

## Summary of findings and recommendations

[59] The matter of public importance that the Inquiry was directed to examine was “the allegations of wrongdoing by NZDF forces in connection with Operation Burnham and related matters”.<sup>55</sup> Those are the allegations made in *Hit & Run*. Within that context, the Inquiry was directed to:

- 6.1. Seek to establish the facts in connection with the allegations of wrongdoing on the part of NZDF personnel during the Operations;
- 6.2. Examine the treatment by NZDF of reports of civilian casualties following Operation Burnham;
- 6.3. Examine the circumstances of Qari Miraj’s transfer and/or transportation to the Afghanistan National Directorate of Security;
- 6.4. Examine the extent to which NZDF rules of engagement authorised the predetermined and offensive use of force, whether this was apparent to those approving the rules of engagement, and whether NZDF’s application of this aspect of the rules of engagement changed.

The Inquiry was then directed to answer 10 specific questions.

[60] In this section we summarise the Inquiry’s key findings and recommendations, under the following headings:

- (a) Operations Burnham and Nova:
  - (i) Conduct of NZDF personnel on Operations Burnham and Nova
  - (ii) Civilian casualties on Operation Burnham
- (b) Targeted killings and the death of Abdullah Kalta
- (c) The alleged “cover-up”
- (d) Operation Yamaha and the transfer / transportation of Qari Miraj, including New Zealand’s detention policy and its response to the allegation that Miraj was tortured
- (e) Recommendations.

In the course of this summary, we will give a direct response to each of the 10 specific questions we were asked to answer.

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<sup>55</sup> *Terms of Reference*, above n 17, cl 5. See also cl 6.1, which directs the Inquiry to “Seek to establish the facts in connection with the allegations of wrongdoing on the part of NZDF personnel during the Operations”.

## Operations Burnham and Nova

### Conduct of NZDF personnel on Operations Burnham and Nova

- [61] As noted, the origin, planning, conduct and consequences of Operations Burnham and Nova are dealt with in chapters 3–5. The discussion in those chapters shows that while *Hit & Run* is accurate in its account of the operations in some respects, it is inaccurate in other important respects.
- [62] Respects in which the book was accurate in relation to Operation Burnham include the timing of the operation, the identity of the insurgents the operation targeted, their links to the attack that resulted in the death of Lieutenant Tim O’Donnell and the names of the villages in which the operation occurred. As we go on to explain, the book also accurately described some of the consequences of Operation Burnham. It correctly identified some of the people killed and injured, and that there were civilians among them. Further, there was, as the book alleges, some damage to buildings as a result of fires caused by ground troops and rounds from the Apache helicopters. The book is also correct in saying that there was a subsequent operation to the area: Operation Nova.
- [63] However, the principal allegations in *Hit & Run* about the conduct of TF81 personnel on Operations Burnham and Nova are not accurate. First, the operations were not revenge operations; nor were they “ill-conceived”.<sup>56</sup> There were legitimate reasons for them—there was reliable intelligence indicating there were insurgents in the villages who had been conducting attacks in Bamyan province (where the NZPRT was based) and who were planning further attacks on the NZPRT and Afghan security forces. The operations aimed to disrupt the insurgent network and improve security in Bamyan province. They were also planned and approved in accordance with standard national and ISAF processes. Further, there was no “air of rage and lack of control” to the operations.<sup>57</sup> The New Zealand forces involved acted professionally, although several miscalculations or errors may have been made.
- [64] Second, the book describes what happened on Operation Burnham as an “attack on innocent people”,<sup>58</sup> claiming that there were no insurgents in the villages (Khak Khuday Dad and Naik)<sup>59</sup> at the time of the operation. This claim is incorrect. One of the two individuals being sought on Operation Burnham, Maulawi Neimatullah, was in Naik on the night of the operation, as was another insurgent leader, Qari Miraj, who had played a prominent part in the ambush that resulted in Lieutenant Tim O’Donnell’s death. Qari Miraj had two armed bodyguards with him. The other objective (or target) of Operation Burnham, Abdullah Kalta, may also have been present, but we have been unable to confirm that. An ammunition cache and a rocket-propelled grenade launcher were found in Kalta’s house and an AK-47 in Neimatullah’s house.
- [65] In addition, available video footage shows that men with weapons emerged from a house in Khak Khuday Dad and began to climb to high ground as the first CH-47 Chinook transport helicopter arrived at the start of the operation. Some of the weapons were capable of bringing down helicopters (for example, rocket-propelled grenades). The actions of the men were consistent with the pre-operation intelligence, to the effect that the area was under the influence of the Taliban and that there were insurgent leaders and fighters there.

