please at those pages. And can you confirm that they are the pages to which you refer?

A. Yes, they are the pages I refer to.

Q. And just to pause there further, you'll have I think in front of you the original version of your evidence and I understand that in relation to the next two sentences, three sentences in fact, in fact the balance of that paragraph, you would wish to replace or adjust the text, and can I perhaps Sir Terence, Sir Geoffrey, there is the explanatory note that accompanies the NZDF witness briefs, can I perhaps pass that to the witness so that he can read from that document?

SIR TERENCE: Yes, that's fine.

MR RADICH: Thank you very much.

SIR TERENCE: Go ahead.

MR RADICH: Thank you, if you could just read that?

A. Yes, paragraph 35:

The final two sentences have been replaced with the text and quotation marks comes from Chris Parsons' email, rather

than from the IAT report itself. I can now see that the way this is expressed in the note makes it look like a quote from the IAT report.

And paragraph 37, the text, "Until now that Chris Parsons had not seen the whole IAT report or" has been deleted.

Q. Thank you.

And carry on please now from 36?

A. As Rian McKinstry reflected in his email of 23 August 2010, at page 15 in the bundle, establishing the outcome was our highest priority. It was essential for us that we were able to provide the most accurate information to the Minister and, as a consequence, to the public.

I did not see the IAT report at the time and did not know anything about its terms, beyond what was expressed in Chris Parsons' email of 8 September 2010 (which is in the bundle at page 77), until it was shown to me in preparation for this hearing. I did not appreciate until now that Chris Parsons had not seen the whole of the IAT report or reflected only the conclusions as they related to the New Zealand ground forces, and not the conclusions as they related to the operation as a whole.

Q. Thank you very much. I'm sorry, I've just been pointed out quite correctly that you were perhaps looking to make an adjustment to the final paragraph?

A. Correct, yes.

Q. Can you explain what that is please?

A. Yes, sorry I did read that out before, it was paragraph -- so in paragraph 37, the text in quotation marks "Until now that Chris Parsons had not seen the whole IAT report or", close quotation marks, has been deleted.

Q. So tell me the words you're taking out please?

A. Okay, so the words I am removing are "Until now that Chris Parsons had not seen the whole IAT report or".

Q. So you wish to strike a line through those words? Thank you.

CROSS-EXAMINATION BY MR ISAC

MR ISAC: I will just make a brief start.

Mr Kelly, should I address you as Major General or?

A. No, Mr Kelly is fine thanking you.

Q. All right, thank you, easier for me.

I just want to pick up on that last point you made about the amendment to your brief at paragraph 37, the briefs of evidence were directed by the Inquiry to be served on the Inquiry by the 6th of September, and the version of your brief was supplied with the text that you have now indicated should be removed?

A. Yes.

Q. But I understand although the briefs hadn't been signed, that they had been read by the witnesses, including you, and approved by you as the content, is that correct?

A. Yes.

Q. So you'd read, presumably carefully because you're going to give evidence on oath, paragraph 37 before you confirmed with NZDF's lawyers that the brief as it was on the 6th of September was true and correct?

A. That's -- yes, but on reflection in reviewing this particular paragraph, it became apparent that it wasn't correct. And I felt that it needed to be corrected.

Q. So prior to the 6th of September you'd read the brief?

A. Yes, I'd read the brief a number of times, and then received --

Q. This would be a bit easier if you just bear with me, you've read the brief before the 6th of September and confirmed with NZDF's lawyers that it's accurate, yes?

A. Yes, but in fact it wasn't accurate.

Q. Okay, yeah, no we'll come to that.

And then you know at that time it's going to be served on the basis that you'd approved it as accurate?

A. Yes.

Q. And now this is additional amendment to the document that you're making today, isn't it?

A. That's correct.

Q. Because there were some other amendments signalled on Friday of last week -- have I got that wrong, sorry, sorry I apologise, so this is an amendment that came about on Friday of last week, is that correct?

A. Yes.

Q. What led you to make that amendment?

A. Well, because the original words did not, as they were read --

Q. As it was drafted, it would indicate that you never understood before the 6th of September that Chris Parsons hadn't read the whole report, right, that's how it did read when you first approved it?

A. Mmm.

Q. Yeah?

A. That's right.

Q. And then the amendment that you made to the brief on Friday of last week, the last workday before the Inquiry hearing, you asked to have words deleted, the effect of which suggests that you knew at some prior time that Chris Parsons hadn't seen the whole IAT?

A. Mmm. So --

Q. Do you agree with that?

A. Well if I may, I found this sentence actually quite confusing. But what was known was that -- and it was in Chris' email as well, our interpretation was that he had seen the conclusions of the IAT report. And that was my interpretation of that email. And not the conclusions as they related to New Zealand ground forces only.

Q. Mmm. So Mr Parsons gave evidence just before you and in fairness to you I have to put to you what he said on oath. He said that following sending you the email on the 8th of September 2010 that you've just referred to, he is sure that he had a secure telephone conversation with you, yeah, do you remember having a conversation with him?

