



POLICY BRIEFING PAPER

CIVILIAN CASUALTIES AND THE NEW ZEALAND DEFENCE FORCE

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ABOUT NEW ZEALAND ALTERNATIVE

New Zealand Alternative is committed to an independent, values-driven foreign policy for our South Pacific nation - a New Zealand alternative.

We seek to reframe and shape public debate about New Zealand's role in the world. We propose practical and imaginative ideas for a globally active Aotearoa which are grounded in progressive values and evidence. We focus on identifying concrete opportunities where New Zealand can provide leadership and support to others to advance international action on: peace and disarmament, decolonisation and indigenous rights, feminist foreign policy, alternative models of economics and trade, humanitarian action and environmental restoration.

New Zealand Alternative was registered as an incorporated society in 2018 by Nina Hall, Max Harris, Thomas Nash and Laura O'Connell Rapira. Evelyn Marsters and Arama Rata joined the steering group in 2019.

EXECUTIVE SUMMARY

New Zealand Alternative's first publication focused on conflict prevention; see *Aotearoa New Zealand Conflict Prevention: Building a Truly Independent Foreign Policy*. This publication moves the focus to New Zealand's actual conduct in armed conflict.

This paper draws on domestic and international case studies to provide an ethical, strategic and legal rationale for reforming New Zealand's institutional responses to allegations of civilian casualties caused by the New Zealand Defence Force (NZDF).

This paper does not consider New Zealand's decision to send troops to Afghanistan. Nor does it seek to assess or evaluate the conduct of New Zealand's troops during their time in Afghanistan. These are questions that deserve scrutiny at the national level, not least in order to inform a national conversation about the future role of our armed forces in the world.

The paper limits itself to the specific topic of how the NZDF deals with situations in which civilians have been killed or injured during its operations. Any discussion on the conduct of armed forces in conflict is inherently uncomfortable. For some, the very idea of making rules about who we can and cannot kill and how we can and cannot kill them risks conferring legitimacy on war. For others, as long as war exists, our humanity requires us to place constraints on the way it is conducted. This tension is at the heart of international humanitarian law. Does the law of armed conflict exist primarily to constrain or to legitimise military violence? That is an important and deeply contested question and it is not a question for this paper. The purpose of this paper is to draw attention to the responsibilities New Zealand has when our soldiers kill or injure civilians and to provide recommendations that will help prevent such actions in the future.

Our first recommendation is that the NZDF establish a Civilian Harm Prevention Team within Headquarters Joint Forces New Zealand, focused on tracking allegations of civilian harm, coordinating verification of those allegations and providing NZDF-wide guidance on avoiding civilian deaths and injuries and making amends if they occur. Ideally, independent civilian oversight should be put in place to reinforce the effectiveness of the Civilian Harm Prevention Team. This publication views 'civilian harm' as a spectrum from property damage to civilian casualties, but focuses on the latter.

Our second recommendation is that the Attorney-General, with support from other relevant ministers, establish standard operating procedures for investigating allegations of civilian harm that have not been satisfactorily addressed. We recommend these standard operating procedures include requirements to provide adequate legal and logistical support to complainants, seek out the perspectives of all those involved (including through in-person interviews with affected civilians) and have the authority to compel declassification of integral or non-sensitive material for viewing by complainants.

These recommendations align with the independent, values-based foreign policy vision which Prime Minister Jacinda Ardern espoused in her 2018 United Nations General Assembly speech, where she urged all states to "remember the core values on which the United Nations was built", and emphasised "[t]hat everyone is entitled to have their dignity and human rights respected ... we must consistently hold ourselves to account on each."¹

The recommendations are also consistent with Minister of Defence Ron Mark's vision. In his Ministerial Foreword to the 2018 Strategic Defence Policy Statement, Mr. Mark underscored that Defence "must operate at high levels of public trust and confidence".² Similarly, in a noteworthy speech to the National Defence University in the People's Republic of China, he emphasised that as an expression of Aotearoa's independent foreign policy, "Defence must act to promote New Zealand as a good international citizen, supporting the rules-based order and

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¹ "Full Text: PM's Speech to the United Nations" (28 September 2018) Newsroom <<https://www.newsroom.co.nz/2018/09/27/256105/full-text-pms-speech-to-the-united-nations>>.
² New Zealand Defence Force "2018 Strategic Defence Policy Statement" (July 2018) at 3.

operating in accordance with law, including the Law of Armed Conflict and International Humanitarian Law.”³

These are values which have been underlined by governments of all political alignments, a point made quite clear in the 2018 Strategic Defence Policy Statement.⁴

Moreover, these recommendations support the NZDF’s own strategic interests. The NZDF is less effective as a tactical force if it cannot win the hearts and minds of local civilian populations, credibly respond to disinformation efforts by opponents, or remain up to date with the defence practices of our security partners - like the United States, which has had a civilian casualty tracking cell since 2008.