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<sup>56</sup> Hager and Stephenson, above n 10, at 6.

<sup>57</sup> Hager and Stephenson, above n 10, at 41.

<sup>58</sup> At 109.

<sup>59</sup> As we discuss in chapter 3 at [4], the area where Operations Burnham and Nova occurred is referred to by various names, but we will use the names derived from the villagers by the authors—Khak Khuday Dad and Naik—or refer simply to “the villages”. We refer to the area where the villages are located as Tirgiran Valley.

[66] Third, the operations were not conducted in the way alleged in *Hit & Run*. In particular:

- (a) *Hit & Run* alleges that the Apache helicopters started a “ferocious attack”<sup>60</sup> on Khak Khuday Dad almost immediately after they arrived there. In fact, they began firing only after they had seen the men carrying weapons, and after receiving clearance to fire from TF81 personnel. That clearance was granted on the basis that (i) insurgents were positively identified, (ii) there were no “collateral damage” issues, and (iii) friendly forces were not nearby.
- (b) *Hit & Run* alleges that the Apache helicopters “bombarded”<sup>61</sup> and “fiercely attacked”<sup>62</sup> houses, destroying 12 of them.<sup>63</sup> It is clear from the video footage that the helicopters did not attack houses; they were aiming their fire at particular men or groups of men. Some of the firing did land close to or hit the roofs and/or walls of two or possibly three houses in Khak Khuday Dad. However, that was found by a United States Army investigation to be the result of a misaligned weapon on one of the helicopters. Moreover, the rounds that landed near houses were from 30mm caliber cannons, not rockets or missiles as the book alleges.<sup>64</sup> No significant damage appears to have been caused to the houses, although there may well have been injuries to any occupants or others in the vicinity.
- (c) TF81 personnel searched only the three buildings that were targets of the operations (two houses and one agricultural building identified as A1, A3 and A2 respectively), not the upwards of 15 houses alleged in *Hit & Run*.<sup>65</sup> There was some damage to A1 and A3, but we are satisfied it was not caused by improper conduct. Rather, it resulted from: (i) in the case of A1 and A3, the use of a standard military technique to gain entry to houses associated with active insurgents (that is, explosive method of entry); (ii) in the case of A1, the detonation close to the house of the weapons found during the operation; and (iii) in the case of A1 and A3, fires that we consider were started accidentally.
- (d) There was no further significant damage to A1 or A3 on the follow-up operation, Operation Nova, contrary to the allegations in *Hit & Run*.

## Casualties on Operation Burnham

[67] *Hit & Run* alleges that six named civilians were killed on Operation Burnham, including a three year old girl named Fatima, and that 15 named civilians were injured. In relation to the six alleged to have been killed:

- (a) We are satisfied that one of those named, a university student named Islamuddin, son of Abdul Qadir, was not killed in Operation Burnham but died in an incident in late January 2010, seven months earlier.<sup>66</sup> He was the innocent victim of gunfire between an offender and police officers at a bazaar.

<sup>60</sup> At 36.

<sup>61</sup> At 70.

<sup>62</sup> At 53.

<sup>63</sup> At 130.

<sup>64</sup> At 50 and 62.

<sup>65</sup> At 40.

<sup>66</sup> He is not the person shown in the photograph at page 57 of the book and identified as Islamuddin. A number of villagers have identified the person in the photograph as someone else.

