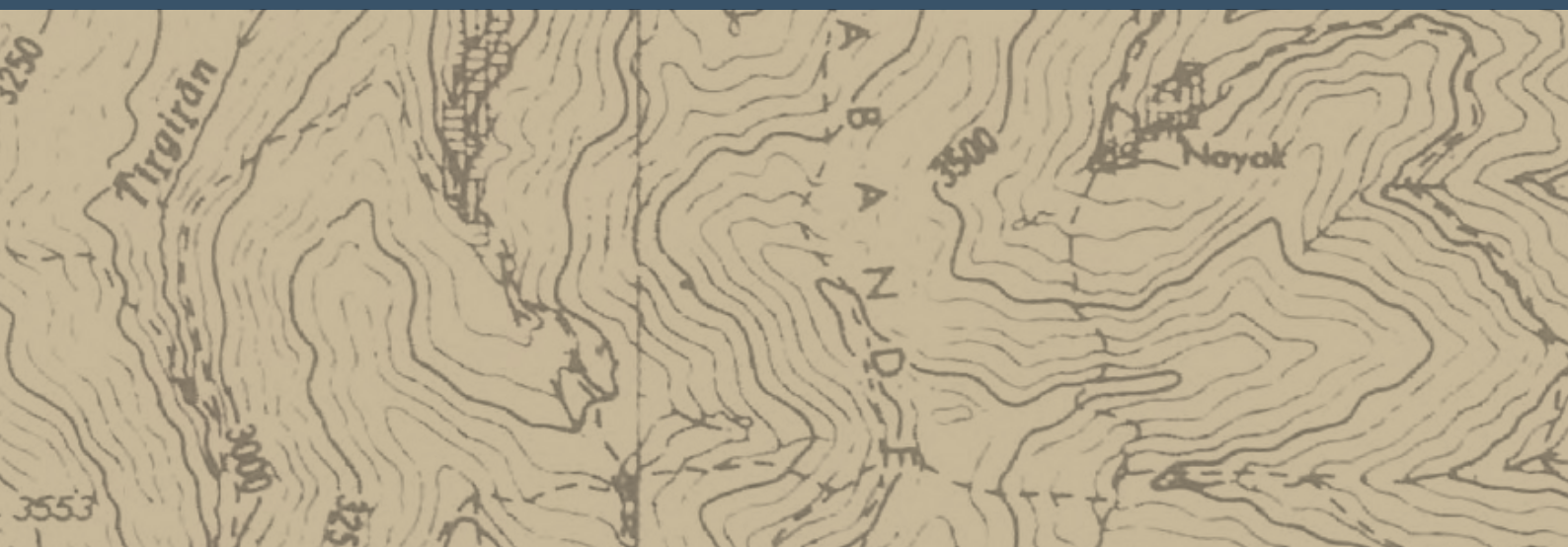




He Uiuinga i a
Inquiry into
OPERATION BURNHAM

Report of the Government Inquiry into Operation Burnham and related matters

JULY 2020



Report of the Government Inquiry
into Operation Burnham and
related matters

Published July 2020

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

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

© Copyright 2020

This document is available online at:

operationburnham.inquiry.govt.nz/inquiry-report

Report of the Government Inquiry into Operation Burnham

Sir Terence Arnold KNZM QC, *Chair*

Sir Geoffrey Palmer KCMG AC QC PC, *Member*

Anna Wilson-Farrell
Manager Secretariat

Kristy McDonald ONZM QC
Andru Isac QC
Counsel Assisting

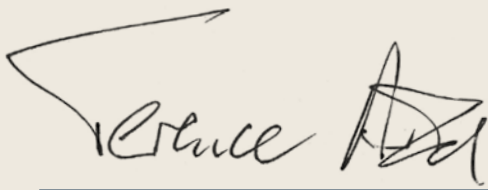
Foreword

We are pleased to present the report of the Government Inquiry into Operation Burnham and related matters to the Attorney-General, Hon David Parker.

The issues examined by the Inquiry and canvassed in this report are of fundamental importance. Some go to two core principles of New Zealand's constitutional arrangements —civilian control of the military and ministerial responsibility to Parliament. Others go to New Zealand's international obligations in relation to the treatment of persons captured and detained in operations in Afghanistan in which New Zealand forces participated.

This has been a challenging and arduous inquiry. Despite that, if the recommendations we make are acted upon, it will, we think, have been worthwhile.

Many people have contributed to the Inquiry's work. At the end of the report there is a list of the major participants. The insights and assistance that they have provided to us have been invaluable. We are deeply grateful to them.

A handwritten signature in black ink, appearing to read 'Terence Arnold', written over a horizontal line.

Sir Terence Arnold QC

A handwritten signature in black ink, appearing to read 'Geoffrey Palmer', written over a horizontal line.

Sir Geoffrey Palmer QC

Contents

Chapter 1

Overview of Inquiry and findings

Page 5

Chapter 3

Operations Burnham and Nova:
origin and planning

Page 65

Chapter 5

Operations Burnham and Nova:
casualties and property damage

Page 111

Chapter 7

Predetermined and offensive use
of lethal force

Page 183

Chapter 9

A cover-up? Our assessment

Page 243

Chapter 11

Operation Yamaha: description
and assessment

Page 319

Appendix 1

Terms of Reference: Government
Inquiry into Operation Burnham and
related matters

Page 387

Contributors

Page 396

Chapter 2

The deployment of the NZSAS to Afghanistan:
political and constitutional dimensions

Page 37

Chapter 4

What happened on Operations Burnham
and Nova?

Page 89

Chapter 6

Assessment of conduct during
Operation Burnham

Page 147

Chapter 8

A cover-up? An account of what happened

Page 199

Chapter 10

Operation Yamaha: detention policy
and the law

Page 287

Chapter 12

Looking to the future

Page 359

Appendix 2

List of common acronyms

Page 393

1

Overview of Inquiry and findings

Chapter 1

A Taliban attack in Bamyān

- [1] In 1996, the Taliban took control of the Government of Afghanistan following a four-year civil war. The Taliban Government permitted the terrorist group al-Qaida, under the command of Osama bin Laden, to operate training camps in Afghanistan.¹ On 11 September 2001, al-Qaida operatives led a number of attacks in the United States, most dramatically and devastatingly on the World Trade Center in New York, resulting in the deaths of approximately 3,000 people. This produced an international response, which resulted ultimately in New Zealand deploying defence force personnel to Afghanistan, along with many other nations.²
- [2] The Taliban Government fell in late 2001. Following a meeting in Bonn, Germany in December 2001, an interim Afghan Government was set up under the leadership of Hamid Karzai. At the same time, the United Nations Security Council established the International Security Assistance Force (ISAF) to provide military support to the interim Government, initially in Kabul and the surrounding area.³ ISAF was a North Atlantic Treaty Organization (NATO)-led force. Later, in March 2002, the Security Council established the United Nations Assistance Mission in Afghanistan (UNAMA) to assist the interim Government with its responsibilities in relation to matters such as human rights, national reconciliation and rebuilding and recovery activities.⁴
- [3] New Zealand's contribution to these efforts was principally two-fold—first, through periodic deployments to Afghanistan of the New Zealand Special Air Service (NZSAS) to provide security, conduct special operations and support the training of Afghan personnel—and second, through its Provincial Reconstruction Team (NZPRT) in Bamyān Province in the central highlands of Afghanistan.⁵ The NZPRT was made up mainly of New Zealand Defence Force (NZDF) personnel but, over time, there was increasing civilian participation.
- [4] The military challenges that faced those who operated in Afghanistan were well articulated to the Inquiry by Sir Angus Houston. During his time as the Australian Chief of Air Force and then Chief of the Defence Force, Sir Angus made some 30 separate visits to Afghanistan. In his presentation to the Inquiry he said:⁶

The war in Afghanistan did not involve a fight against a known and formally organised adversary – it was not conducted against formed military units and adversaries wearing uniforms who had set orders of battle of which we already had well documented intelligence.

1 In 1999 the United Nations Security Council passed a resolution designating al-Qaida and the Taliban as terrorist groups: SC Res 1267 (1999).

2 The background is more fully set out in chapter 2.

3 SC Res 1386 (2001).

4 SC Res 1401 (2002).

5 There were other contributions, for example, the deployment of New Zealand Police personnel.

6 Sir Angus Houston “The military context” (Public Hearing Module 1, 4 April 2019) at 13.

Rather there were very few set piece battles. There were no easily demarcated front lines. This was irregular, guerrilla, asymmetric and counter-insurgency warfare. Quite literally a soldier could be standing beside someone in an Afghan village who hours or days later might take up arms against him. Similarly there was a vast civilian population whose tribal and ethnic structure was intricate and complex.

- [5] As we discuss in subsequent chapters, these features of the conflict are important when considering the application of International Humanitarian Law (also referred to as the Law of Armed Conflict) in Afghanistan and, in particular, the use of a list known as the Joint Prioritised Effects List (JPEL) to identify suspected insurgents.
- [6] On 3 August 2010, an NZPRT patrol was returning to base after delivering wire baskets which were to be filled with rocks and used to repair flood-damaged river banks in the northern part of Bamyan province, near the border with Baghlan province. The patrol was ambushed by Taliban insurgents. The commander of the patrol, Lieutenant Tim O'Donnell, was killed and two other soldiers and an Afghan interpreter were wounded.⁷ The insurgents escaped, apparently unharmed. This attack triggered a series of events, which led, ultimately, to this Inquiry.
- [7] Following the 3 August attack, the NZSAS were involved in a number of operations directed at those identified as having led the attack. From the viewpoint of the Inquiry and the public, the most significant of these operations is the first, which has become known as Operation Burnham.⁸ This was an operation which occurred on 22 August 2010 in two villages in Tirgiran Valley in the Tala wa Barfak District of Baghlan province. The operation was aimed at capturing two insurgent leaders thought to have participated in the 3 August attack: Abdullah Kalta and Maulawi Neimatullah. There were as well several other relevant operations, which have attracted less public attention but which fall within the Inquiry's Terms of Reference, as we discuss below.⁹

Allegations against the New Zealand Defence Force

- [8] In their jointly authored book, *Hit & Run: The New Zealand SAS in Afghanistan and the meaning of honour*,¹⁰ Mr Nicky Hager and Mr Jon Stephenson dealt with NZDF's response to the 3 August 2010 attack. The authors, both investigative journalists, relied on information from a variety of sources in Afghanistan and in New Zealand. They made a number of allegations about the conduct of members of NZDF during the operations that followed the attack, most particularly in the context of Operation Burnham and an operation that was directed at arresting and detaining Qari Miraj (referred to as Objective Yamaha by NZDF), another insurgent leader suspected of involvement in the 3 August 2010 attack. For convenience, we will refer to this latter operation as Operation Yamaha.

⁷ "Inquiry into death will examine soldier safety" *Otago Daily Times* (Dunedin, 6 August 2010).

