

UNDER

THE INQUIRIES ACT 2013

IN THE MATTER

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

Memorandum for the New Zealand Defence Force

19 July 2019

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MAY IT PLEASE THE INQUIRY:

1. By memorandum of 7 November 2018 and in response to the Inquiry's statements at paragraphs [11] and [94] of Minute 4 of 14 September 2018, the New Zealand Defence Force (NZDF) provided to the Inquiry an unreferenced narrative account of the events at issue that could be made publicly available ("the NZDF narrative account").
2. The circumstances of its preparation were noted in the NZDF narrative account, as was the possibility that aspects of it may be updated at a later stage.¹
3. At the Inquiry's public hearing Module 2, a non-Crown core participant took issue with aspects of the NZDF narrative account, including (i) questioning whether the single insurgent engaged by an NZSAS sniper during Operation Burnham was armed,² and (ii) the nature of the roles of the Ground Force Commander (GFC) and Joint Tactical Air Controller (JTAC) during that Operation.³
4. The NZDF has since conducted a thorough review of all the material it holds that is relevant to the first issue. Not all of that material had been identified or reviewed when the narrative account was prepared. The material in question has been provided to the Inquiry and the Inquiry has access to witness evidence which the NZDF does not have. Nonetheless, the NZDF wishes to advise the Inquiry that, on the basis of the material the NZDF holds and has now reviewed, it is not possible to determine *conclusively* whether or not the insurgent observed by the ISR RPA was armed at the moment he was engaged.

¹ The NZDF narrative account noted that it had been prepared on the basis of documents, video footage, photographs, and records and interviews from a prior investigation, and that while NZDF personnel with relevant knowledge of the events in issue were consulted in order to provide an accurate account as possible of operations that occurred some nine years ago, the NZDF did not interview any NZDF personnel to produce or contribute to the account; as that is a task for the Inquiry.

² NZDF narrative account at page 9: "At approximately 0125 hours, the ISR RPA observed an armed insurgent moving along the ridgeline south of the village towards the observation position where the Commander and his team were stationed. The ground forces were informed that the insurgent was heading up the ridgeline. The insurgent was identified as presenting a threat by the GFC, who authorised a NZSAS sniper to engage the insurgent. On receiving authorisation to fire by the GFC, two shots were fired; the first killing the insurgent while the second hit a rock."

³ NZDF narrative account at page 9: "The GFC was a NZSAS Major, responsible for the conduct of the operation and, in particular, for providing clearance for any engagements. Communication between air and ground forces was coordinated by the JTAC, a NZSAS operator co-located with the Commander, who also had communication with the other elements of the ground force."

5. While providing this update in the interests of transparency, the NZDF notes that whether or not it is able to be confirmed at a later point in time that an individual was or was not armed at a given moment is neither determinative of whether the individual was in fact armed nor of the lawfulness of the engagement in a situation of armed conflict. Rather, and as is well-established in case law, the lawfulness depends, among other things, on the reasonably-held belief of the person who is in the position of having to assess a threat and determine whether the use of force is necessary in the circumstances. The belief of a threat would be informed by all of the information reasonably available to that person. This would include, for example, intelligence gathered and analysed in pre-operation planning including tactics known to be used in a given area, as well as information being relayed during an operation from various ground and air sources with different vantage points.

6. On the second issue, the NZDF wishes to point out that the comments of the non-Crown core participant at Module 2 appear to demonstrate a misunderstanding of the relationship between different national elements in a joint operation. As the title indicates, a Ground Force Commander (**GFC**) commands ground forces, and not others who may be providing air support. The role of the Joint Tactical Air Controller (**JTAC**) is necessary to control the movement of assets in a given area of airspace at a given time for safety and in an effort to obtain the best available operational effect.

7. In a joint operation involving coalition forces, each national element acts in accordance with its own Rules of Engagement (**ROE**) and under its own national chain of command. Coalition forces in a joint operation may have substantially similar ROE and those national ROE would have been developed in knowledge of, and for consistency with, ISAF ROE. However, each force is responsible for making its own determinations about its use of force and, in Operation Burnham, no member of a coalition force was in a position to give orders to a member of another national force.

8. Communications between coalition forces during Operation Burnham enabled the various elements to work alongside one another effectively and safely:
 - a. For instance, clearance from the GFC to another national force for an engagement from the air, means that, from the perspective of those on the ground, an engagement would be appropriate and there is no impediment at that time to the engagement. It is not (and could not be) an order for that other national force to conduct the engagement.
 - b. Similarly, as the JTAC coordinates communications between air and ground forces, an authorisation from the JTAC for a particular air asset to act would not be an order for that other national force to conduct the engagement. Rather, it is the relaying of a clearance from the GFC on the basis set out in the preceding subparagraph.

9. As was said in the NZDF memorandum accompanying the narrative account, it was provided to be helpful to the Inquiry and the general public and was not intended to provide views or to make submissions on the issues before the Inquiry. The same is so of this update. In addition to all of the evidence before the Inquiry, issues of applicable law, including the principles of international humanitarian law, will be addressed at the Inquiry's public hearing Module 3 on 29 and 30 July.



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19 July 2019