- (b) In relation to Fatima, we are satisfied that the girl depicted in the photograph at page 52 of *Hit & Run* was not killed on Operation Burnham. However, based on the available evidence we consider it is likely that a female child approximately 8-10 years old (whose identity remains unknown) did die as a result of the operation. Obviously, she was a civilian. Despite this, we have concluded that TF81 personnel had a proper basis for clearing the engagement in which the girl was most likely killed. Based on the information available to them at the time, they would not have known that there were civilians in close proximity to the man who was the target of the firing.
- (c) One of those named is Mohammad Iqbal, the father of the insurgent Maulawi Neimatullah. He was killed while walking along a track below A3 towards the south. He was carrying an AK-47 at the time. We have not reached a firm view on whether he was a civilian, and it is unnecessary for us to do so. The air assets did not seek clearance from TF81 personnel before engaging him. Accordingly, there is no basis on which NZDF could be responsible for his death.
- (d) Another of those named, Abdul Qayoom, son of Sakhi Dad, appears to have been shot and killed by an NZDF marksman as he approached the overwatch position. We have been unable to determine whether he was a civilian or an insurgent. However, based on the information available to the TF81 Ground Force Commander at the time, we conclude that his killing was in accordance with rules of engagement and the principles of International Humanitarian Law applicable to a non-international armed conflict.
- (e) That leaves two men—Abdul Qayoom, son of Mohammad Iqbal and brother of Neimatullah; and Abdul Faqir, son of Abdul Rahman. We are satisfied that both were killed during Operation Burnham. There is some evidence linking both to the insurgent group, but we are unable to express a firm conclusion about whether they were insurgents. It appears likely that Abdul Faqir was part of the group of men who removed weapons from a house in Khak Khuday Dad before moving to high ground. We consider that there was a proper justification for engaging those men. It seems likely that Abdul Qayoom's death resulted from the final engagement, to which we now turn.
- [68] It appears that at least four men were killed in the final engagement of the operation, which occurred over a kilometre south of the main area of operations. All were identified as insurgents in an intelligence report soon after the operation, although they were not named. One may have been Abdul Qayoom, son of Mohammad Iqbal, as noted above. The others, however, do not appear to be any of those named in the book or identified by villagers. This engagement was cleared by the TF81 Ground Force Commander. On the basis of his understanding at the time, as revealed in contemporaneous material, we consider that his clearance of the engagement was consistent with the applicable rules of engagement and International Humanitarian Law / the Law of Armed Conflict.
- [69] As to non-fatal injuries, we agree with the authors to the extent that at least six civilians were injured during Operation Burnham. Based on hospital and health centre records, we are satisfied that at least two women and two girls suffered injuries. We have also established from health centre records and other information that at least two men were injured. Although there is some information suggesting the men may have had links to insurgents, it is insufficient to enable us to determine whether they were insurgents. We therefore assume they were civilians. We accept that others may also have suffered injuries.

## FINDINGS ON THE INQUIRY'S TERMS OF REFERENCE: OPERATIONS BURNHAM AND NOVA

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### Clause 7.1.

*The conduct of NZDF forces in Operation Burnham, including compliance with the applicable rules of engagement and international humanitarian law.*

[7.1.1] The conduct of TF81 personnel throughout Operation Burnham was professional, although there may have been several miscalculations which resulted in damage to property. Contrary to the allegations in *Hit & Run*, TF81 personnel were not motivated by a desire for retaliation or revenge. We have concluded that all actions by TF81 personnel during the operation complied with the applicable rules of engagement and International Humanitarian Law.

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### Clause 7.2.

*The assessment made by NZDF as to whether or not Afghan nationals in the area of Operation Burnham were taking direct part in hostilities or were otherwise legitimate targets.*

[7.2.1] There was a proper basis for TF81's assessment at the beginning of the operation that there were people in the area who were taking direct part in hostilities. Men were observed removing weapons capable of bringing down aircraft from a house in Khak Khuday Dad and moving to high ground. Their actions were consistent with pre-operation intelligence indicating that there were armed insurgents in the villages. The targeting of these men was legitimate, as was the engagement by an NZSAS marksman, which targeted a man who was understood to have come from the same group.

[7.2.2] On the basis of the objective evidence (video footage, audio recordings and location information) there is a serious question as to whether the final engagement, which targeted a group of people who were climbing a hillside over a kilometre south of the main operational area, should have been cleared when it was. However, based on the Ground Force Commander's understanding at the time of what was occurring (as revealed in contemporary documentation), we consider that he gave clearance consistently with the requirements of the applicable rules of engagement and International Humanitarian Law.

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### Clause 7.3.

*The conduct of NZDF forces in the return operation to Tirgiran Valley in October 2010.*

[7.3.1] We have no concerns about the conduct of TF81 personnel during the return operation to the villages: Operation Nova. The evidence does not support the allegations in *Hit & Run* that the return operation was motivated by revenge or that the houses of the targets were destroyed.

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**Clause 7.4.**

*The NZDF's planning and justification/basis for the Operations, including the extent to which they were appropriately authorised through the relevant military chains of command, and whether there was any Ministerial authorisation of the Operations.*

[7.4.1] Operations Burnham and Nova were not revenge raids. There were legitimate military justifications for them—there was reliable intelligence indicating there were insurgents in the villages who had been conducting attacks in Bamyan province where the NZPRT was located and were planning further attacks on the NZPRT and Afghan security forces.

[7.4.2] The operations were planned in accordance with standard operating procedures. Authorisation was obtained from the Chief of Defence Force (which was required because the operations were outside TF81's mandated area of operation) and through the ISAF chain of command (as the Chief of Defence Force had delegated operational control of TF81 to the Commander ISAF).

[7.4.3] The Minister of Defence and Prime Minister were informed of the intention to conduct Operation Burnham and did not object to it. They did not, and were not required to, provide formal authorisation for the operations.