⁸ The name given to the operation at the time was Operation Rahbari. One of the targets of the operation, an insurgent leader named Abdullah Kalta, was given the name "Objective Burnham". The name "Operation Burnham" has now been widely adopted, so the Inquiry will also use it. It should be borne in mind, however, that the publicly available contemporaneous documentation will refer to "Operation Rahbari" and "Objective Burnham". "Operation Rahbari" was also used at the time to refer to the second operation, which is now commonly called "Operation Nova" (the primary target of that operation being Maulawi Neimatullah, known as "Objective Nova").

⁹ See paragraph [12].

¹⁰ Nicky Hager and Jon Stephenson *Hit & Run: The New Zealand SAS in Afghanistan and the meaning of honour* (Potton & Burton, Nelson, 2017).

- [9] In relation to Operation Burnham, the key allegations are:
- (a) The operation was based on faulty intelligence—no insurgents were present in the villages when the operation occurred.
 - (b) Six civilians, including a three year old child, Fatima, were killed and 15 were injured during the operation, mostly as a result of aircraft fire.
 - (c) Villagers' houses were deliberately destroyed or damaged by both the NZSAS and the aircraft involved, in some instances purely for reasons of revenge. In one house, the NZSAS destroyed a room containing religious books.
 - (d) NZDF provided no aid or assistance to the wounded, the relatives of the deceased or those who suffered property damage, either immediately after the operation or at any time subsequently.
 - (e) NZDF did not investigate the allegations of civilian casualties and damage to civilian property, but rather tried to cover up what had happened.
- [10] In relation to Operation Yamaha, the book alleges that, when Qari Miraj was captured, he was beaten by NZSAS personnel, before being transported to an Afghanistan National Directorate of Security (NDS) facility in Kabul where torture was known to occur. Qari Miraj was detained at that facility and was, it is alleged, tortured to extract a confession from him. New Zealand had access to that confession knowing that it had been obtained by torture.
- [11] NZDF's actions in respect of these operations are alleged to have been in breach of its obligations under International Humanitarian Law / the Law of Armed Conflict, the applicable rules of engagement and the law relating to the treatment of detainees.
- [12] The other operations relating to insurgents thought to have been involved in the 3 August 2010 attack which are referred to in *Hit & Run* include operations against:
- (a) Maulawi Neimatullah (Objective Nova). This involved a return operation to the villages where Operation Burnham occurred. *Hit & Run* alleges that the NZSAS personnel on the operation burned down the house of Abdullah Kalta (who was not present) in an act of revenge. We will discuss this operation in conjunction with Operation Burnham.
 - (b) Qari Musa. It is alleged that Qari Musa was killed in a targeted killing carried out on 20 May 2011. The book claims that the NZSAS organised this operation, tracking Qari Musa to a house and then calling in an air strike to kill him.¹¹ This operation did occur (albeit on 23 May). Qari Musa was initially reported as killed,¹² but reporting shortly afterwards indicated that he had in fact survived.¹³ We understand that he is still alive today.¹⁴ More significantly for present purposes, having reviewed the evidence we are satisfied that NZDF personnel were not involved in the planning, preparation or execution of this operation. We will not discuss it further.

¹¹ At 91.

¹² CDF Ops Brief Op Watea 31 May 2011 (31 May 2011) (Inquiry doc 11/29).

¹³ NZPRT Bamyān Daily Intsum 154-11 (4 June 2011) (Inquiry doc 10/30) at [5].

¹⁴ See, for example, Afghanistan Independent Human Rights Commission "Attacks against Hazaras in Afghanistan" <www.aihrc.org.af>.

- (c) Alawuddin. It is alleged that Alawuddin was killed in a targeted killing on 23 May 2011.¹⁵ It is correct that Alawuddin was killed in an operation (albeit on 20 May), but contrary to the allegations in the book, NZDF personnel were not involved in its planning, preparation, or execution. Again, we are confident of this on the basis of material we have reviewed. We will not discuss this operation further.
- (d) Abdullah Kalta (Objective Burnham). It is alleged that Abdullah Kalta was killed in a targeted air strike, along with five other people, on 21 November 2012.¹⁶ We will address this operation in the context of our discussion of targeted killings in chapter 7.

The Inquiry is established

- [13] The Inquiry was established by the Attorney-General, Hon David Parker, on 12 April 2018 as a government inquiry under s 6(1)(c) of the Inquiries Act 2013. The purpose section in the Inquiry's Terms of Reference identifies "the allegations of wrongdoing by NZDF forces in connection with Operation Burnham and related matters" as the matter of public importance that the Inquiry is directed to examine.¹⁷ The purpose section goes on to state that the Inquiry "will" do a number of things, one of which is to "[s]eek to establish the facts in connection with the allegations of wrongdoing on the part of NZDF personnel during the Operations".¹⁸ Then, under the heading "Scope of the Inquiry", the Terms of Reference list 10 matters that the Inquiry will inquire into and report on "having regard to its purpose".¹⁹
- [14] While the Inquiry has the power to make findings of fault, it has no power "to determine the civil, criminal, or disciplinary liability of any person".²⁰ That does not, of course, prevent the Inquiry from expressing a view about New Zealand's obligations as a State, either under relevant treaties to which it is a signatory or under customary International Humanitarian Law. A further limitation on the Inquiry is that the Terms of Reference state that it "has no jurisdiction to make determinations about the actions of forces or officials other than NZDF forces or New Zealand officials".²¹ This limitation is particularly significant, as we now explain.
- [15] Like many other operations under the umbrella of ISAF at the time, Operation Burnham was a joint operation, involving not only the NZSAS contingent (known for ISAF purposes as Task Force 81 or TF81), but also Afghan ground forces and United States air support (including most relevantly two AH-64 Apache attack helicopters and an AC-130 Spectre gunship).²² Most of those killed and wounded on Operation Burnham died or suffered injuries as a result of fire from the Apaches and the AC-130. To give a coherent account of Operation Burnham, the Inquiry has had to describe all that happened on the operation, including what the air assets did; but the Inquiry may not (and does not) make any determinations about the actions of the non-New Zealand forces or officials. As set out in chapter 8, an investigation carried out under the United States Army Regulations determined that all engagements by the United States air assets appeared to be consistent with the applicable rules of engagement and the relevant Tactical Directive.²³

¹⁵ Hager and Stephenson, above n 10, at 91.

¹⁶ At 92–93.

¹⁷ *Terms of Reference: Government Inquiry into Operation Burnham and related matters* (11 April 2018), cl 5. The full text of the Inquiry's Terms of Reference is set out in Appendix 1.

¹⁸ Clause 6.1.

¹⁹ Clause 7.

²⁰ Inquiries Act 2013, s 11; *Terms of Reference*, above n 17, cl 13.

²¹ Clause 9.

²² Other supporting air assets were involved as well. We use the term "air assets" frequently throughout this report. This term reflects military usage and is a comprehensive term for aircraft of all types.

²³ See chapter 8 at [40]–[43].

The Inquiry's processes

- [16] The Inquiries Act was enacted in 2013 following a Law Commission report entitled *A New Inquiries Act*.²⁴ The Act was intended to “reform and modernise the law relating to inquiries” by (among other things) “enabling those inquiries to be carried out effectively, efficiently and fairly”.²⁵ The Law Commission Report, and Parliamentary debates as the Inquiries Bill went through the House, indicated that one of the Act’s purposes was to give inquiries greater flexibility in selecting processes that best fitted their particular circumstances.²⁶ There was a perception that inquiry processes under the previous legislation had become overly legalistic and adversarial in nature, making them unnecessarily costly and time-consuming.²⁷
- [17] An inquiry established under the Inquiries Act has a wide discretion as to what procedures it adopts, as we explained in Minute No 4 and in Ruling No 1. However, in determining its procedure, an inquiry must take into account the principles of natural justice and have regard to the need to avoid unnecessary delay or cost in relation to public funds, witnesses or other persons participating in the inquiry.²⁸
- [18] The Inquiries Act provides for the designation of “core participants”.²⁹ Persons designated as core participants are entitled to give evidence and make submissions to the inquiry “subject to any directions of that inquiry as to the manner in which evidence is to be given and submissions made”.³⁰ Notably, an inquiry may not order general discovery³¹ and a core participant does not have the right to obtain information provided to the inquiry by other core participants (or anyone else); but an inquiry may order such disclosure³² particularly where it is necessary to meet natural justice obligations.³³ At the outset, the Inquiry designated NZDF, Mr Nicky Hager, Mr Jon Stephenson and three Afghan villagers from Tirgiran Valley as core participants.³⁴ As we discuss further below, the Afghan villagers withdrew from the Inquiry in June 2019.
- [19] The processes which the Inquiry adopted for handling material and taking evidence were intended to reflect three important considerations in particular:
- (a) most of the potential witnesses had legitimate claims for various reasons to anonymity and confidentiality;
 - (b) much of the documentary material provided to the Inquiry was classified or subject to obligations of confidentiality (for example, to foreign governments or organisations and to sources who assisted Mr Stephenson); and

²⁴ Law Commission *A New Inquiries Act* (NZLC R102, 2008).

²⁵ Inquiries Act, s 3.

²⁶ Law Commission, above n 24, especially at [1.18]–[1.28].

²⁷ Especially at [1.18]–[1.28].

²⁸ Inquiries Act, s 14(2); Minute No 4 (14 September 2018) at [46] and [60]–[66]; Ruling No 1 (21 December 2018) at [13].

²⁹ Section 17.

³⁰ Section 17(3).

³¹ Section 22(1)(b).

³² Section 22.

³³ Sections 14(2) and (3).

³⁴ The three Afghan villagers designated as core participants were represented by McLeod & Associates, two of whom were present on the night of Operation Burnham. McLeod & Associates also acted for a further 19 villagers connected to the Operation Burnham events.

- (c) the Inquiry had to be as open as possible given the public interest in its subject matter, albeit against the background of the two constraints mentioned in (a) and (b) above.

In addition, the Inquiry had to be alert to the requirements of natural justice, as required by the Inquiries Act.

- [20] Exercising its judgement as best it could after hearing submissions at a public hearing, the Inquiry determined that:³⁵

- (a) it would treat witnesses as witnesses of the Inquiry rather than as witnesses of any particular core participant;
- (b) most of the oral evidence would have to be given in private and tested by the Inquirers and Counsel Assisting, given the constraints referred to in paragraphs [19](a) and (b); and
- (c) legal issues could be addressed in public hearings, at which the core participants could make submissions.