The United States military, of course, is very different to the NZDF. It is vastly bigger, vastly more involved in conflict around the world and has a well-documented history of human rights abuses and war crimes. It would be wrong to take the US military as a role model for the NZDF, for a variety of reasons. But some of the structures that it has adopted, in response to its own misconduct, can prompt further discussion in New Zealand about how the NZDF might address the trauma, distress and injustice of civilian deaths and injuries.

³ Ron Mark, Minister of Defence “Responsibilities, Challenges and Values: The New Zealand Defence Perspective” (Speech to the PLA National Defence University, People’s Republic of China, 2 July 2019).
⁴ New Zealand Defence Force, above n 2, at [31].

THE IMPETUS FOR REFORM

AZIZABAD AIRSTRIKE, 22 AUGUST 2008

In the early hours of the morning, a US Air Force AC-130 gunship opened fire on the Afghan village of Azizabad, Herat. The United Nations Assistance Mission in Afghanistan (UNAMA) found evidence that seven to eight homes had been destroyed or seriously damaged. Local residents reported 90 civilians, including 60 children, had been killed. They were able to provide the victims' names, ages and genders.⁵

Coalition forces were criticised for their response, as they were unable to provide accurate information about the number of victims. Initially, a spokesperson claimed all the victims were militants, but US General David McKiernan admitted some civilians may have been killed in the attack, although he continued to dispute the UNAMA figure. A few weeks later, mobile phone footage emerged showing approximately 30 to 40 bodies – including 11 children – laid out in a local mosque. An investigation was launched. The coalition admitted 33 civilians had been killed, although this figure is disputed by human rights groups.⁶

The episode was embarrassing for ISAF, the NATO-led international coalition conducting military operations in Afghanistan. It demonstrated they did not have accurate information about the people they were targeting and the number of civilians killed. In response, General McKiernan created the Civilian Casualty Tracking Cell (CCTC) to ensure the coalition could be 'first with the truth'. As he explains, the CCTC was meant to ensure the coalition did not 'become totally reactionary: we didn't always want to end up responding, and at that point we were'.⁷

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⁵ UN Special Representative Kai Eide "Civilian Casualties Caused by Military Operations in Shindand" (press release, 12 March 2009) <<https://unama.unmissions.org/special-representative-kai-eide-civilian-casualties-caused-military-operations-shindand>>.

⁶ "Afghanistan: US Investigation of Airstrikes Death 'Deeply Flawed'" (15 January 2009) Human Rights Watch <<https://www.hrw.org/news/2009/01/15/afghanistan-us-investigation-airstrike-deaths-deeply-flawed>>.

⁷ Jennifer Keene "Civilian Harm Tracking: Analysis of ISAF Efforts in Afghanistan" (May 2014) Center for Civilians in Conflict <https://civiliansinconflict.org/wp-content/uploads/2017/09/ISAF_Civilian_Harm_Tracking.pdf> at 2.

A

THE CASE FOR PREVENTING AND MITIGATING CIVILIAN CASUALTIES

The case for appropriately addressing allegations of civilian harm, while occasionally intuitive, is worth setting out in full.

New Zealand's obligation to improve its civilian harm response mechanism flows from the political vision set out by Prime Minister Jacinda Ardern and Minister of Defence Ron Mark. It also flows from the military's vision, set out in the Strategic Defence Policy Statement, that "Defence operates in ways that maintain public trust and confidence ... [and] be transparent and open with the New Zealand public."

But the obligation to improve our response mechanisms has deeper roots; the ethical and legal responsibility to prevent civilian harm. The most obvious manner in which this obligation manifests is the duty to avoid wounding or killing civilians and the prohibition on causing harm that is not necessary or proportional to the task. The NZDF also has a responsibility to the wider community. According to the Harvard Law School Human Rights Project:⁸

The primary purpose of casualty recording is to recognize individuals killed in armed violence who would otherwise remain nameless and unacknowledged in death. The idea of public recognition relates to the notion that the truth should be disclosed. Casualty recording also addresses families' right to know the fate of their loved ones and communities' demand for full understanding of how violence has affected them.