## Targeted killings and the death of Abdullah Kalta

- [70] The Terms of Reference required us to consider whether the rules of engagement authorised the predetermined and offensive use of lethal force against specified individuals (that is, targeted killings). We are satisfied that they did, provided the individual was directly participating in hostilities. This was apparent to both NZDF and responsible ministers, as is evident from briefings provided to the Minister of Defence and public statements made by the Prime Minister.
- [71] In practice, whether an individual was considered to be a legitimate target of lethal force was determined by their inclusion as a "lethal target" on ISAF's JPEL. The JPEL was a mechanism for identifying active insurgents and prioritising the use of ISAF resources to target them (whether through surveillance, capture or killing). These individuals were considered to be directly participating in hostilities by virtue of their ongoing involvement in the insurgency.
- [72] *Hit & Run* alleges that Abdullah Kalta (one of the objectives of Operation Burnham) was killed in a targeted strike by a United States aircraft or drone on an NZSAS operation in November 2012.<sup>67</sup> We agree that Kalta was killed as a result of an air strike in November 2012. NZSAS personnel were involved in gathering intelligence prior to the strike, but it was not an NZSAS operation and we have no concerns about the involvement of NZSAS personnel. After Operation Burnham, Kalta had continued to be a significant security threat and was linked to a number of further attacks. At the time he was killed, he and others were preparing to conduct an ambush on ISAF or Afghan security force personnel. Although Kalta was listed on the JPEL, as events transpired the strike against him was not ultimately authorised on that basis.<sup>68</sup>

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<sup>67</sup> Hager and Stephenson, above n 10, at 92.

<sup>68</sup> See chapter 7 at [51]–[53].

- [73] *Hit & Run* also alleges the NZSAS was involved in two other targeted killings in 2011, but we are satisfied that allegation is incorrect.<sup>69</sup>

#### FINDINGS ON THE INQUIRY'S TERMS OF REFERENCE: TARGETED KILLINGS

##### Clause 7.9.

*Separate from the Operations, whether the rules of engagement, or any version of them, authorised the predetermined and offensive use of lethal force against specified individuals (other than in the course of direct battle), and if so, whether this was or should have been apparent to (a) NZDF who approved the relevant version(s) and (b) responsible Ministers. In particular were there any written briefings to Ministers relevant to the scope of the rules of engagement on this point.*

[7.9.1] The rules of engagement did authorise the predetermined and offensive use of lethal force against individuals on the JPEL. A person identified as a lethal target on the JPEL was treated as directly participating in hostilities for the duration of the listing.

[7.9.2] The fact that such force was permitted by the rules of engagement was apparent to NZDF, the Minister of Defence and the Prime Minister.

##### Clause 7.10.

*Whether, and the extent to which, NZDF's interpretation or application of the rules of engagement, insofar as this involved such killings, changed over the course of the Afghanistan deployment.*

[7.10.1] The rules of engagement were amended in December 2009, which in turn led to a change in the interpretation and application of the rules. Before the amendment, predetermined and offensive use of force would have been permitted only against members of specified insurgent groups. Following the amendment, the rules permitted the use of such force against any person or group who was directly participating in hostilities.

## The alleged “cover-up”

- [74] *Hit & Run* alleges that, from the outset, NZDF avoided publicity about the role of NZDF personnel in Operation Burnham, beginning with the fact that the ISAF media release immediately after the operation did not refer to their involvement.<sup>70</sup> It also alleges that NZDF was aware that civilians had been killed and injured on the operation as a result of intelligence reporting from shortly after it occurred.<sup>71</sup> The book alleges that an active “cover-up” started with NZDF’s media release of 20 April 2011, when it stated that nine insurgents were killed on the operation<sup>72</sup> and that the ISAF

<sup>69</sup> See paragraph [12] above.

<sup>70</sup> At 8.

<sup>71</sup> At 72.

<sup>72</sup> This was said to be “knowingly false” because NZDF knew that there were no insurgents in the villages at the time of the operation. As we have said, in fact there were.

Incident Assessment Team's investigation had concluded that the allegations of civilian casualties were unfounded.<sup>73</sup> The active "cover-up" allegedly went on from there.