In addition, the Inquiry had earlier decided that it would establish an independent review process to examine the classified material provided to it to assist in identifying what could be publicly disclosed.³⁶

- [21] The Inquiry went ahead on the basis outlined. It held three public hearings on “modules” which addressed particular legal topics that were relevant to the determinations it had to make.³⁷ The presentations and submissions at these public hearings were of considerable assistance. They informed our thinking in a variety of ways.
- [22] Most of the evidence heard by the Inquiry was taken in private, including evidence from Mr Hager and Mr Stephenson, and is subject to confidentiality orders. The evidence of NZDF and other government agency personnel, both present and former, was taken in accordance with the Inquiry’s Witness Protocol.³⁸ This involved Counsel Assisting, Ms Kristy McDonald QC and Mr Andru Isac QC, interviewing the witnesses to prepare “will say” statements, which then formed the basis of witnesses’ evidence to the Inquiry. Witnesses’ oral evidence was recorded and, in most cases, transcribed. The Inquiry did not hear oral evidence from all those interviewed by Counsel Assisting. Those who did not give evidence directly to the Inquiry were deposed by Counsel Assisting under delegation from the Inquiry.³⁹
- [23] The evidence-gathering process which we have just outlined met a concern that non-Crown core participants had raised with the Inquiry at an early stage. The concern was that if NZDF was left to brief and lead evidence from its present and former personnel as normally occurs in litigation, there was a risk that the evidence could be “shaded” or “shaped” in the process, whether consciously or unconsciously. From the Inquiry’s perspective, this was not a concern limited to NZDF—it applied more generally. In any event, Counsel Assisting were confident at the end of

³⁵ Ruling No 1 (21 December 2018) at [79], [82]–[85].

³⁶ See Minute No 4, above n 28, at [27].

³⁷ See Minute No 11 (22 March 2019), Minute No 12 (25 March 2019) and Minute No 17 (27 June 2019). The Inquiry held five public hearings in all, totalling 14 days of hearing time. The other two hearings dealt with the procedures the Inquiry would follow and the “cover-up” allegations.

³⁸ Minute No 4, above n 28, at Appendix 1: Witness Protocol.

³⁹ Inquiries Act, s 21.

the process that the NZDF and related witnesses from whom they took “will say” statements gave their unvarnished accounts, uninfluenced by NZDF—a confidence shared by the Inquiry. The Inquiry acknowledges NZDF’s “hands off” approach to this evidence-gathering process.

- [24] An exception to the Inquiry’s approach to taking evidence occurred in relation to evidence from NZDF personnel on the topic of the alleged “cover-up”. This evidence was heard in public session (Public Hearing Module 4) on 16–19 September and 15, 16 and 18 October 2019, for reasons which we explained in Minute No 19.⁴⁰ This involved NZDF briefing the relevant witnesses, filing the briefs in advance and leading their evidence at the hearing. Counsel Assisting then examined the witnesses, followed by Mr Davey Salmon, Counsel for one of the non-Crown core participants, on a time-limited basis. Following that, Counsel for NZDF re-examined the witnesses, after which the Inquirers asked any questions they had.
- [25] Finally, in February 2020, the Inquiry undertook a natural justice process with affected persons. This involved identifying potentially adverse provisional findings and making relevant parts of the draft report available to the affected persons so that they were aware of the basis for the potential findings and could comment on them. All but one of the affected parties made submissions.
- [26] At the same time, the Inquiry made its draft report available to the core participants for comment. The Inquiry had intended to give the core participants the opportunity to make oral as well as written submissions on the draft report. Shortly before the hearings were to take place, however, the COVID-19 pandemic lockdown occurred. As a consequence, the proposed hearings were abandoned and the core participants were given the chance to provide further written submissions covering any points that they had intended to cover orally.
- [27] As a consequence of the natural justice process and the submissions from core participants, the Inquiry made changes to the content of the draft report and to some of its provisional findings and recommendations. As should be obvious, it is the Inquiry’s final report that sets out the views the Inquiry ultimately reached.
- [28] Besides analysing the relevant documentation (most of which was classified), conducting interviews and taking oral evidence, the Inquiry undertook extensive research into open source information including, for example, satellite imagery, reports of Afghan government agencies and international organisations, and media reports from inside and outside Afghanistan. The Inquiry had access to specialist expertise and assistance of the highest quality in relation to all facets of its work, for which we express our immeasurable gratitude.
- [29] The Inquiry also acknowledges the assistance it received from the book’s authors, both of whom made helpful submissions on legal and factual matters. We are particularly indebted to Mr Stephenson who, from an early stage, provided valuable assistance in connecting us with some of his important sources and making the results of his extensive researches available to us.

The Inquiry’s reporting date extended

- [30] In its Terms of Reference, the Inquiry was given a year from the date of its establishment to investigate and report (that is, by 12 April 2019). However, it soon became apparent that this timeframe was insufficient to allow the Inquiry to complete its work, for reasons we summarise

⁴⁰ See Minute No 19 (18 July 2019).

below. Accordingly, the Inquiry sought an extension until 31 December 2019 and an increase in its budget, both of which were granted. It then became necessary to obtain further extensions to its reporting date, until, ultimately 17 July 2020, although without any further budget increases.

- [31] A number of factors led to the extension requests. The fact that most of the documentary material relevant to the Inquiry was classified, and that much of it contained information supplied by overseas partners, created real difficulty for the Inquiry, both administratively and substantively. On the administrative side, beyond the usual challenges involved in setting up a new organisation, the Inquirers had to obtain security clearances; the Inquiry had to obtain premises (or access to premises) capable of handling classified material; and most Inquiry staff had to obtain security clearances. This was a time-consuming and demanding exercise. We acknowledge the assistance we received from government agencies with these matters, particularly the Department of Internal Affairs; New Zealand Security Intelligence Service; Government Communications Security Bureau; Ministry of Justice; and Ministry of Business, Innovation and Employment.
- [32] Once the logistical issues were resolved, the Inquiry had to develop, publish and hear submissions on the processes it considered would accommodate the interests identified at paragraph [19], and then make final decisions. Overall, this work took many months. In particular, the Inquiry's determinations in relation to its processes were not finalised until December 2018, after a public hearing held on 21–22 November 2018.⁴¹
- [33] On the substantive side, the provision of classified documents and information to the Inquiry by government agencies took far too long. We accept that government agencies holding relevant classified material, particularly material provided by overseas partners, had a legitimate interest in being satisfied that the Inquiry's processes for handling classified information were robust and complied with the government's Protective Security Requirements.⁴² However, at an early stage, the Inquiry made clear that it would regard itself as bound by those requirements.⁴³
- [34] We consider that government agencies did not take adequate steps to facilitate the production of relevant partner and domestic material to the Inquiry as soon as they could have. For instance, they could have started to collate relevant material soon after the Inquiry was established in April 2018, given it was inevitable that the Inquiry would require access to such material. We note that the Inquiry was still receiving relevant material from NZDF and others in June 2020, shortly before the Inquiry was due to report. Some of this material only came to light as a result of the public hearing on the "cover-up" allegations; other previously undisclosed material came to light during the natural justice process. We found this disappointing because specific requests had been made for some of this material much earlier (in particular, a notebook kept by a senior officer in Afghanistan), but it was not provided at the time. The result is that the Inquiry cannot be confident that it has received all relevant material.
- [35] We are not suggesting that NZDF and other government agencies acted in bad faith or were attempting to delay the Inquiry. NZDF advised us that it had to review hundreds of thousands of items to seek out relevant material, which was a time-consuming and resource-intensive process. NZDF also said that it found the iterative nature of the Inquiry's work challenging in

⁴¹ See Ruling No 1 (21 December 2018).

⁴² The Protective Security Requirements (PSR) is a policy framework that outlines the government's expectations for security governance and for managing personnel, physical and information security. Government agencies are expected to adopt the PSR and meet its mandatory requirements. More information can be found at <protectivesecurity.govt.nz>.

⁴³ See Minute No 4, above n 28, at [5].

this context. But this does illustrate a problem that will be highlighted in subsequent chapters, namely that NZDF had a number of different systems, with the result that it was not able to find relevant material readily—nor could it be sure that the Inquiry had been provided with all relevant information.

- [36] We note that the Inquiry has had access to a range of overseas partner-sourced material, much of it in the possession of New Zealand agencies when the Inquiry was established. New Zealand agencies refused to disclose overseas partner information to us without the consent of the relevant overseas partner, on the basis that it had been provided to New Zealand agencies in the first instance under obligations of confidence. We had some difficulty with the idea that Crown agencies would refuse to provide relevant overseas partner-sourced material in their possession to a government Inquiry without the consent of the relevant overseas partner, particularly as the Inquiry had agreed to meet the Protective Security Requirements.
- [37] Although the Inquiry did eventually obtain access to this material, the process of obtaining overseas partner consent sometimes took what was, from the Inquiry's perspective, an excessively long time—in one instance, a week short of six months. This impacted the Inquiry's ability to make timely progress on some issues. In several instances, material was made available to the Inquiry only in a redacted form. While we are grateful to the overseas partners for granting consent, this raises issues to which we return in chapter 12.
- [38] Finally, we acknowledge the cooperation of the Crown Agencies⁴⁴ in the process the Inquiry established for the review of classified material. That review was designed to identify what of the classified material could be disclosed publicly, either in whole or in redacted form. The establishment of the review process reflected two things:
- (a) first, the fact that the need for material to remain classified is not kept under review on any systematic basis, despite such reviews being required by the Protective Security Requirements; and
 - (b) second, the Inquiry's desire to make public as much of the information available to it as it properly could.

The classification review process was led by the Inquiry's independent reviewers, Mr David Johnstone and Mr Ben Keith. As a result of their work, much previously classified material has been disclosed publicly.⁴⁵ This was only possible with the considerable cooperation of the agencies, for which we are grateful.

Particular challenges faced by the Inquiry

- [39] As noted above, the Inquiry faced a number of challenges in preparing its report. These included, among others, challenges resulting from the quantity of classified information and material sourced from overseas partners, the legitimate claims of witnesses to confidentiality and the need to have as much of the Inquiry's work as possible visible to the public, which we address in more detail below.

⁴⁴ As we describe later in the report, the Crown Agencies made submissions to the Inquiry on various topics. They were represented by the Crown Law Office and comprised New Zealand Security Intelligence Service, Government Communications Security Bureau, Ministry of Foreign Affairs and Trade, Department of Prime Minister and Cabinet and Ministry of Defence.

⁴⁵ A total of 423 previously classified documents were made publicly available.

An iterative process

- [40] The first challenge was the iterative nature of the investigative process. As we noted in paragraph [13], the Inquiry's Terms of Reference list 10 specific matters which the Inquiry is to investigate. Those, interpreted in light of the Inquiry's purpose, provided the framework for the Inquiry's investigations. As the Inquiry progressed, issues that seemed important initially turned out to be uncontentious. For example, the precise location of Operation Burnham appeared at the outset to be a matter in dispute, but it quickly became obvious that there was no room for dispute. Other contentious issues (such as whether there were insurgents in the villages during Operation Burnham) were readily resolved during the Inquiry for a range of reasons. Some issues, then, fell away, which required some modification to the Inquiry's work.
- [41] Further, new issues were exposed as the Inquiry progressed. In part, this resulted from the Inquiry obtaining new material from NZDF or other government agencies, in some instances well after the material should have been provided. On occasion, this meant that the Inquiry had to request further material from agencies or obtain further information from witnesses. As noted earlier, one example was the public hearing on the alleged "cover-up". That threw up a number of new matters from the Inquiry's perspective and meant that it had to request further documentation and seek further evidence. As we have already mentioned, during the natural justice process we learnt of the existence of information that should have been provided to us much earlier. This led to further information requests and the need to re-write significant parts of the draft report. At times, this became frustrating.
- [42] In summary, while some issues fell away, new ones emerged. The Inquiry had to adjust its work to take account of this. In general though, the issues became more focused as the Inquiry progressed and this allowed us to hone in on what was truly in contention.