A. Look, I can't say that I do remember that specific conversation.

Q. So he might be right?

A. Oh he could well be right.

Q. And he said that during that secure phone call with you he told you that he had read only four lines of the IAT report, do you agree with him, that he told you that?

A. Ah, like I -- I don't recollect that conversation; so I can't agree that that was the nature of the conversation.

Q. So he may have told you that, but you don't remember?

A. He may have -- I know that I wasn't in Wellington on that particular -- around that particular timeframe. I did have a secure phone with me, but communications was patchy.

Q. If you disagree with him it's okay to say I "don't agree with what he said", yeah? Do you agree that he told you that he had read only four lines?

A. I can't recollect the conversation, so I couldn't -- you know, I can't say I don't agree with him, I just can't remember that particular conversation.

Q. He says on oath that he's also sure that he would have told you he only had a fleeting glance at the report, you don't recall that either?

A. No no, I do realise that on the basis of his email that he only saw a small portion of that particular report, and I know through subsequent conversations that he wasn't able to read the entire report.

Q. Yes, you see what you were saying is that you interpreted his email to indicate that he'd only sighted the conclusions, right?

A. That's correct.

Q. That was your evidence. His evidence is he didn't express the email very well, right, I'm paraphrasing, so it might lead someone to think that in fact you've read it, right?

A. Read the conclusions.

Q. Well, whatever, read it, yeah? And so he would have told you, right, he rang you to tell you that he'd only seen four lines and had a fleeting glance at it. So you think he might have told you that?

A. Look I -- he may have. I was on a skiing holiday at the time and I know that the secure cell phone I had, its reliability to go secure outside of an urban environment was patchy. So for us to have that secure conversation would have been difficult given where I was at that particular point in time.

Q. Do you think that he may have told you that?

A. Subsequently, after I came back from leave, yes potentially, because we had a number of conversations post that particular week.

Q. So this is the week that you're down south in the mountains?

A. That's right.

Q. So if it wasn't that proximate, it's within a week that he's telling you these things?

A. Possibly, yes.

Q. Can you turn to the big bundle you have there; turn to page 165 please. This is a briefing paper, is it not, from the Chief of Defence to the Minister of Defence dated 10 December 2010?

A. That's correct.

Q. You drafted this, didn't you?

A. Yes I co-wrote that, that's correct.

Q. And if you turn over the page to page 166, paragraph 7, the last sentence:

"The Joint Assessment Team's report has not been released beyond Headquarters ISAF and our knowledge of the findings are based on the comments provided by the NZ SAS Task Force Commander who was permitted to read the report."

You drafted those words?

A. Yes, that's correct.

Q. After Chris Parsons has told you he's had a fleeting glance at four lines?

- A. Yes.
- Q. How do you explain to the Minister of Defence at the time, who's in the room, and members of the public, how you could say in that briefing paper that Chris Parsons had read the report, when clearly on your evidence he's saying he had not?
- A. Look, I accept the words perhaps weren't the most eloquent for the paragraph and perhaps weren't as clear as they should be, but in terms of our understanding on the basis of what he had been permitted to read from the report, which exonerated the New Zealand forces from what we saw, and the other Coalition partners, that's what we reflected in this particular note to the Minister.
- Q. That's what you wanted to convey to the Minister, isn't it?
- A. That's right, on the basis of the information that Chris had passed to us from the -- granted he had not read the entire report, and I accept the wording here is sloppy, but there certainly was no intent to deceive the Minister in this particular regard and what we were trying to convey to him is that on the basis of the conclusions that Chris read, even though it was fleeting and may have only been a number of sentences, from his understanding of that, and from what was conveyed to us and our understanding of that, was that, that those particular lines cleared the Coalition forces in that particular operation of civilian casualties.
- Q. You couldn't have been much more wrong, could you, Mr Kelly, if you know that the officer you're relying on hasn't read the report, right? He's saying I've read four lines?
- A. He's read four lines which were from the conclusion.
- Q. And you have in a Ministerial briefing that Sir Jerry Mateparae has signed as CDF, you have said he read it?
- A. Yes.
- Q. That's not sloppy, is it --
- A. Look what I would say and I reinforce --
- Q. -- it's misleading?



A. No there was no intent to mislead in the drafting of this particular report, and our intent up to that time was to convey the information as we knew it, and the information as we knew it was what Chris passed to us in that email. And, as I said, in my summary of evidence, it superseded all the other information and the press releases.

MR ISAC: Sir Terence, Sir Geoffrey I'm conscious of the time.

That might be an appropriate time.

SIR TERENCE: Is that a convenient moment?

MR ISAC: It is, thank you.

SIR TERENCE: All right, we will adjourn for the evening.

Mr Kelly you are under cross-examination, so you are not permitted to discuss any aspect of the case with anyone else.

MR KELLY: Certainly Sir Terence.

SIR TERENCE: We will adjourn.

(The hearing adjourned until Wednesday, 18 September 2019 at 9.30am)