- [75] We are satisfied that NZDF personnel were not aware during the course of Operation Burnham that civilian casualties may have occurred. However, within a few days NZDF knew that civilian casualties were possible, as a result of intelligence reporting, information received by TF81 personnel from the Incident Assessment Team appointed by ISAF to investigate allegations of civilian casualties, and public reports of ISAF media releases circulated within NZDF. The Incident Assessment Team had conducted a preliminary investigation when allegations of civilian casualties emerged immediately after the operation.<sup>74</sup> It effectively "cleared" the ground forces of any allegations of civilian casualties, but concluded that it was possible that civilian casualties had occurred when several buildings were struck by fire from a misaligned weapon on one of the United States Apache helicopters.
- [76] NZDF did not take any effective steps to investigate the allegations of civilian casualties on Operation Burnham. Further, the advice it provided to ministers was inaccurate because it misstated the position in relation to the possibility of civilian casualties. Between 2010 and 2017 NZDF made a series of incorrect statements in both briefings to ministers and public releases, to the effect that the allegations of civilian casualties had been investigated and found to be "baseless" or "unfounded".
- (a) The misinformation stemmed from what was accepted to be a seriously misleading email sent by the Senior National Officer in Afghanistan, Lieutenant Colonel Chris Parsons, to the Director of Special Operations in Wellington, Colonel Peter Kelly, on 8 September 2010 (New Zealand time). Lt Col Parsons said he had "sighted" the Incident Assessment Team's "conclusion". He said that the investigation had "categorically" cleared both the ground forces and air assets of any allegations and found that "there was no way that CIVCAS [civilian casualties] could have occurred". This was based on his reading of one short paragraph in a three-page report (known as the Incident Assessment Team Executive Summary). Lt Col Parsons' description of the Incident Assessment Team's conclusion was inaccurate because the Team had not cleared both ground and air forces but had acknowledged the possibility of civilian casualties from the misaligned weapon. The Inquiry has concluded that soon after he had sent the email, Lt Col Parsons appreciated that he may have misrepresented the Incident Assessment Team's conclusion and failed to take adequate steps to correct the position. This was a serious failure on his part, with significant and long-lasting ramifications.
- (b) Colonel Kelly and other NZDF personnel in New Zealand accepted the advice in Lt Col Parsons' email without question, even though there was substantial evidence contradicting it—including ISAF's own media releases. The email was relied on in preparing erroneous written briefings to ministers in December 2010. The briefings were inaccurate and misleading in describing Operation Burnham as an Afghan Crisis Response Unit (CRU)-led operation when it was not; and in stating that the allegations of civilian casualties had been investigated by a joint assessment team, which found they were baseless and cleared both ground and air forces of all allegations. NZDF issued a media release on 20 April 2011 to that effect and the Minister of Defence, Hon Dr Wayne Mapp, made similar statements to the media in April 2011 and in response to a parliamentary question for written answer in May 2011.

<sup>73</sup> Hager and Stephenson, above n 10, at 100.

<sup>74</sup> The Incident Assessment Team produced a three-page report referred to in its title as an "executive summary". We generally refer to it as the Incident Assessment Team Executive Summary or the executive summary.

- (c) In 2011, NZDF obtained a copy of the Incident Assessment Team Executive Summary, probably through the then Director of Special Operations, Colonel Jim Blackwell. We have concluded that he did not brief the Chief of Defence Force or other senior members of NZDF so as to correct NZDF's inaccurate understanding of the Incident Assessment Team's findings. Nor was a written briefing provided to ministers. Colonel Blackwell did give Dr Mapp an oral briefing, but in a way that minimised the Incident Assessment Team's findings. Nonetheless, Colonel Blackwell's briefing alerted Dr Mapp to the fact that civilian casualties were possible. In light of what Dr Mapp accepted Colonel Blackwell had told him, Dr Mapp (and NZDF) ought to have corrected the public record, but did not. Further, Dr Mapp responded to an Official Information Act request in a way that continued to misrepresent the position. This contributed to subsequent misunderstandings and misstatements.
- (d) In 2014, shortly before a documentary by Mr Stephenson called *Collateral Damage* was to air on Māori Television, the then Minister of Defence, Hon Dr Jonathan Coleman, was orally briefed in line with the inaccurate December 2010 ministerial briefings, to the effect that the Incident Assessment Team had concluded that the allegations of civilian casualties on Operation Burnham were baseless. He discovered the true position only when his Military Secretary found the Incident Assessment Team Executive Summary in a safe at NZDF Headquarters two days later, essentially by chance. Once he was aware of the true position, Dr Coleman's statements to the media accurately stated the Incident Assessment Team's findings.
- (e) Despite the re-discovery of the Incident Assessment Team Executive Summary in 2014, NZDF again made incorrect public statements dismissing allegations of civilian casualties as "unfounded" following the release of *Hit & Run* in March 2017. This appears to have resulted from systemic issues within NZDF, including frequent changes in key staff, failures to keep proper records and provide written briefings, and inadequate information storage and retrieval processes. NZDF did correct the position and acknowledged civilian casualties were possible shortly after.