The Afghan villagers

- [43] Second, the Inquiry was conscious that it would face special challenges in taking evidence from the Afghan villagers. Three villagers had issued judicial review proceedings challenging the decision of the previous New Zealand Government not to hold an inquiry.⁴⁶ Those proceedings were discontinued when the new Government decided to establish this Inquiry. The Inquiry accorded core participant status to the three villager applicants in the proceedings. As such, they were entitled to give evidence and make submissions to the Inquiry, subject to any directions from the Inquiry about the way this should be done.⁴⁷
- [44] In March 2019, the three villagers with core participant status issued judicial review proceedings challenging the Inquiry's determination as to process. They applied for interim relief aimed at preventing the Inquiry from holding any further hearings pending determination of their substantive application for review. They also sought permission to administer interrogatories to the Inquiry. The latter application was rejected⁴⁸ and, ultimately, the villagers discontinued their proceedings.
- [45] Initially, we assumed that we would need to hear from the three villagers (and other Afghan villagers) directly. We considered how to do this, against the background that they were vulnerable

⁴⁶ *AVI v Attorney-General* Wellington CIV-2017-485-000675.

⁴⁷ Inquiries Act, s 17(3).

⁴⁸ *K & G v The Government Inquiry into Operation Burnham and Related Matters* [2019] NZHC 854.

witnesses and we needed to accommodate security, cultural, psychological and other issues.⁴⁹ We then thought that we might not need to take evidence directly from the villagers but, rather, could rely on the information already available about what the villagers said had occurred, including what they told Mr Stephenson in his interviews with many of them.⁵⁰ However, after receiving submissions on that suggestion and considering the matter further, we decided that we did need to hear from the villagers directly. As a result, we indicated that one of us would travel to Kabul to hear the villagers' accounts, with the assistance of a local law firm in Kabul.⁵¹

- [46] Shortly after (in mid-June 2019), the lawyers for the villagers, McLeod & Associates, advised that their clients were withdrawing from the Inquiry.⁵² The reasons given were that the villagers had been sceptical about New Zealand authorities and their legal processes from the start. Their view that the Inquiry's processes had marginalised them had reinforced their scepticism. Counsel advised that their clients had lost confidence in the Inquiry and its processes and were no longer willing to participate in it.
- [47] The Inquiry found this a puzzling and disappointing decision, especially because the villagers had issued judicial review proceedings in 2017 aimed at having an inquiry established and had stated in their supporting affidavits that they wished to speak to the investigators about what had happened to them. Although disappointed by the villagers' decision, we were able to gather accounts from some people who were in the villages during Operation Burnham and who expressed a desire to engage with the Inquiry. This was done through a law firm in Kabul. The firm also made various other enquiries in Afghanistan at the Inquiry's request. Care was taken to ensure that no one was put at risk in this process.

Maintaining public confidence

- [48] A further major challenge was maintaining public confidence in the outcome of the Inquiry, given that we had decided that much of the evidence from NZDF personnel and related witnesses would have to be taken in private and that much of the classified material could not be disclosed to the public or the non-Crown core participants. Some commentators drew the immediate conclusion that the Inquiry would be a "whitewash".
- [49] Obviously, neither of the Inquirers had any interest in participating in a whitewash, and we did not. We did what we could to promote public understanding of what the Inquiry was doing and the issues it was addressing. This included:
- (a) disclosing much previously classified material on the Inquiry's website;
 - (b) holding public hearings concerning the Inquiry's processes and on significant legal and factual topics, including a public hearing in September/October 2019 on the "cover-up" allegations;
 - (c) publishing submissions received for these hearings, the transcripts of what took place at them, and the associated Minutes and Rulings; and

⁴⁹ See Minute No 10 (20 March 2019), Minute No 14 (29 April 2019), Minute No 15 (17 May 2019) and Minute No 16 (4 June 2019).

⁵⁰ See Minute No 14, above n 49.

⁵¹ See Minute No 16, above n 49.

⁵² RE Harrison QC and DA Manning *Memorandum of Counsel for Former Residents of Khak Khuday Dad and Naik as to Withdrawal from the Inquiry* Submission to Inquiry (18 June 2019).

- (d) publishing periodic progress reports on the Inquiry's website.

In the result, we consider that interested members of the media and the public will have been able to follow the Inquiry's work reasonably well.

A public report?

- [50] The writing of this report was also affected, as we have said, by the constraints resulting from most of the witnesses' evidence being protected by confidentiality orders and much of the material before the Inquiry being classified. We were concerned to produce a report that the Attorney-General could, if he wished, make available to the public. To achieve this, the Inquiry had to be careful to write the report in a way that addressed the issues in sufficient detail to provide a proper explanation to the public but did not compromise legitimate security and confidentiality concerns.
- [51] Given that the matters at issue occurred a decade ago, the Inquiry considered that the security interests were not so much in the information obtained but rather in:
 - (a) the particular methods by which information was obtained (that is, the capabilities of NZDF and intelligence agencies);
 - (b) the identity of individuals who provided information (disclosure of which might endanger their safety); and
 - (c) closely protected strategic, tactical and operational information that may have value to opposing forces and others in the future.
- [52] As we have said, the Inquiry had access to relevant material sourced from overseas partners that had originally been provided to New Zealand agencies on a basis of confidence. Whether we have been able to make that material available to non-Crown core participants or the public has, as a practical matter, depended on whether the relevant overseas partner has been prepared to give its consent. While consent was granted in respect of some matters, ultimately we were not able to make available to non-Crown core participants and the public as much overseas partner-sourced material as we would have wished. We comment further on this in chapter 12.
- [53] Accordingly, the report is written in a way that seeks to protect information that is classified or was provided in confidence yet provides a coherent account of relevant factual matters. Where we have relied on material that is unclassified or has been declassified, or on evidence that was given in public session, we have attempted to footnote it. However, we have not referenced classified material (which has been "gisted") or oral evidence provided in confidence. Where we have referred specifically to oral evidence given in confidence, we have obtained the consent of the relevant witness.
- [54] In the result, we believe that we have managed to write a report that is sufficiently detailed and comprehensive to explain the conclusions we have reached yet accommodates legitimate security and confidentiality interests.
- [55] We appreciate that our inability to share classified and confidential material with the public, or even with non-Crown core participants, may be frustrating for those who have taken a close interest in these events over the years. This must be particularly so for the authors of *Hit & Run*, given that the report does not accept allegations they made about the conduct of NZDF forces

during Operations Burnham and Nova, in part on the basis of objective⁵³ and witness evidence not available to them. Unfortunately, that is part of the reality of an inquiry such as this.

Inquiry by the Inspector-General of Intelligence and Security

- [56] Before this Inquiry was established, the then Inspector-General of Intelligence and Security (IGIS) began an inquiry of her own motion into the roles of the New Zealand Security Intelligence Service and the Government Communications Security Bureau in relation to specific events in Afghanistan from 2009 to 2013, including Operation Burnham. Given that there was a degree of overlap between the two inquiries, we agreed a Memorandum of Understanding with the IGIS as to how we would interact.⁵⁴
- [57] We had regular meetings with the IGIS, which we found helpful. We have attempted to write the Inquiry's report in a way that does not impinge on the work of the IGIS, but refers to her findings where appropriate. We note that the IGIS's public report will be available around the same time as the Inquiry's report.

The Inquiry's report

- [58] This report sets out the Inquiry's views on the matters we were asked to investigate. The structure of the report is as follows:
- (a) Chapter 2 describes the background to the deployment of New Zealand forces to Afghanistan. We deal with the decisions to deploy the NZSAS initially in 2001 (and the NZPRT in 2003), and later the NZSAS in 2009 on Operation Wātea, during which the operations at issue occurred. This chapter also outlines two important features of New Zealand's constitutional arrangements—civilian control of the military and ministerial responsibility to Parliament—and addresses the question of whether there was ministerial authorisation for Operation Burnham.
 - (b) Chapters 3 to 6 relate to Operations Burnham and Nova. Chapter 3 describes the planning and preparation for Operations Burnham and Nova, while chapter 4 outlines what happened on the two operations. Chapter 5 considers whether there were insurgents in the villages at the time of Operation Burnham and addresses the consequences of Operations Burnham and Nova, in particular whether there were civilian casualties and the extent of property damage. Chapter 6 sets out the relevant principles of International Humanitarian Law (or the Law of Armed Conflict) and discusses their application to the facts of Operations Burnham and Nova.
 - (c) Chapter 7 deals with issues relating to targeting killings and the JPEL. It also discusses the air strike that killed Abdullah Kalta in 2012.

⁵³ We use the term "objective evidence" to refer to imagery, video footage, audio tapes and such like.

⁵⁴ Sir Terence Arnold and Cheryl Gwyn "Memorandum of Understanding between Inquiry into Operation Burnham (the "Inquiry") and Inspector-General of Intelligence and Security (the "IGIS")" (16 November 2018).

- (d) Chapters 8 and 9 deal with the allegations of a “cover-up” by NZDF. We focus on how NZDF responded to allegations of civilian casualties on Operation Burnham, both initially and in subsequent years. The facts are set out in chapter 8 and our assessment of them in chapter 9.
- (e) Chapters 10 and 11 deal with the capture and detention of Qari Miraj on Operation Yamaha. Chapter 10 explains New Zealand’s policy on detention at the relevant time and the legal context, specifically the law relating to states’ obligations in respect of torture and its prevention. Chapter 11 sets out the facts of Qari Miraj’s capture; addresses allegations that he was assaulted by TF81 personnel and later tortured while in NDS custody; and analyses the circumstances of his capture to determine what obligations New Zealand owed to him at the time.
- (f) Chapter 12 looks to the future and sets out our recommendations and observations.

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”.⁵⁵ 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.

⁵⁵ *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”.⁵⁶ 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.⁵⁷ 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”,⁵⁸ claiming that there were no insurgents in the villages (Khak Khuday Dad and Naik)⁵⁹ 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.

⁵⁶ Hager and Stephenson, above n 10, at 6.

⁵⁷ Hager and Stephenson, above n 10, at 41.

⁵⁸ At 109.

⁵⁹ 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”⁶⁰ 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”⁶¹ and “fiercely attacked”⁶² houses, destroying 12 of them.⁶³ 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.⁶⁴ 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*.⁶⁵ 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.⁶⁶ He was the innocent victim of gunfire between an offender and police officers at a bazaar.

⁶⁰ At 36.

⁶¹ At 70.

⁶² At 53.