Meeting these responsibilities is contingent on having sufficient information to respond to allegations of civilian deaths and injuries.

These ethical obligations are reflected in the Law of Armed Conflict and International Humanitarian Law, which aim to protect at-risk civilian populations. New Zealand is a longstanding adherent to and energetic proponent of international humanitarian law, including the four Geneva Conventions of 1949 and their subsequent Additional Protocols.⁹ The NZDF has consciously accepted these statutory obligations, declaring in the Strategic Defence Policy Statement 2018 that "Defence operates in accordance with both domestic and international law, including the Law of Armed Conflict and International Humanitarian Law."¹⁰

The NZDF works alongside international partners on peacekeeping and humanitarian operations around the world. Up to 56 NZDF personnel are

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⁸ Jacob Beswick and Elizabeth Minor "Casualty Recording" in Bonnie Docherty (ed) *Acknowledge, Amend, Assist: Addressing Civilian Harm Caused by Armed Conflict and Armed Violence* (Harvard Law School Human Rights Project, Cambridge MA, 2015) at 4.

⁹ Geneva Conventions Act 1958.

¹⁰ New Zealand Defence Force, above n 2, at [38.5].

deployed on “peace support operations” in any given year, a figure which is does not include NZ Special Air Service (SAS) operations or overseas training deployments and exercises.¹¹

This operational role is dependent on the NZDF maintaining the trust of the New Zealand public. That trust has been shaken by the Operation Burnham controversy (discussed later), and particularly by the NZDF’s evolving account of what happened during that operation. Whether the NZDF did not adequately investigate the consequences of Operation Burnham at the time or whether individuals within the NZDF chose to obscure known consequences, the implications are concerning. Introducing a Civilian Harm Prevention Team (CHPT) to monitor and investigate allegations of civilian harm, and taking a proactive and collaborative approach to disclosing allegations, is crucial for the NZDF to regain public confidence.

The NZDF’s international role is also contingent on the NZDF remaining a respected international partner. The NZDF has a good reputation due to the perception it focuses on meeting its ethical and legal responsibilities. The case needs to be made that this perception is accurate. To maintain our international reputation, we must reform our civilian harm response mechanisms.

Another reason the NZDF is a respected international partner is it is seen as an effective tactical force which can deliver operational outcomes. Since New Zealand first began stability and security operations in Timor-Leste, the NZDF has operated in military contexts where the focus is on humanitarian work and counter-insurgency. In such contexts, it is crucial the NZDF “avoid the trap of winning tactical victories – but suffering strategic defeats – by causing civilian casualties or excessive damage and thus alienating the people,” in the words of General Stanley McChrystal, then commander of NATO forces in Afghanistan.¹²

The NZDF can maintain its strategic efficacy by proactively and comprehensively collating relevant information from military and civilian sources concerning allegations of civilian harm. By doing so, the NZDF could credibly and systematically refute allegations which are inaccurate or propagandistic. It could also quickly respond to accurate reports of civilian harm and minimise their strategic consequences by seeking dialogue with victims and extending support through ex-gratia payments.¹³

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¹¹ “Diplomacy and Deployments - Deployments Map” (accessed 4 August 2019) New Zealand Ministry of Defence <<https://defence.govt.nz/what-we-do/diplomacy-and-deployments/deployment-map/>>.
¹² Daniel R. Mahanty and Annie Shiel “Protecting Civilians Still Matters in Great-Power Conflict” (3 May 2019) DefenseOne <<https://www.defenseone.com/ideas/2019/05/protecting-civilians-still-matters-great-power-conflict/156723/?oref=d-river>>.
¹³ Maria Keenan “Backgrounder: US ‘Condolence’ Payments” (June 2010) Center for Civilians in Conflict <https://civiliansinconflict.org/wp-content/uploads/2017/09/Backgrounder-US_Condolence_Payments_2010.pdf>.

The accurate collation of such information would also help the NZDF to understand fully the causes of civilian harm, allowing the institution to develop stronger internal processes to prevent similar mistakes from taking place again.