[77] The Inquiry does not accept that there was an organised institutional strategy within NZDF (or within NZDF Headquarters) to "cover up" NZDF's role in Operation Burnham or the possibility that there were civilian casualties. The Inquiry considers that if there had been clear evidence of civilian casualties on Operation Burnham, NZDF would have faced up to that.

[78] However, the Inquiry agrees with the book's authors that there were serious deficiencies in the way that NZDF dealt with the allegations. The Inquiry has concluded that, at some time soon after he had sent the email, Lt Col Parsons appreciated that he might have misrepresented the Incident Assessment Team's conclusion and did nothing effective to correct the position. The description in his email was too readily accepted by Colonel Kelly and others, despite strong evidence to the contrary. It became the accepted NZDF narrative due to a disappointing lack of commitment and rigour, both individual and collective, on the part of senior NZDF personnel in finding out what had happened. NZDF's failure to obtain accurate information concerning the allegations meant that it advanced a false narrative, which misled ministers and the public and unfairly undermined public confidence in the accuracy of some aspects of the authors' work. NZDF's failures undermined two constitutional principles of fundamental importance, namely civilian control of the military and ministerial accountability to Parliament, both of which depend on the provision of full, timely and accurate information by NZDF to ministers.

- [79] The Inquiry was also concerned that a video claimed to have been taken in the villages shortly after Operation Burnham, which appeared to show the funeral of a child, was not found in TF81's records. In the circumstances, which we explore in more detail in chapter 9, we consider the most likely explanation is that the funeral video was deleted or misfiled, probably in Afghanistan. Whether this was a matter of inadvertence, poor record-keeping or an attempt to hide potentially embarrassing evidence we cannot now determine.

## FINDINGS ON THE INQUIRY'S TERMS OF REFERENCE: THE ALLEGED "COVER-UP"

### **Clause 7.5.**

*The extent of NZDF's knowledge of civilian casualties during and after Operation Burnham, and the content of written NZDF briefings to Ministers on this topic.*

[7.5.1] NZDF personnel were not aware during the course of Operation Burnham that civilian casualties may have occurred. However, the possibility of civilian casualties became apparent to NZDF within a few days after the operation.

[7.5.2] NZDF misrepresented the situation to ministers in written briefings in December 2010, by overstating the Afghan Crisis Response Unit's role in Operation Burnham and stating that the allegations of civilian casualties had been investigated and found to be baseless when, in fact, the investigation had concluded that civilian casualties may have occurred.

[7.5.3] The erroneous briefings were based on an email sent by the Senior National Officer in Kabul to the Director of Special Operations, which misrepresented the findings of the ISAF Incident Assessment Team sent to investigate the allegations of civilian casualties. The Senior National Officer who sent the email appreciated soon after he sent it that he may have misrepresented the Incident Assessment Team's conclusion and failed to take adequate steps to correct the position. The advice in the email was accepted without question by the Senior National Officer's superior and others despite being contradicted by other information available to NZDF, including video footage, intelligence reporting and ISAF's own media releases.

[7.5.4] NZDF failed to adequately remedy its incorrect advice. In 2011 the Minister of Defence, Hon Dr Wayne Mapp, was informed orally by the Director of Special Operations that civilian casualties were possible, but in a way that minimised the significance of the Incident Assessment Team's findings. No written briefing was provided. In 2014 the Minister of Defence (then Hon Dr Jonathan Coleman) received an inaccurate oral briefing in line with the December 2010 briefings. He discovered the true position only when his Military Secretary discovered the Incident Assessment Team Executive Summary in a safe at NZDF Headquarters.

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**Clause 7.6.**

*Public statements prepared and/or made by NZDF in relation to civilian casualties in connection with Operation Burnham.*

[7.6.1] NZDF made a series of erroneous and misleading public statements about the possibility of civilian casualties on Operation Burnham from 2011 to 2017. On 20 April 2011 it issued an inaccurate media release, which said the Incident Assessment Team had concluded that the allegations of civilian casualties were “unfounded”. This position was repeated in subsequent public statements by NZDF and ministers in 2014, although the Prime Minister and the Minister acknowledged publicly that civilian casualties were possible after NZDF found the Incident Assessment Team’s report in a secure safe, essentially by chance. NZDF did not itself issue a public correction, however. Despite these events, NZDF’s initial public response when *Hit & Run* was launched in March 2017 was to repeat the false narrative and advise ministers accordingly—although it stated the correct position within a day or two.

[7.6.2] NZDF’s continued repetition of incorrect statements, both publicly and to ministers, resulted from the combined impact of frequent changes in key staff, failures to keep proper records and provide written briefings, and inadequate information storage and retrieval processes. These were not simply failures of organisational structure or systems; they were also failures of culture, particularly in relation to NZDF’s obligations to ministers.