⁶³ At 130.

⁶⁴ At 50 and 62.

⁶⁵ At 40.

⁶⁶ 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

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.

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 Bamyān 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 2012.⁶⁷ 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.⁶⁸

⁶⁷ Hager and Stephenson, above n 10, at 92.

⁶⁸ 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.⁶⁹

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.⁷⁰ 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.⁷¹ 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 operation⁷² and that the ISAF

⁶⁹ See paragraph [12] above.

⁷⁰ At 8.

⁷¹ At 72.

⁷² 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.⁷³ 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.⁷⁴ 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.

⁷³ Hager and Stephenson, above n 10, at 100.

⁷⁴ 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.

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.

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.⁷⁵ 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.⁷⁶
- [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.

⁷⁵ At 84–85.

⁷⁶ 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.

Inquiry by the numbers

159

Individuals who
gave evidence
to the Inquiry

423

Documents publicly
available as a result of
the Inquiry's process
for reviewing classified
information

119

Submissions
and memoranda
published on the
Inquiry's website

29

People the Inquiry
heard evidence
from in public

5

Public hearings
held over 14 days

1,756

Pages of public hearing
transcripts published on
the Inquiry's website

4,431

Documents
disclosed to
the Inquiry

3,237

Documents
disclosed
by NZDF

1,194

Documents from other
agencies and core
participants, including
the *Hit & Run* authors,
MFAT, DPMC, NZSIS,
GCSB, and MOD

2

The deployment of the NZSAS to Afghanistan: political and constitutional dimensions

Chapter 2

- [1] This chapter deals with various matters that provide important context for issues that we are directed to consider. We begin by providing some brief background on Afghanistan, its history and the impact that various conflicts have had on the population. We then describe the New Zealand deployments to Afghanistan and the basis for them, with particular reference to the initial deployment in 2001 and the deployment of the New Zealand Special Air Service (NZSAS) in 2009.
- [2] This leads on to a discussion of the nature of the NZSAS deployment in 2009 as part of the International Security Assistance Force (ISAF), and requires consideration of issues relating to command and control. We outline the constitutional position of the military in New Zealand, focusing particularly on two important issues—civilian control and ministerial accountability to Parliament. This is necessary background to two of the questions raised in our Terms of Reference. The first is “whether there was any ministerial authorisation of the Operations”, which we consider at the end of this chapter.¹ The second is whether, if the relevant rules of engagement “authorised the predetermined and offensive use of lethal force against specified individuals (other than in the course of direct battle)”, responsible ministers understood that.² We address the detail of this second question in chapter 7.

Afghanistan: a little background

- [3] In his informative book on the history of Afghanistan, Thomas Barfield describes the country as holding a key geographic position linking “three major cultural and geographic regions: the Indian subcontinent to the southeast, central Asia to the north, and the Iranian plateau in the west”.³ As a result, Afghanistan was the target of invaders over many centuries and for much of its history was incorporated, at least in part, into the empires of various foreign leaders. Equally, at various times Afghan leaders led incursions into India and other neighbouring countries, as William Dalrymple graphically describes in his book, *The Anarchy: The Relentless Rise of the East India Company*.⁴
- [4] More recently, in the 19th and early 20th centuries, the British fought three wars in Afghanistan which were largely driven by a perceived need to counter Russian expansion. None ended particularly well for the British. More recently again, troops from the Soviet Union invaded Afghanistan in 1979, at a time when the communist government then in power in Afghanistan was involved in a conflict with anti-communist mujahideen. The Soviet troops met with strong local resistance (supported by a number of countries, including the United States) and ultimately withdrew ten years later, again without significant success. It is for good reason that Afghanistan is referred to as “the graveyard of empires”.⁵

1 *Terms of Reference: Government Inquiry into Operation Burnham and related matters* (11 April 2018), cl 7.4. This aspect of the Terms of Reference may reflect the fact that *Hit & Run* says that Operation Burnham was approved by the then Prime Minister, Rt Hon (now Sir) John Key, and that he “is uniquely responsible for what followed from his decision”: Nicky Hager and Jon Stephenson *Hit & Run: The New Zealand SAS in Afghanistan and the meaning of honour* (Potton & Burton, Nelson, 2017) at 120.

2 *Terms of Reference*, above n 1, cl 7.9.

3 Thomas Barfield *Afghanistan: A Cultural and Political History* (Princeton University Press, Princeton, 2012) at 1.

4 William Dalrymple *The Anarchy: The Relentless Rise of the East India Company* (Bloomsbury, 2019).

5 Barfield *Afghanistan: A Cultural and Political History*, above n 3, at 255.

- [5] Reflecting Afghanistan's geographical position and turbulent history, its population comprises a complex mix of different ethnicities, different languages and different religious beliefs/practices. Barfield describes the outstanding social feature of life there as being its local tribal or ethnic divisions. He writes "[p]eople's primary loyalty is, respectively, to their own kin, village, tribe, or ethnic group, generally glossed as *qawm*."⁶ There is no significant adherence to a central government.
- [6] Many parts of Afghanistan are marked by extreme poverty and subsistence living. The country has a high illiteracy rate.⁷ We heard evidence that malnutrition is common and Afghanistan remains one of the most dangerous places in the world to be an infant, a child or a mother.⁸ Among the population, there are high levels of anxiety, depression and post-traumatic stress disorder, resulting from the long-running conflicts and other circumstances of daily life.⁹ Corruption and criminal activity (much of it drug-related) are endemic.¹⁰
- [7] One result of the interminable wars in Afghanistan, particularly the conflict with the Soviet Union in the 1980s, is that military-style weapons are widespread. Rivalry and feuds are commonplace, although allegiances do change as circumstances change. Warlords and private militias have played a significant part in Afghanistan's history, even in recent times. Between 1992 and 1996 Afghanistan endured civil war, during which warlike militias effectively ruled the country, leading to the emergence of the Taliban.¹¹ In her book *Farewell Kabul: From Afghanistan to a More Dangerous World*, war correspondent Christina Lamb describes the many difficulties faced by President Hamid Karzai in the early/mid-2000s, commenting that "... in a country where anyone that mattered had their own militia, he had no one".¹² In such a setting, locals may see weapons such as AK-47s as necessary to protect themselves and their families, particularly in remote or rural areas.¹³

The New Zealand deployments to Afghanistan

- [8] New Zealand's involvement in Afghanistan began in 2001 "as part of international counter-terrorism operations directed against Osama bin Laden, al-Qaida, and the Taliban following the 9/11 attacks in the United States of America."¹⁴ Before we outline the process leading up to the Government's decision to deploy troops to Afghanistan, we provide a brief overview of the international community's response to 9/11. This response was within the framework of the Charter of the United Nations (the UN Charter), the starting point of which is that states should settle their international disputes by peaceful means but which then recognises certain exceptions.¹⁵

⁶ At 18.

⁷ Evidence of [name withheld] "Afghan Civilian Perspective" Transcript of Proceedings, Public Hearing Module 2 (22 May 2019) at 17; and UNESCO Institute for Statistics "Afghanistan: Education and Literacy" <uis.unesco.org>.

⁸ Evidence of [name withheld], above n 7, at 14.

⁹ At 15.

¹⁰ Barfield *Afghanistan: A Cultural and Political History*, above n 3, at 334.

¹¹ Cornelius Friesendorf *How Western Soldiers Fight: Organizational Routines in Multinational Missions* (Cambridge University Press, Cambridge, 2018) at 172.

¹² Christina Lamb *Farewell Kabul: From Afghanistan to a More Dangerous World* (William Collins, London, 2015) at 310.

¹³ The same is unlikely to be true of weapons such as rocket-propelled grenade launchers and machine guns, however, which are likely to be associated with insurgent or militia activities.

¹⁴ Crown Agencies "New Zealand Government's decisions to deploy New Zealand forces into Afghanistan" (Public Hearing Module 1, 4 April 2019) at 1.

¹⁵ See paragraph [13] below.

- [9] On 12 September 2001, the day following the 9/11 attacks, the United Nations Security Council passed Resolution 1368. This resolution recognised the right of individual or collective self-defence and condemned the attacks as acts of international terrorism which were a threat to international peace and security. The resolution called on the international community to bring those responsible to justice and to work together to prevent further attacks.¹⁶
- [10] Resolution 1368 was passed against the background that a Taliban Government held power in Afghanistan and permitted al-Qaida leadership to live and operate training camps there. As Cornelius Friesendorf observed: "... al Qaeda, under the leadership of Osama bin Laden, supported the Taliban financially to the point that the Taliban became dependent on al Qaeda and Bin Laden's personal wealth."¹⁷
- [11] In the months that followed, the Security Council passed further relevant resolutions:
- (a) On 28 September 2001 the Security Council passed Resolution 1373. Acting under Chapter VII of the UN Charter, the Security Council decided that states should take a number of measures to prevent the financing and commission of terrorist acts.
 - (b) On 12 November 2001 the Security Council passed Resolution 1377, which adopted a declaration on the global effort to combat terrorism. It declared that acts of international terrorism constituted a serious threat to international peace and security in the 21st century and that "a sustained, comprehensive approach involving the active participation and collaboration of the Member States of the United Nations, and in accordance with the Charter of the United Nations and international law, is essential to combat the scourge of international terrorism". It called on all states to implement Resolution 1373.
 - (c) On 14 November 2001 the Security Council passed Resolution 1378. Among other things, the resolution expressed its "strong support for the efforts of the Afghan people to establish a new and transitional administration leading to the formation of a government ..." It affirmed that the United Nations should play a "central role" in supporting those efforts.
 - (d) On 6 December 2001 the Security Council passed Resolution 1383, which endorsed provisional arrangements in Afghanistan until permanent government institutions were re-established. These arrangements were set out in the Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions (the Bonn Agreement).¹⁸ The arrangements established the Afghan Interim Authority to govern the country for six months while a Transitional Authority was appointed.¹⁹
 - (e) On 20 December 2001 the Security Council passed Resolution 1386. Acting under Chapter VII of the UN Charter, the Security Council authorised the establishment of ISAF for six months at the request of, and to support, the Afghan Interim Authority. ISAF's role would be to "assist

¹⁶ We will not set out a full list of the Security Council resolutions relating to Afghanistan over the period of New Zealand's involvement. A complete list can be found in annex B to Ministry of Foreign Affairs and Trade "An overview of Afghanistan, its history, New Zealand's relationship with the country, the international response to 9/11, current security situation" (Public Hearing Module 1, 4 April 2019).

¹⁷ Friesendorf, above n 11, at 172.

¹⁸ The Agreement was signed at Bonn on 5 December 2001 at a meeting convened by the United Nations.