These strategic considerations have long been recognised by New Zealand’s security partners. In 2008, the NATO International Security Assistance Force (ISAF) in Afghanistan introduced a Civilian Casualty Tracking Cell (CCTC) to collate information concerning allegations of civilian harm. According to the Center for Civilians in Conflict:¹⁴

In June 2008, shortly after General David McKiernan assumed command, ISAF was involved in two high profile incidents resulting in numerous civilian casualties. Information on these events from local NGOs, the Taliban, and international organizations differed so dramatically from ISAF’s data that ISAF recognized the need for action...

A third, more dramatic incident ... [the previously detailed Azizabad airstrike] ... again resulted in considerable civilian casualties, further underscoring to ISAF leadership that the command “was not able to control the scene of the incident in order to determine facts and prevent disinformation by insurgents.”

The CCTC evolved into the Civilian Casualty Mitigation Team (CCMT), which collated and verified allegations, used the information to identify trends and developed recommendations for avoiding and mitigating civilian harm in future. The CCMT also liaised with media and civil society groups to verify allegations of civilian casualties, monitor implementation of its recommendations and build trust-based external relationships. Amongst those studying military practice and doctrine on civilian casualties, ISAF’s introduction of the CCMT is now recognised as international best practice.

In identifying these reforms of US military practice in relation to civilian casualties, it is important to acknowledge the persistent violations of international humanitarian and human rights law that have characterised contemporary US military engagements. There is clearly a tension within the US military and political establishment between those who seek to constrain military activities in line with international norms – whether for strategic and / or humanitarian reasons – and those who seek to loosen such constraints. In New Zealand, we should be firmly in the camp of those placing constraints on military activity so that it always remains in line with international norms of humanity and dignity.

Reforming NZDF military processes along the lines of the recommendations in this paper would contribute to maintaining public confidence and trust. At the same time, by nature they will likely still be at least partially obscured from public view. As a result there must be robust mechanisms for civilian oversight of the NZDF.

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¹⁴ Jennifer Keene, above n 7, at 3.

Without such mechanisms, mistrust of the NZDF is inevitable. This publication will later demonstrate some ways in which New Zealand’s civilian oversight process is unsatisfactory. This publication therefore also recommends some avenues for inquiry operating procedures to be strengthened, standardised and made more equitable.

B
INSTITUTIONAL FLAWS AND OPERATION BURNHAM

To fully understand the institutional flaws in how the New Zealand government and Defence Force respond to allegations of civilian casualties, it is illustrative to explain the public disquiet surrounding Operation Burnham, which prompted New Zealand’s first public inquiry into civilian casualty allegations.

‘Hit and Run’, a book by journalists Nicky Hager and Jon Stephenson, describes an event in which 15 Afghan civilians were allegedly wounded and six killed in a raid (codenamed Operation Burnham) by SAS troops on two Afghan villages. Allegations concerning the raid have been available since it took place in 2010, but only became prominent after ‘Hit and Run’ was published in 2017.

The charges set off a firestorm in New Zealand. When similar allegations surfaced in 2011 and 2014 the NZDF firmly denied any civilian casualties.¹⁵ Later, when responding to the book’s publication, Chief of Defence Lieutenant General Tim Keating, still disputed some facts (including the number of people killed and the names of the villages), but conceded some civilians may have died due to targeting malfunctions in a helicopter weapons system.¹⁶

Hager and Stephenson also conceded some reporting errors (including the location of the villages), but maintained that the central allegations about civilian deaths and injuries were accurate.¹⁷

Unanswered questions continued to attract public attention, until a change of government precipitated an inquiry into the allegations. The ad hoc inquiry was the first of its kind in New Zealand. Defence Minister Ron Mark said, given the “degree of anxiety” among New Zealanders, “It is important to me that the record be put straight ... Given the seriousness of the allegations that have been

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¹⁵ Nicky Hager and Jon Stephenson “Hit & Run: Preface and Timeline” (accessed 2 August 2019) Hit and Run <<https://www.hitandrnz.com/preface>>.
¹⁶ Eugene Bingham and Paula Penfold “Killed Girl’s Parents Demand NZ Government Inquiry” Stuff (14 September 2017) <<https://www.stuff.co.nz/national/95902726/killed-girls-parents-demand-nz-government-inquiry>>.
¹⁷ Sam Sachdeva “What We Know, and Don’t Know, About the SAS Raid Allegations from Hit and Run” (30 March 2017) Stuff <<https://www.stuff.co.nz/national/politics/91025890/what-we-know-and-dont-know-about-the-sas-raid-allegations-from-hit-and-run>>.