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**Clause 7.7.**

*Steps taken by NZDF after Operation Burnham to review the conduct of the operation.*

[7.7.1] NZDF failed to take appropriate steps after the operation to determine what happened. It did not conduct any effective investigation into the allegations of civilian casualties; nor did it appear to give any serious consideration to whether such an investigation was appropriate, despite clear ministerial concern about the allegations. NZDF relied on the Incident Assessment Team’s investigation, although it was aware this was only a preliminary assessment and not intended to replace a national investigation if appropriate. NZDF also had information that ISAF had ordered a further investigation following the Incident Assessment Team’s preliminary investigation, but did nothing effective to follow up on that.

## Operation Yamaha and the transfer / transportation of Qari Miraj

- [80] *Hit & Run* alleges that when Qari Miraj was captured in January 2011, he was assaulted and injured by NZSAS personnel in retaliation for his involvement in the raid that resulted in Lieutenant O'Donnell's death.<sup>75</sup> He was then handed over to the NDS, where he was tortured and made a confession. The book says that New Zealand authorities received Miraj's confession and were advised of his torture, but did nothing about it.<sup>76</sup>
- [81] Despite a vehement denial by the person said to have been responsible, we consider that Qari Miraj was assaulted as he was being placed into a vehicle for transport to an NDS facility in Kabul. Miraj was punched once or possibly several times around the ribs or stomach. While there is some difference between the assault described to us and that described in *Hit & Run*, any unjustified striking of a detainee is wrong, and it should not have happened. Given the persistent rumours about it at the time, the matter should have been looked into more closely then.
- [82] In addition, there is strong evidence that Miraj was tortured by NDS personnel soon after he was delivered to an NDS detention facility by NZDF personnel, and made a confession. New Zealand authorities learnt of the allegations that he had been tortured soon afterwards, but did not conduct further enquiries or bring it to the attention of relevant ministers. In the result, New Zealand did nothing in response to the allegations. We consider that action should have been taken.
- [83] Because Qari Miraj was captured on an Afghan-partnered operation (that is, an operation conducted by NZSAS troops in conjunction with an Afghan partner force), New Zealand considered it did not owe the same obligations in respect of protecting him from torture and mistreatment in detention that it would have owed if NZDF personnel had detained him in a non-partnered operation.
- [84] When Cabinet approved the deployment of the NZSAS to Afghanistan on Operation Wātea in 2009, it directed a two-pronged approach to detention:
- (a) Cabinet accepted that where New Zealand forces detained people directly, either when acting alone or during a New Zealand-led operation involving another ISAF partner, the detainees could not legally be transferred to people or places where there were substantial grounds to believe that they faced a real risk of torture. Accordingly, in respect of such detainees, New Zealand entered into arrangements with the Government of the Islamic Republic of Afghanistan which were intended to ensure that New Zealand could meet its international obligations in relation to the transfer and subsequent treatment of detainees.
  - (b) By contrast, in respect of those arrested during partnered operations by an Afghan official under an Afghan arrest warrant, New Zealand considered that its obligations in relation to transfers did not arise. In such operations, New Zealand took the view that it had no jurisdiction to interfere with the operation of Afghan criminal justice processes following arrest, and so accepted no responsibility to prevent or act on any subsequent torture.

During Operation Wātea, only one or two people were detained by NZDF personnel directly in terms of (a) above; almost 200 were detained in Afghan-partnered operations under (b) above.

<sup>75</sup> At 84–85.

<sup>76</sup> At 88–89.

- [85] As a blanket policy, we consider that the approach to Afghan-partnered operations was inappropriate. As we see it, the facts of particular operations matter—the key issue is the substance of an operation, not the form. On some Afghan-partnered operations, NZDF personnel could properly be seen as mentors simply observing and, where necessary, overseeing Afghan authorities in carrying out their law enforcement functions, but not being actively involved in the operation. In such circumstances, New Zealand might not owe those detained by Afghan forces legal obligations going to their conditions of detention.
- [86] However, on other operations (Operation Yamaha in particular), the comprehensive nature of NZDF’s involvement, both in the operation itself and in the way the person captured was processed and handled, the position may be different. In such operations, New Zealand may properly be seen as a detaining authority. As such, New Zealand owed certain obligations to the detainee, including a duty not to transfer them in circumstances where they faced a real risk of torture (a duty of *non-refoulement*). As a consequence, New Zealand could not transfer such detainees to Afghan custody where there were substantial grounds to believe that they faced a real risk of torture, without having appropriate arrangements in place. In our view, as it was articulated and applied, New Zealand’s policy in relation to detention on Afghan-partnered operations did not recognise the critical importance of the particular factual context or the fundamental nature of the relevant obligations.