¹⁹ The Transitional Authority was appointed in June 2002, after some delays, by a Loya Jirga ("grand assembly"). It governed the country until presidential elections could be held in 2004. Hamid Karzai, the chairman of the Interim Authority, was also appointed as the president of the Transitional Authority in 2002 and was subsequently elected as president in 2004.

the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas”. The resolution called on Member States of the United Nations to contribute to ISAF with personnel, equipment and other resources. Member States participating in ISAF were authorised to “take all necessary measures to fulfil its mandate”. (Resolutions in subsequent years enlarged the territorial scope, and extended the length, of ISAF’s mandate. The North Atlantic Treaty Organization (NATO) assumed the leadership of ISAF in 2003.²⁰)

- (f) On 28 March 2002 the Security Council passed Resolution 1401. It established the United Nations Assistance Mission in Afghanistan (UNAMA).²¹ The resolution stressed recovery and reconstruction assistance to help implement the Bonn Agreement. It urged donors to respond.

- [12] We should also note that from late 2002, the United States began to establish Provincial Reconstruction Teams (PRTs) in Afghanistan.²² These were combined military/civil units which were intended to facilitate reconstruction of infrastructure and suchlike in Afghanistan, to enhance security and to reinforce and extend the authority of the Afghan Government. Over time, individual countries took responsibility for particular PRTs. Much of the PRT funding came through ISAF programmes.
- [13] One important restriction on the use of force in international relations flows from art 2 of the UN Charter. Article 2(3) obliges States to settle their disputes by peaceful means, and art 2(4) limits the use of force or the threat of force against the territorial integrity or political independence of any state. These restrictions are, however, subject to the inherent right of self-defence in art 51, which provided the basis for the initial involvement of the United States (and New Zealand) in Afghanistan in Operation Enduring Freedom, a United States-led coalition. They are also subject to the authorisation of the use of force under Chapter VII of the UN Charter, which the Security Council invoked when establishing ISAF. As noted, Resolution 1386 authorised participating member states “*to take all necessary measures to fulfil [ISAF’s] mandate.*”
- [14] The Inquiry sought an expert opinion on the applicable law from Emeritus Professor Sir Kenneth Keith QC, a former Judge of the International Court of Justice. He told the Inquiry that Resolution 1386 authorised the use of armed force, and that was how the resolution had been understood in practice.²³ The Inquiry accepts this and notes that the resolution did not limit ISAF to using force defensively. Thus, ISAF often undertook planned offensive action targeting insurgent groups to fulfil its mandate of maintaining security. The Inquiry agrees with Professor Keith that any use of force by ISAF had to be consistent with international law. The Inquiry also agrees with Professor Keith’s view, again reflecting the international consensus, that the language from the Security Council resolution provides authority for the detention of persons in Afghanistan.²⁴

²⁰ “NATO takes on Afghanistan mission” (11 August 2003) NATO <www.nato.int>.

²¹ The United Nations Assistance Mission in Afghanistan (UNAMA) was formed to better support the implementation of the Bonn Agreement by integrating all the existing United Nations elements in Afghanistan into a single mission. Its mandate included fulfilling tasks and responsibilities relating to human rights, the rule of law and gender issues; promoting national reconciliation and rapprochement; and managing all United Nations humanitarian relief, recovery and reconstruction activities in Afghanistan (*The situation in Afghanistan and its implications for international peace and security* UN Doc A/56/875–S/2002/278 (18 March 2002), endorsed in SC Res 1401 (2002)).

²² United States Army Combined Arms Center *Afghanistan Provincial Reconstruction Team Handbook: Observations, Insights and Lessons* (February 2011) Center for Army Lessons Learned at 3.

²³ Rt Hon Sir Kenneth Keith “The international legal framework” (Public Hearing Module 3, 29 July 2019) at 5. Crown Agencies agreed this was the position (see Paul Rishworth QC “The International legal framework” (Public Hearing Module 3, 29 July 2019) at [11]), and the non-Crown core participants did not dispute it.

²⁴ Rt Hon Sir Kenneth Keith, above n 23, at 5.

- [15] As can be seen from the foregoing description, the international community reacted strongly to the 9/11 attacks, calling on member states to take a range of military, reconstructive and humanitarian steps. The United States-led Operation Enduring Freedom, the NATO-led ISAF coalition, UNAMA and the PRTs operated for much of the period of New Zealand's involvement in Afghanistan, reflecting a multi-faceted approach. Operation Enduring Freedom and ISAF were separate, but to some extent overlapping, in their military operations and ran alongside each other.
- [16] The deployment of New Zealand forces to Afghanistan began in 2001 with a deployment of the NZSAS for 12 months, in 2004 for six months, in 2005 for six months and from 2009 until 2012.²⁵ New Zealand assumed responsibility for the PRT in Bamiyan province in 2003 and was active there until 2013. We now describe the background to the initial deployments of the NZSAS in 2001 and the New Zealand Provincial Reconstruction Team (NZPRT) in 2003 and then describe the deployment of the NZSAS in 2009.

The initial NZSAS deployment in 2001

- [17] New Zealand responded to the call of the United Nations in 2001 for assistance in Afghanistan, as did many other nations. Then Prime Minister Rt Hon Helen Clark announced in a media release on 21 September that New Zealand would make a military contribution. (The first deployment of NZSAS arrived in Kandahar in December 2001). A parliamentary debate about this decision was triggered on 3 October 2001, when the Prime Minister moved the following resolution:²⁶

That this House declares its support for the offer of New Zealand Special Air Service troops and other assistance as part of the response of the United States and international coalition to the terrorist attacks that were carried out on 11 September 2001 in New York, Washington and Pennsylvania.

- [18] A lengthy debate followed, in which all political parties represented in the House of Representatives took part. The debate took place shortly before the United States launched Operation Enduring Freedom in Afghanistan.²⁷ Various amendments were moved. The resolution that finally passed included the following additional words (added by amendment):²⁸

... and totally supports the approach taken by the United States of America, and further declares its support for United Nations Security Council Resolutions 1368 and 1373.

- [19] The Prime Minister pointed out to the House that the offer to deploy what she characterised as “New Zealand’s crack troops” was made because New Zealand people were not neutral about terrorism and they wanted their country to be part of the effort to combat it.
- [20] The parliamentary resolution in its amended form passed in the House by 112 votes to 7, with only the Green Party voting against it. As in other nations, there was wide cross-party support for sending New Zealand troops to Afghanistan in response to the Security Council’s call for assistance from the international community. The New Zealand commitment initially was to Operation Enduring Freedom, but later it was to ISAF. In addition to forming part of the ISAF

²⁵ A timeline of New Zealand’s involvement in Afghanistan is included in “New Zealand Government’s decisions to deploy forces to Afghanistan”: Crown Agencies, above n 14, at annex one.

²⁶ (3 October 2001) 595 NZPD 524.

²⁷ Operation Enduring Freedom was launched by the United States on 7 October 2001, with United Kingdom support.

²⁸ (3 October 2001) 595 NZPD 548.

presence in Afghanistan, which was mandated by the Security Council resolutions referred to above, the deployment of New Zealand troops was also supported by direct arrangements between New Zealand and the Government of the Islamic Republic of Afghanistan (Afghan Government).²⁹ This enabled New Zealand troops to conduct national tasks as well as ISAF operations, as we discuss further below.³⁰ By the time ISAF transitioned to Resolute Support Mission in 2014, 51 nations had contributed to the international effort by providing military or police assistance in Afghanistan.³¹ Nineteen nations were there by January 2002.

- [21] The fact that the NZSAS was deployed initially was facilitated by the contact its leaders had already had with United States Special Forces a few weeks before 9/11. On a visit to Tampa, Florida and to Fort Bragg, North Carolina, described in Ron Crosby's book on the NZSAS, Lieutenant Colonel Tim Keating (then Commanding Officer of the NZSAS) and his successor designate, Lieutenant Colonel Jon Knight, established a good working relationship with United States Special Forces. This relationship had developed during New Zealand's involvement in Kuwait in 1998 as part of a joint contribution with Australia.³²
- [22] A squadron of NZSAS soldiers landed in Afghanistan on 9 December 2001, shortly after the collapse of the Taliban Government as a result of United States-led attacks. By then al-Qaida leaders, including Osama bin Laden, had escaped from the mountain fortress of Tora Bora in eastern Afghanistan into Pakistan. It is important to recall that the Taliban, who at the time were largely Pashtun and tended to view other ethnic groups as enemies, had never created a real government in Afghanistan despite controlling much of the country.³³ As a result, after the collapse of the Taliban regime, there was little left upon which to build. As Thomas Barfield noted:³⁴

... the United States invaded Afghanistan at a time when the state structure had ceased to function. It would need to create a new state to restore stability to the country.

- [23] The Taliban regime had caused or led to significant negative outcomes for Afghanistan and its people. For example:³⁵
- (a) Its enforcement of Sharia law had included inflicting harsh punishments.
 - (b) Women had few rights and freedoms.
 - (c) Many institutions and much of the country's infrastructure were badly damaged or destroyed.

²⁹ *Military Technical Arrangements between the Government of New Zealand and the Government of the Islamic Republic of Afghanistan* (12 August 2009), a copy of which is contained in: Arrangement Between Afghanistan MFA and NZDF concerning the Transfer of Persons between the NZDF and Afghan Authorities (12 August 2009) (Inquiry doc 05/32) from 5 onward. See also NZDF brief – 13 Apr 2010 (14 April 2010) (Inquiry doc 13/23) at 2.

³⁰ See CDF OP DIRECTIVE 21-2009 (July 2009) (Inquiry doc 12/11) at [22], noting that Task Force 81 (TF81) would be covered by the Military Technical Arrangement between New Zealand and Afghanistan when conducting national tasks.

³¹ "ISAF's mission in Afghanistan (2001–2014)" (1 September 2015) NATO <www.nato.int>.

³² Ron Crosby *NZSAS: The First Fifty Years* (Penguin Group, Auckland, 2009) at 345–346.

³³ Thomas Barfield *The War for Afghanistan: A Very Brief History* (Princeton University Press, New Jersey, 2012) at 6; see also Antonio Giustozzi "The Taliban Beyond the Pashtuns" The Centre for International Governance Innovation (5 July 2010) at 4.

³⁴ Barfield *The War for Afghanistan: A Very Brief History*, above n 33, at 1.

³⁵ See Oxfam *The Cost of War; Afghan Experience of Conflict, 1978–2009* (November 2009) at 11–12, 14; Danish Immigration Service *Danish Immigration Service: Report on fact-finding mission to Pakistan to consider the security and human rights situation in Afghanistan (18 to 29 January 2001)* (November, 2001) at [1.1]; Human Rights Watch *Human Rights Watch World Report 2000—Afghanistan* (December 1999).

- (d) Much productive land had become unproductive.
- (e) Particular ethnic groups had been preyed upon (for example, the Hazara people).
- (f) Cultural genocide had occurred, most notably the destruction in 2001 of 6th century Buddhas in Bamyan province.
- (g) Thousands of homes were destroyed.
- (h) Millions of people had fled to neighbouring countries, particularly Iran and Pakistan, to live as refugees. After the United States invaded, several million of them returned to Afghanistan, creating further difficulties.