made in that book, it's the right and proper thing to do".¹⁸

The inquiry provided funding for 50 hours of legal research by counsel for the affected Afghan villagers, who strenuously back Hager and Stephenson's allegations. Counsel argued this funding was insufficient, especially given the difficulties of coordinating and communicating with the villagers who are now spread out over inaccessible geographic regions.¹⁹ By contrast, the NZDF established a 12-person Special Inquiry Office (including civilian lawyer Paul Radich QC), with a budget of \$2 million, to defend the NZDF.²⁰

Significant concerns were raised over the NZDF's conduct by political stakeholders, counsel for the Afghan victims, Hager and Stephenson. The NZDF had to correct multiple Official Information Act responses that it had issued to media and on several occasions failed to keep Minister Mark up to date with changing information.²¹ As of May 2019, of the approximately 1,000 documents which the NZDF had submitted to the inquiry, only 14 had been provided to complainants to be considered and responded to. This hampered proper scrutiny by the inquiry.²²

As the inquiry went on, multiple stakeholders provided further information about what happened during the 2010 raid. In early 2019, the NZDF acknowledged an SAS sniper shot and killed an individual who they allege presented a threat. Documents appear to show the individual was unarmed.²³

Similarly, Stephenson indicated after further investigative work that there were insurgents present in one of the villages (although not the village where most of the civilian casualties allegedly occurred) on the night of the raid.²⁴

The inquiry initially refused to interview relevant Afghan witnesses in person. This refusal (which was later reversed) and the inquiry's refusal to let victims see NZDF material (like drone footage which the NZDF said disproved the allegations)

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¹⁸ Jo Moir "Defence Minister Says an Inquiry into the NZDF is 'Necessary' to Set the Record Straight" (12 April 2018) Stuff <<https://www.stuff.co.nz/national/politics/103066349/defence-minister-says-an-inquiry-into-the-nzdf-is-necessary-to-put-the-record-straight>>.

¹⁹ Lucy Bennett "Operation Burnham Hearing into 2010 SAS Raid in Afghanistan Continues" (22 May 2019) NZ Herald <https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12233209>.

²⁰ Andrea Vance "Defence Force Unit to Fight Hit and Run Claims" (23 June 2018) Stuff <<https://www.stuff.co.nz/national/104862339/defence-force-unit-to-fight-hit-and-run-claims>>.

²¹ David Fisher "NZDF Again Makes a Critical Error in Trying to Get its Story Straight on the Controversial NZSAS Raid" (19 May 2018) NZ Herald <https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12054090>.

²² Lucy Bennett, above n 19.

²³ "Insurgent Leaders Admit That They Were in Afghanistan Village Raided During NZ SAS's Operation Burnham" (20 June 2019) Stuff <<https://www.stuff.co.nz/national/113621206/insurgent-leaders-admit-they-were-in-afghanistan-village-raided-during-nz-sass-operation-burnham>>.

²⁴ Craig McCulloch "Operation Burnham: Hit & Run Author Backtracks on Key Claim" (20 June 2019) Radio New Zealand <<https://www.rnz.co.nz/news/national/392464/operation-burnham-hit-and-run-author-backtracks-on-key-claim>>.

prompted the Afghan victims to withdraw from the inquiry process.²⁵ This meant evidence presented to the inquiry mostly came from military witnesses, reducing the inquiry's credibility and efficacy.

We can extract three broad concerns from this timeline of events.

First, the NZDF repeatedly and significantly changed its account of what took place in the 2010 raid. This could be because important information about the raid only began coming to light after the NZDF began systematically investigating the allegations. This would be worrying, given it indicates the NZDF failed to appropriately scrutinise its operations. Alternatively, it could have been due to a deliberate effort to obfuscate or mislead.

Second, despite repeatedly changing its account, the NZDF denied any moral responsibility and rejected any consideration of potential fault on its part. This prevents the NZDF from engaging in meaningful self-reflection or implementing institutional reforms which could prevent the repeat of civilian casualties which the NZDF has admitted likely occurred.

