



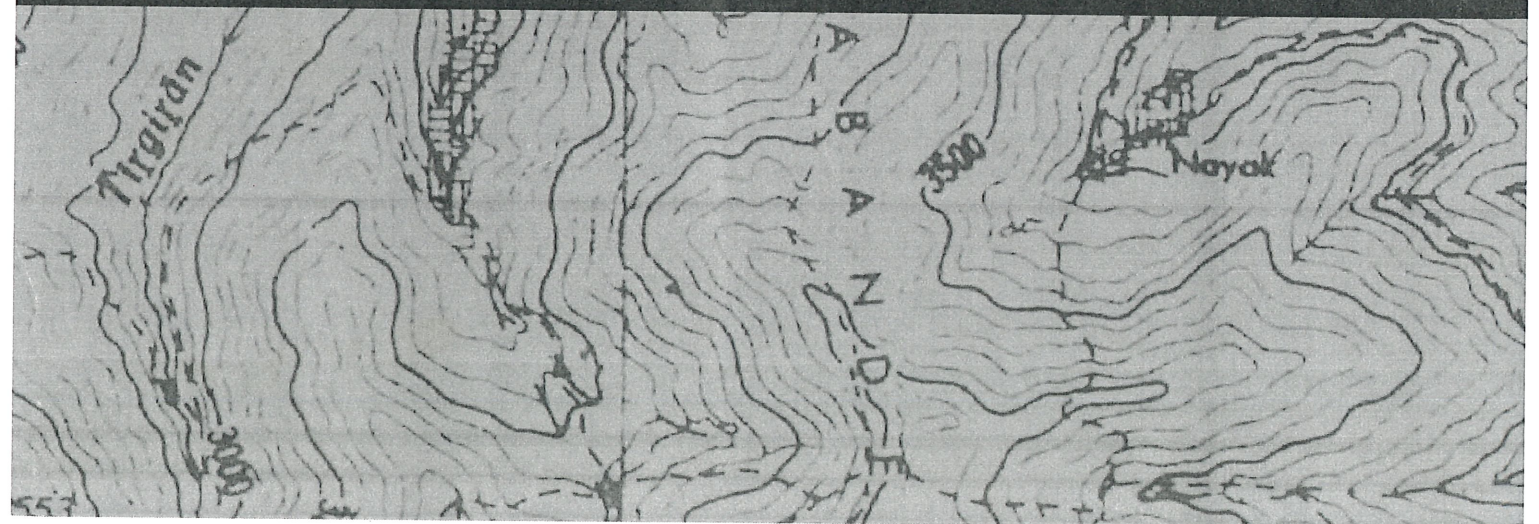
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Inquiry into  
OPERATION BURNHAM

(Report of the Government Inquiry  
into Operation Burnham, 2020: 24,  
25, 30, 33, 34)

# Report of the Government Inquiry into Operation Burnham and related matters

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JULY 2020



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Published July 2020

ISBN 978-0-473-52816-4 (Hardcover)

ISBN 978-0-473-52817-1 (PDF)

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

### **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.

### **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.

### **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].

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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.

[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.