The NZPRT in Bamyan

- [24] The international community considered that it was necessary to re-build the capacity of the Afghan people to conduct their own government and their own defence and to support the reconstruction and development of the country.³⁶ One result was the increased focus on PRTs, which led to New Zealand troops being deployed in Bamyan province as the NZPRT from 2003 until April 2013. As Sir Angus Houston, the former Australian Chief of Defence Force, told the Inquiry, “[t]he PRTs were central to ISAF efforts across Afghanistan and were the heart of the counter-insurgency effort, or more widely known as COIN.”³⁷
- [25] On 8 July 2003 the New Zealand Minister of Defence, Hon Mark Burton, announced the new NZPRT commitment.³⁸ The Minister said the NZPRT had a focus “on enhancing the security environment and promoting reconstruction efforts.” The NZPRT was more of a security and reconstruction force than a combat unit, albeit that it undertook security patrols which, on occasion, did lead to combat. The NZPRT consisted both of military personnel and civilians. In 2012 the Ministry of Foreign Affairs and Trade (MFAT) became the lead agency for the NZPRT, taking over from the New Zealand Defence Force (NZDF).³⁹ From that time until the NZPRT ceased operations in 2013, NZDF’s senior officer in the NZPRT deployment took the title of “Senior Military Adviser to the PRT” as well as Commanding Officer of CRIB (the NZDF operation name for the NZPRT deployments).⁴⁰
- [26] Between 2004 and 2011 “NZDF was involved in more than 200 projects, large and small, that assisted the people of Bamyan.”⁴¹ The NZPRT’s official purpose was to establish a stable and secure environment in which local people could rebuild their province with the support of the Afghan Government, New Zealand and other donors. The New Zealand contribution included police resources, development assistance, education, governance, justice and the rule of law,

³⁶ Annex B to Ministry of Foreign Affairs and Trade “An overview of Afghanistan...”, above n 16.

³⁷ Sir Angus Houston “The military context” (Public Hearing Module 1, 4 April 2019) at 4; Evidence of Sir Angus Houston, Transcript of Proceedings, Public Hearing Module 1 (4 April 2019) at 20–21. COIN is an abbreviation for Counter-Insurgency.

³⁸ Hon Mark Burton, Minister of Defence “New Zealand to lead Provincial Reconstruction Team in Afghanistan” (8 July 2003) <www.beehive.govt.nz>.

³⁹ Ministry of Foreign Affairs and Trade “New Zealand’s Achievements from 10 Years of Development Assistance in Bamyan, Afghanistan” (Public Hearing Module 1, 4 April 2019).

⁴⁰ NZDF “Chief of Defence Force: Bamyan Mission Accomplished” (5 April 2013) <www.nzdf.mil.nz>.

⁴¹ Ministry of Foreign Affairs and Trade “New Zealand’s achievements from 10 years of development assistance in Bamyan, Afghanistan”, above n 39, at 4.

health, humanitarian assistance and reconstruction elements.⁴²

- [27] The Security Council passed numerous resolutions in relation to Afghanistan from 2002 to 2009, the detail of which we do not need to address. However, two points relevant to the issues before the Inquiry are worth noting:
- (a) First, the Security Council stated on a number of occasions that Afghan authorities were responsible for providing security and law and order throughout Afghanistan.⁴³ ISAF and other partners were encouraged to continue their efforts “to train, mentor and empower the Afghan national security forces, in particular the Afghan National Police”.⁴⁴
 - (b) Second, a number of resolutions relating to Afghanistan incorporated the Security Council’s general resolutions calling for the protection of civilians in armed conflicts.⁴⁵

The NZSAS deployment in 2009

- [28] In addition to the ongoing NZPRT deployment, in 2009 the NZSAS was deployed to Afghanistan for the fourth time, as part of ISAF. This was consistent with other nations’ involvement and reflected the focus of the international community on state-building in Afghanistan. As we noted earlier, Operation Enduring Freedom was a United States-led coalition combat operation, part of the United States’ global war on terror, while ISAF was a NATO-led coalition operation, concentrating on security assistance and helping Afghan authorities rebuild key government institutions. Both operations ran concurrently in Afghanistan for more than a decade. United States forces could be assigned to one or both operations and the Commander ISAF was also the Commander of United States Forces in Afghanistan (USFOR-A).
- [29] The international community recognised that progress was needed on security if proper governance arrangements were to be established. Development assistance could not succeed without effective security, proper governance, application of the rule of law and the absence of corruption. Achieving these was essential for a proper functioning state, but proved a major challenge.
- [30] The decision to deploy the NZSAS in 2009 was made by the National-led Government of Rt Hon (now Sir) John Key.⁴⁶ In February 2009, the Cabinet had decided to extend New Zealand’s existing commitments in Afghanistan (principally the NZPRT) from 1 October 2009 through to 30 September 2010. Cabinet also agreed that there should be a review of New Zealand’s commitment in Afghanistan beyond 30 September 2010, with the results to be provided by mid-2009.

42 The Ministry of Foreign Affairs and Trade advised that since 2001 New Zealand has invested approximately NZ\$100m in development initiatives in Afghanistan at the national, regional and provincial level: Ministry of Foreign Affairs and Trade “An overview of Afghanistan...”, above n 16, at 2.

43 SC Res 1776 (2007) at 1.

44 SC Res 1776, above n 43, at [4]. See also, for example, SC Res 1833 (2008) at [4].

45 See, for example, SC Res 1833, above n 44.

46 Some relevant Cabinet papers have been disclosed publicly by the Inquiry: 16 February 2009 Cabinet Decision Minute – Afghanistan: NZ’s contributions beyond Sept 2009 (16 February 2009) (Inquiry doc 01/02); 3 July 2009 Cabinet Paper Cover Sheet – Afghanistan: 2009 Deployment of the NZSAS (Operation Watea) (3 July 2009) (Inquiry doc 01/03); 6 July 2009 Cabinet Decision Minute – Additional Item Afghanistan: Power to Act for Group of Ministers (6 July 2009) (Inquiry doc 01/04); 7 August 2009 Cabinet Paper – Review of NZ’s Commitment to Afghanistan (7 August 2009) (Inquiry doc 01/05); 10 August 2009 Cabinet Decision Minute – Afghanistan 2009: Deployment of NZSAS (10 August 2009) (Inquiry doc 01/06); and 10 August 2009 Cabinet Decision Minute – Review of NZ’s Commitments to Afghanistan (10 August 2009) (Inquiry doc 01/07). See also Evidence of Hon Dr Wayne Mapp, Transcript of Proceedings, Public Hearing Module 1 (4 April 2019) at 72–78.

- [31] In March 2009 the Government received a request from the United States for a further deployment of the NZSAS to Afghanistan, beginning in September 2009. This was one of several requests made by ISAF and United States authorities, the most notable of which was in a telephone call from United States President Barack Obama to Mr Key⁴⁷. The proposal was that the NZSAS would, at least temporarily, replace the withdrawing Norwegian Task Group. Like the Norwegians, the NZSAS would partner with the Afghan Crisis Response Unit (CRU) in a mentoring role.⁴⁸ In his evidence, Hon Dr Wayne Mapp, who was the Minister of Defence at the time, said that the United States military hierarchy regarded the NZSAS highly as a Tier 1 Special Forces group—well trained, professional and capable of handling difficult missions successfully.
- [32] In July 2009 the Cabinet established a group of ministers with Power to Act in relation to the proposed NZSAS deployment, subject to the full Cabinet endorsing its decisions. The group comprised the Prime Minister, the Minister of Finance (Hon Bill English), the Minister of Foreign Affairs (Hon Murray McCully) and the Minister of Defence (Dr Mapp). On 10 August 2009 the Cabinet endorsed the group's decision that the NZSAS would deploy to Afghanistan from late September 2009 for a period of 18 months.⁴⁹ The tasks which the NZSAS was to perform were:⁵⁰
- (a) conducting reconnaissance in Kabul and adjacent provinces to locate insurgent forces and improvised explosive device networks;
 - (b) both training and mentoring the CRU;
 - (c) direct action against insurgent networks in support of ISAF and the Afghan Government; and
 - (d) national tasks, including (most relevantly) supporting NZDF elements in Afghanistan.
- [33] A number of features of the Cabinet's decision are pertinent given the issues before the Inquiry. In particular, the Cabinet noted that:⁵¹
- (a) the deployment was authorised by various Security Council Resolutions;
 - (b) there were national caveats for the deployment;
 - (c) the Prime Minister had approved the rules of engagement for the deployment;
 - (d) Afghan authorities (such as the CRU) would generally be responsible for detaining individuals, rather than NZSAS, but where the NZSAS detained people, there were procedures in place to deal with that;
 - (e) MFAT was continuing to seek formal written assurances from the Afghan Government that detainees would not be subjected to torture or capital punishment;
 - (f) the Chief of Defence Force “would retain full command of all NZDF personnel posted or attached as part of the deployment, and that the NZSAS would only accept tasks that they [were] willing to undertake and would be able to decline other tasks” (sometimes described as a national “red card”).

⁴⁷ Evidence of Hon Dr Mapp, above n 46, at 66–67.

⁴⁸ The CRU was a police unit in the nature of a SWAT or tactical operations team.

⁴⁹ Inquiry doc 01/06, above n 46.

⁵⁰ Inquiry doc 01/03, above n 46, at [14].

⁵¹ Inquiry doc 01/06, above n 46.

- [34] The decision to re-deploy the NZSAS to Afghanistan was debated in Parliament. An urgent debate on 15 August 2009 was moved by the Green Party, which opposed the deployment. The debate showed that political opinions about the desirability of such a deployment had shifted, compared to those expressed in the debate on the 2001 NZSAS deployment.
- [35] One of the Government's support parties,⁵² the Māori Party, expressed firm opposition to the deployment on the grounds that "Afghanistan is not our war, and the SAS should not be going".⁵³ The Labour Party (by then in opposition) said it was opposed. While in government, it had considered a decision to recommit the NZSAS to Afghanistan, but had decided against it. Hon Phil Goff explained that following the return of the NZSAS in 2005, the Government reassessed the situation and thought the nature of the conflict had changed, becoming a more local conflict between disparate groups. The Progressive Party of Hon Jim Anderton was also opposed.
- [36] Government speakers outlined why the Government had made the decision to deploy. The Minister of Foreign Affairs spoke of the NZPRT's work and the decision of New Zealand to increase aid "with a greater emphasis on agriculture and continuing high priority ... to education and health services".⁵⁴ In lifting the level of military support, New Zealand was aligned to the international community.
- [37] The Minister of Defence told the House:⁵⁵

The challenge is to produce a sufficiently stable Afghanistan so that it does not once again become a haven for terrorists.

Dr Mapp said he had argued for a more sophisticated approach at a NATO meeting earlier in 2009 and a new strategy had been adopted:

It involves an increased commitment of defence forces to build renewed security within the country. The reason for that is to prevent the country from reverting to Taliban control and providing a safe haven for terrorists, particularly al-Qaeda.