CHECKPOINT KILLINGS

On 30 May 2006, a pregnant woman named Nabihah Jassim was shot and killed by US troops as her brother drove through the streets of the Iraqi city of Samarra. Nabihah had gone into labour and her brother was rushing her to the hospital, but soldiers at the US-led coalition checkpoint mistook his speed for a sign he was hostile and opened fire.²⁶

This incident was tragic, but it wasn't an aberration. An average of one Iraqi civilian was killed or injured at coalition checkpoints each day in 2006. These incidents were often overlooked because the number of victims in each case were relatively small. When these incidents were investigated, military lawyers argued the vast majority were lawful engagements because soldiers thought the victims were hostile, so the military was not liable for these mistakes.²⁷ Consequently, nobody noticed

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²⁵ "Afghan Villagers Pull Out of Operation Burnham Inquiry" (18 June 2019) Radio New Zealand <<https://www.rnz.co.nz/news/political/392295/afghan-villagers-pull-out-of-operation-burnham-inquiry>>.

²⁶ Thomas Gregory "Dangerous Feelings: Checkpoints and the Perception of Hostile Intent" (2019) 50(2) Security Dialogue 131.

²⁷ Bonnie Docherty *Tackling Tough Calls: Lessons from Recent Conflicts on Hostile Intent and Civilian Protection* (International Human Rights Clinic Harvard Law School, Cambridge MA, 2016).

the steady accumulation of innocent civilians killed or injured at coalition checkpoints.²⁸

Eventually the US military started taking these incidents seriously. US General Peter Chiarelli reduced the number of civilians killed or injured at coalition checkpoints from an average of one per day to an average one per week. He achieved these results by making small adjustments to the rules of engagement, changing the layout of checkpoints so soldiers had longer to assess potential threats, and by equipping soldiers with non-lethal weapons that could be used to warn civilians they were in danger.²⁹

Third, the power imbalance between the NZDF and those making the allegations severely undermined the effectiveness of the inquiry. The imbalance reduced the quantity and quality of information provided to the inquiry, prevented scrutiny being applied to the accounts of either side and prompted the withdrawal of the Afghan villagers, who are crucial stakeholders.

This publication’s recommendations address these concerns. The introduction of a Civilian Harm Prevention Team (CHPT) would ensure the NZDF had accurate and comprehensive information on allegations of civilian harm. It would also help the NZDF reflect internally on allegations and build a culture of proactive self-reform.

Standardising the inquiry process so it adequately supports and considers those alleging civilian harm will reduce the power imbalance which can be observed in the Operation Burnham Inquiry, ensuring proper scrutiny and full participation. This should support future inquiries producing stronger and more effective analysis and recommendations.

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²⁸ Gregg Carlstrom “Iraq Files Reveal Checkpoint Deaths” (24 October 2010) Al Jazeera <<https://www.aljazeera.com/secretiraqfiles/2010/10/2010102216241633174.html>>.

²⁹ George J. Mordica II (ed) *Escalation of Force Handbook* (Center for Army Lessons Learned, July 2007) <<https://wlstorage.net/file/us-escalation-of-force-handbook-2007.pdf>>.

POLICY RECOMMENDATIONS

A

INTRODUCING A CIVILIAN HARM PREVENTION TEAM

The American-led introduction of a Civilian Casualties Mitigation Team (CCMT) to the NATO ISAF in Afghanistan, now recognised as international best practice, is the model for this recommendation. The implementation of this has four components. In this report we refer to the proposed entity as a Civilian Harm Prevention Team (CHPT).

First, the CHPT must have the support of senior NZDF leadership:

1. **Internal Leadership**

The ISAF CCMT was helmed by a colonel, underlining the importance of the ISAF CCMT.³⁰ A similarly ranked officer ought to helm the NZDF CHPT. There should be consideration also of the need for independent civilian oversight of the CHPT.

2. **Force-Wide Emphasis**

ISAF leadership repeatedly issued force-wide directives emphasising the importance of preventing civilian harm at a unit level.³¹ Similar NZDF-wide emphasis should be given to preventing civilian casualties.

3. **Effective Resourcing**

The ISAF CCMT was staffed by approximately five civilian and military experts.³² Balancing the NZDF's scale with the CHPT's wide mandate, the NZDF CHPT ought to have at least two full-time support staff.

4. **Structural Continuity**

The NZDF CHPT must be an ongoing element of the NZDF structure. It must operate both during and outside of major deployments, so that there is an ongoing internal strengthening and reform process.



³⁰ Jennifer Keene, above n 11, at 5.

³¹ As above.

³² As above.