## FINDINGS ON THE INQUIRY’S TERMS OF REFERENCE: OPERATION YAMAHA

### Clause 7.8.

*Whether NZDF’s transfer and/or transportation of suspected insurgent Qari Miraj to the Afghanistan National Directorate of Security in Kabul in January 2011 was proper, given (amongst other matters) the June 2010 decision in R (oao Maya Evans) v Secretary of State for Defence [2010] EWHC 1445.*

[7.8.1] The transfer and transportation of Qari Miraj to the NDS in Kabul was improper in three respects.

[7.8.2] First, as Miraj was being placed in a vehicle for transportation, he was punched around the rib or stomach area by a member of TF81. Although rumours of the assault circulated within TF81 at the time, insufficient steps were taken to address the matter.

[7.8.3] Second, there were insufficient measures in place to protect Miraj against the risk of torture or mistreatment in detention. TF81 developed and led the operation to detain Miraj, had effective control over him for an hour or more and delivered him to the NDS. Accordingly, if there were substantial grounds to believe that he faced a real risk of torture, New Zealand had an obligation to ensure that he was not transferred into Afghan custody without sufficient protective arrangements being in place. Despite this, New Zealand’s policy on detention meant he, like others detained on Afghan partnered operations, was treated as an Afghan detainee and did not benefit from the arrangements in place to protect New Zealand detainees (such as notification and monitoring obligations). We consider New Zealand breached its duty of *non-refoulement* and related obligations to prevent torture in relation to Miraj.

[7.8.4] Third, there was strong evidence that Miraj was tortured soon after he was placed into NDS custody, which New Zealand authorities became aware of a short while later. Despite this, senior leaders and ministers were not briefed; nor were any further steps taken to investigate, to express New Zealand's position on the use of torture, or to review its policy on detention.

## The Inquiry's recommendations

[87] In chapter 12 we make four recommendations to address some of the problems identified by the Inquiry. They are set out below:

### RECOMMENDATION 1

We recommend that the Minister of Defence take steps to satisfy him or herself that NZDF's (a) organisational structure and (b) record-keeping and retrieval processes are in accordance with international best practice and are sufficient to remove or reduce the possibility of organisational and administrative failings of the type identified in this report. To enable the Minister to do so, and to ensure public confidence in the outcome, we recommend the appointment of an expert review group comprising people from within and outside NZDF, including overseas military personnel with relevant expertise.

### RECOMMENDATION 2

We recommend the establishment, by legislation, of an office of the Independent Inspector-General of Defence, to be located outside the NZDF organisational structure.

The purpose of the office would be to facilitate independent oversight of NZDF and enhance its democratic accountability.

The functions of the Inspector-General would include:

- (a) investigating, either on his or her own motion or by way of a reference, and reporting on particular operational activities of NZDF to ascertain whether they were conducted lawfully and with propriety;
- (b) investigating and reporting on such other matters requiring independent scrutiny as are referred to it by the Minister of Defence, the Chief of Defence Force, the Secretary of Defence or the Defence and Foreign Affairs Select Committee of Parliament; and
- (c) providing an annual report to the Minister of Defence and to the Defence and Foreign Affairs Select Committee of Parliament.

### RECOMMENDATION 3

We recommend that a Defence Force Order be promulgated setting out how allegations of civilian casualties should be dealt with, both in-theatre and at New Zealand Defence Force Headquarters.

### RECOMMENDATION 4

We recommend:

- (a) The Government should develop and promulgate effective detention policies and procedures (including for reporting to ministers) in relation to:
  - (i) persons detained by New Zealand forces in operations they conduct overseas;
  - (ii) persons detained in overseas operations in which New Zealand forces are involved together with the forces of another country; and
  - (iii) the treatment of allegations that detainees in either of the first two categories have been tortured or mistreated in detention (including allegations that New Zealand personnel may have mistreated detainees).
- (b) The draft policies and procedures referred to should be made public, with an opportunity for public comment.
- (c) Training programmes should be developed to ensure that military, intelligence, diplomatic and other personnel understand the policies and the procedures and their responsibilities under them.
- (d) Once finalised, the detention policies and procedures should be reviewed periodically to ensure they remain effective.

[88] We see recommendations 1, 2 and 4 as necessary to enable full effect to be given to two important constitutional principles—civilian control of the military and ministerial responsibility to Parliament.

[89] We make no recommendations arising out of the various operations discussed or in relation to any failures within other government agencies. Rather, we leave it to those responsible to assess whether any further action is required in light of the discussion in this report.