Second, the CHPT must have a clear mandate. Drawing on the ISAF CCMT's responsibilities, the NZDF CHPT should have four key tasks:

1. **Collation**
A CHPT's primary responsibility is to receive and collate allegations of civilian casualties and information relevant to those allegations.
2. **Investigation**
A CHPT must use its own resources or liaise with NZDF personnel on the ground to pursue credible allegations and investigate their accuracy.³³
3. **Advice**
A CHPT ought to draw on collected data, as well as on external advice and practices, to identify trends and provide recommendations to NZDF leadership about how civilian casualties can be prevented or mitigated.
4. **Monitoring**
A CHPT ought to use its collation and investigatory functions to monitor the implementation of its recommendations.

Third, the CHPT must be supported by stringent reporting requirements:

1. **Reporting of Allegations**
ISAF leadership required units to investigate all allegations of civilian harm, regardless of source. This is best explained in the footnoted CIVIC report.³⁴ The NZDF should take a similar approach.
2. **Battle Damage Assessments**
Comprehensive reporting of actual or potential collateral or civilian harm was required after any indirect fire or air strikes.

Fourth, there must be strong engagement between the CHPT and civil society and media. Often these organisations are more effective at investigating allegations of civilian harm. Proactive engagement will ensure more accurate collation and verification of allegations and build trust between the NZDF and the public, media and civil society.

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³³ Ryan Goodman "The Pentagon Needs a Better Way to Count Civilian Casualties" (26 April 2018) New York Times <<https://www.nytimes.com/2018/04/26/opinion/civilian-casualties-pentagon-military.html>>.

³⁴ Jennifer Keene, above n 11, at 4.

HOW COULD THE CHPT IMPROVE NZDF PROCESSES?

The NZDF has procedures in place to provide ex-gratia payments to civilians or local nationals who have suffered death, injury or property damage as a result of NZDF activities. According to information gathered through the Official Information Act 1982, the NZDF has disbursed \$3,000 to Afghan civilians as compensation for incidents involving the NZSAS.³⁵

Defence Force Order 77, which governs financial management and reporting, permits ex-gratia payments of up to \$30,000 to be approved for 'claims that are not actionable at law, but for which there exists a moral obligation and payment should be made'. Payments of below \$1,000 can be approved by sub-delegates above the rank of brigadier. Larger payments must be approved by the Chief of Defence Force.

On 25 October 2009, ISAF HQ stressed the need for 'speedy, transparent and accurate settlement of claims' but noted NZDF procedures meant even minor claims could 'take a considerable amount of time to process'. ISAF requested a formal exemption from Defence Order 77, to allow New Zealand's Senior National Officer (SNO) to approve small claims of below \$200. It states 'although it is considered that any such claims will be a rarity, there are occasions where collateral damage is a consequence of operations'. The NZDF complied and allowed the ad hoc approval of smaller claims by the SNO.³⁶

The NZDF provided a list of 14 claims filed between 8 October 2009 and 22 March 2011. One claim was refused, but the reason is not recorded. Claims paid to Afghan civilians include \$450 for damage to a vehicle on 19 March 2010, \$150 for damage to property (date not recorded) and \$1,700 for damage to a vehicle on 14 March 2011. The list provided by the NZDF does not provide details about what damage was caused or how damage occurred.

In adjusting its ex-gratia payment processes, the NZDF recognised a need to reform its approach to allegations of civilian harm. This publication's recommendations are another step along that road. It appears the process is still ad hoc, under-analysed and underreported. The introduction of a CCMT would ensure it is standardised, developed and scrutinised, allowing the NZDF to continually improve its internal processes.

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³⁵ Letter from A Woods (Air Commodore RNZAF, Chief of Staff HQNZDF) to Dr Thomas Gregory (Senior Lecturer, University of Auckland) regarding ex-gratia payments made by the NZDF (OIA-2018-3233) (28 September 2018).

³⁶ Letter from G.R Smith (Commodore RNZN, Chief of Staff HQNZDF) to Dr Thomas Gregory (Senior Lecturer, University of Auckland) regarding the NZDF's policies on ex-gratia payments (OIA-2018-3159) (29 August 2018).

B

STANDARDISING CIVILIAN OVERSIGHT AND THE INQUIRY PROCESS

Civilian inquiries are a satisfactory means of scrutinising military processes. However, likely because it was the first time an inquiry was used in the context of civilian casualties, the Operation Burnham Inquiry exhibited significant and avoidable flaws.

We recommend the Attorney-General, with relevant ministers, develop standard inquiry operating procedures for future use. This would draw on most aspects of the Operation Burnham Inquiry approach, with three key changes:

1. Funding

Funding 50 hours of legal research for counsel representing the Afghan victims of the 2010 raid was insufficient,³⁷ as was expecting the uncompensated participation of key stakeholders like the authors of 'Hit and Run'. Future inquiries must provide adequate legal funding for complainants and support for key stakeholders.

2. Witnesses

The Inquiry was severely limited by its failure to interview the Afghan victims in-person. Future inquiries should be required to interview victims and relevant witnesses in a convenient and safe location, almost certainly their current home region.

3. Evidence and Scrutiny

Despite being delayed, the most impactful aspect of the Inquiry was the declassification and release of most NZDF evidence. This has yielded significant insights. It has also shown that concerns expressed by NZDF about the importance of secrecy were unfounded because, upon being independently reviewed, most evidence could be declassified. Future inquiries can be much more open from the start, compel greater declassification of evidence and support stakeholders to view as much relevant evidence as possible.

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³⁷ Lucy Bennett, above n 19.

CONCLUSION

When New Zealand decides to send its soldiers into situations of armed conflict the government takes on a series of grave responsibilities. It takes on responsibilities towards the soldiers it is sending into harm's way. Those soldiers should feel they have the support of their government, that they have a clear and legitimate mission and that they are equipped to fulfill that mission. The government also takes on a set of responsibilities to the civilian populations that live and work in the areas it is sending our troops to fight. This report highlights just how important those responsibilities are in human terms, with examples of where the actions of the armed forces – those of New Zealand and of our partners – have fallen short of those responsibilities in Afghanistan.

At a time of declining trust in democracy and our public institutions, it is crucial that all public bodies do their utmost to build and maintain trust and confidence. The strongest institutions are those that are open to critique, that embrace self-reflection and that are eager to learn and adapt and improve. This is how many of the most effective businesses, sports teams, political campaigns and organisations thrive. Unfortunately, New Zealand's reaction – both immediate and over time – to the killing and injuring of civilians during Operation Burnham did not display this type of openness to critique and willingness to learn. The reaction of a strong institution would be to acknowledge that civilians may have been killed, to seek information from locals about what had happened and to undertake to look into the raid to first of all make amends and second of all make sure it would not happen again. This did not happen. In fact the response was rather the opposite – to assert that nothing wrong had happened and to try to maintain that line at all costs. As information has come out, this line could no longer be maintained and so a process may now perhaps begin in order to make amends and make sure it will not happen again.

Democratic, civilian control of the armed forces is a fundamental pillar of what we consider to be a free and open democracy. Where it starts to break down, alarm bells start to ring about human rights and the rule of law. Thankfully there is a strong commitment to civilian control of our armed forces in New Zealand. The purpose of this paper is to show how that control can be strengthened by establishing practices that standardize and open up to scrutiny the way our armed forces respond to civilian casualties caused during conflict. Because this response shouldn't depend on which commander is in place at the time or who the senior civil servants, legal advisors, government or Minister is. It should be a standard, embedded practice that

is followed rigorously whenever there is an allegation or instance of civilian casualties caused by the New Zealand Defence Force. We are recommending that these practices be held and supported by a Civilian Harm Prevention Team that would have the expertise and experience to deal with situations of civilian casualties.

This is not to say that practices are not already in place to deal with these situations. They obviously are. But the experience of Operation Burnham suggests that there is room for improvement. Indeed, rather than placing an additional burden on the armed forces, these proposal would actually make it easier for commanders and soldiers to deal with situations of civilian casualties, because they would not need to set up ad hoc processes and risk getting tied up in knots with media management and political fallout.

Establishing such a team is also not a panacea to the problems of conducting armed conflict and the inherent risk to civilian lives and livelihoods that war involves. One only needs to look at the situation with the United States armed forces. It is the US military that has set the standard we are proposing New Zealand should adopt in relation to preventing, recording and responding to instances of civilian casualties. Yet the US military itself is responsible for a continuous catalogue of violations of international humanitarian law over many decades. So it should be noted that while a Civilian Harm Prevention Team is likely to be a necessary condition for adequate protection of civilians in armed conflict, it is not a sufficient response.

When we consider the importance of preventing civilian casualties in armed conflict, the moral, legal, strategic and practical arguments for the proposals in this report are compelling. We owe it to our soldiers, to the civilians they work amongst overseas and to the New Zealand public to put the strongest possible practices in place.

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