- [38] At the Inquiry's Public Hearing on Module 1 on 4 April 2019, Dr Mapp set out in detail the preliminary work relating to the deployment, the Cabinet processes and the factors that influenced the Government's decision to deploy as announced on 16 August 2009. These were:⁵⁶
- (a) a focus on the need to minimise casualties;
 - (b) the context of a bipartisan commitment to collective security and a rules-based international order;
 - (c) requests from President Obama and ISAF;
 - (d) the re-deployment of the NZSAS together with the continuation of the NZPRT deployment advanced the twin aims of ensuring security and facilitating civil reconstruction;

⁵² At the time National led a minority government with confidence-and-supply agreements with the Māori Party, as well as ACT and United Future.

⁵³ (18 August 2009) 656 NZPD 5605.

⁵⁴ (18 August 2009) 656 NZPD 5603.

⁵⁵ (18 August 2009) 656 NZPD 5609.

⁵⁶ Evidence of Hon Dr Mapp, above n 46, at 75–78.

- (e) the need to stop Afghanistan being a haven for international terrorism; and
- (f) the strong support of the Security Council for the remedial steps in governance in Afghanistan and the widespread international support.

[39] In the result, the Government had majority support in Parliament and the decision to deploy was one it was entitled to make. The NZSAS was accordingly deployed to Afghanistan under the title “Operation Wātea”.

The nature of the NZSAS deployment as part of ISAF

[40] We begin by briefly describing the context within which ISAF was operating in 2009 when Operation Wātea began and the NZSAS took over the responsibility for training and mentoring the CRU from the Norwegian forces. We then discuss briefly command and control arrangements.

The context

[41] In his book *The Taliban at War 2001—2018*, Antonio Giustozzi writes:⁵⁷

The Taliban Emirate, established in 1996, was in 2001 overthrown relatively easily by a coalition of US forces and various Afghan anti-Taliban groups. Few at the end of 2001 expected to hear again from the Taliban, except in the annals of history. Even as signs emerged in 2003 of a Taliban comeback, in the shape of an insurgency against the post-2001 Afghan government and its international sponsors, many did not take it seriously. It was hard to imagine that the Taliban would be able to mount a resilient challenge to a large-scale commitment of forces by the US and its allies.

[42] One of the reasons for the rapid collapse of the Taliban Government was the overwhelming firepower that the United States and its allies brought to bear against the Taliban. As Giustozzi graphically records:⁵⁸

The fall of the Taliban was swift and brutal. Following 11 September 2001, Taliban forces were obliterated in a lightning war prosecuted by American special forces and their Afghan allies, supported by an armada of warplanes. Mullah Cable, a Taliban commander renowned for his toughness, recalls what it was like to be under US bombardment early in the war: ‘My teeth shook, my bones shook, everything inside me shook’. After witnessing his comrades being decimated by the bombing, Cable gathered the rest of his men and told them to go home, before himself deserting.

[43] However, the Taliban did re-emerge and began to gather strength in terms of both fighters and funding, aided by a perception that the Afghan Government was corrupt and ineffective. Giustozzi considers that after 2005, “the insurgency accelerated considerably”.⁵⁹ While, historically, the Taliban had been largely of Pashtun origin, this began to change. Over the next several years, the Taliban expanded their influence in various parts of the country, including in non-Pashtun areas such as Tala wa Barfak, the district in Baghlan province where Operation Burnham occurred.⁶⁰

⁵⁷ Antonio Giustozzi *The Taliban at War 2001—2018* (C Hurst & Co (Publishers) Ltd, London, 2019) at 1.

⁵⁸ At 17 (footnotes omitted). See also Barfield, *The War for Afghanistan*, above n 33, at 276–277.

⁵⁹ At 45.

⁶⁰ Discussed further in chapter 3.

They melded into the community and were difficult for outsiders to detect. This resulted in asymmetrical or unconventional warfare, which posed a real challenge for conventional armed forces, and led to the adoption of the counter-insurgency strategy (COIN).⁶¹ This aimed to achieve three objectives for Afghanistan: governance, development and security. While it involved committing more forces to Afghanistan, COIN was ultimately about winning the support of the Afghan people for the Afghan Government, thereby marginalising insurgent forces. It highlighted the centrality of the treatment of the civilian population to achieving success in Afghanistan.

- [44] The continued reliance by United States and coalition forces on air power in the years after the fall of the Taliban Government came at a significant cost—an increasing number of deaths of innocent civilians. While insurgents caused most civilian deaths in Afghanistan, significant civilian casualties resulted from the actions of coalition forces, including in the course of night operations by Special Forces.⁶² Such deaths raised issues of accountability, often unanswered.⁶³ As Sir Angus Houston said to the Inquiry:⁶⁴

The single greatest setback to operational success in Afghanistan was civilian casualties. By far and away it is the innocent civilian population that has suffered the most in Afghanistan. ... Potentially for every civilian killed by coalition forces, the saying went you created five to ten more insurgents.

- [45] The leadership of ISAF and USFOR-A understood this and began to address it.⁶⁵ From 2007, ISAF issued a number of tactical directives and revisions of them (the latter known as fragmentary orders or FRAGOs) to place limits on the use of weapons, particularly air-delivered weapons, so as to minimise civilian casualties. In August 2008, the ISAF Commander, General David McKiernan, established a Civilian Casualty Tracking Cell to gather information on and monitor civilian casualties from coalition activities.⁶⁶ The following month, he issued a Tactical Directive that limited the use of air strikes in particular circumstances.⁶⁷ His successor, General Stanley McChrystal, issued a Tactical Directive on 6 July 2009 which was intended (among other things) to limit civilian casualties, particularly from close air support against residential compounds and similar places.⁶⁸ The directive did not purport to prescribe the appropriate use of force or to prevent commanders from using force in self-defence to protect the lives of their forces where no other options were available to counter the threat effectively.⁶⁹

61 For a description of the COIN strategy, see United States Government “Counterinsurgency Guide” (January 2009) Bureau of Political-Military Affairs <www.state.gov> and General Stanley McChrystal “ISAF Commander’s Counterinsurgency Guidance” (27 August 2009) NATO <www.nato.int>.

62 See, for example, Human Rights Watch ‘*Troops in Contact’ Airstrikes and Civilian Deaths in Afghanistan* (September 2008); United Nations Assistance Mission in Afghanistan and Afghanistan Independent Human Rights Commission *Afghanistan—Annual Report 2010: Protection of Civilians in Armed Conflict* (March 2011).

63 See, for example, Amnesty International *Left in the Dark—Failures of accountability for civilian casualties by International Military Operations in Afghanistan* (August 2014).

64 Evidence of Sir Angus Houston, above n 37, at 40–41.

65 For a helpful discussion of the development of ISAF’s approach, see Sahr Muhammedally “Minimizing civilian harm in populated areas: Lessons from examining ISAF and AMISOM policies” (2016) 98 Int Rev of the Red Cross 225, at 232–238.

66 This was later renamed the CIVCAS Data Tracker database. See, for example, United Nations Office for the Coordination of Humanitarian Affairs *Compilation of Military Policy and Practice: Reducing the humanitarian impact of the use of explosive weapons in populated areas* (August 2017) at 49.

67 Jim Garamone “Directive Aimed at Minimizing Civilian Casualties” American Forces Press Service (16 September 2008) US Department of Defense <archive.defense.gov>.

68 Headquarters ISAF “Tactical Directive” (6 July 2009) NATO <www.nato.int>.

69 Other Tactical Directives were issued dealing with matters that affected the civilian population such as driving (emphasising that troops should drive safely rather than aggressively) and night raids (limiting their use unless other options were not feasible).

- [46] General McChrystal's successor was General David Petraeus. At his Senate confirmation hearing in June 2010 following his nomination as ISAF Commander, General Petraeus had indicated that a tactical directive was "designed to guide the employment, in particular, of large casualty-producing devices: bombs, close air support attack helicopters, and so forth".⁷⁰ He reviewed and amended General McChrystal's 6 July directive, issuing a replacement Tactical Directive in August 2010, which was in force at the time of Operation Burnham.⁷¹ It was considered that the directives were effective in reducing the number of civilian casualties from coalition operations.⁷²

Command and control arrangements

- [47] When deploying personnel to participate in a coalition force, New Zealand does not sign away sovereign responsibility for its forces or allow them to be used without oversight. Consequently, when the NZSAS deployed to Afghanistan in 2009 as part of the ISAF coalition force, several questions arose:

- (a) first was the question of the NZSAS's role and what, if any, constraints or caveats should be placed on NZSAS operations to ensure the NZSAS was used in a way that was consistent with the Government's expectations and intent and with the applicable legal obligations;
- (b) second was the question of the applicable command and control arrangements; and
- (c) third was the question of what the NZSAS could do when conducting operations as part of the deployment, which included the question of what controls should be placed on the use of force.

The third of these questions raises the topic of the rules of engagement for the deployment. We address that issue in chapter 6. Here, we make some brief comments on constraints and issues relating to command and control. Before we do so, however, we note an observation made by Sir Angus Houston in his presentation at Public Hearing Module 1, namely that negotiating the labyrinth of command and control, national policy constraints, differing military capabilities and rules of engagement is at the heart of modern coalition operations.⁷³

- [48] Besides the obvious constraints associated with fixing the number of NZDF personnel to be deployed, the length of the deployment and the funds available for it, the Government imposed other constraints (or national caveats) on the deployment. These national caveats were formally communicated to NATO, ISAF and the United States through the Chief of Defence Force and were accepted by all as conditions of the provision of military forces by New Zealand. They were also included as part of the Chief of Defence Force's orders to the NZSAS.

- [49] We emphasise two of these constraints:

- (a) In terms of ultimate control, the NZSAS remained under the full command of the Chief of Defence Force and was bound by the New Zealand Government-approved rules of engagement,

⁷⁰ General David Petraeus Confirmation Hearing (29 June 2010) C-Span <www.c-span.org>.

⁷¹ ISAF Public Affairs Office "Gen. Petraeus updates guidance on use of force" (4 August 2010) U.S. Central Command <www.centcom.mil>. Discussed further in chapter 3.

⁷² Joseph Felter and Jacob Shapiro "Limiting Civilian Casualties as Part of a Winning Strategy: The Case of Courageous Restraint" (2017) 146 *Daedalus* 44.

⁷³ Evidence of Sir Angus Houston, above n 37, from 28.

which were intended to reflect New Zealand views and values on the use of lethal force.

- (b) As to the geographic scope of the deployment, the Government decided that the deployment would be focused on Kabul and its immediate surrounding areas, but that the NZSAS would be permitted to conduct operations outside that geographic zone if requested by the commander of ISAF Special Operations Forces. Effectively, this gave the Chief of Defence Force the power to approve operations outside Kabul and its surrounding provinces if he thought it appropriate to do so. Operation Burnham was one such operation.
- [50] The various constraints reflected government policy and were, in effect, a lawful direction from the Government to and through the military chain of command. As noted by Sir Angus Houston, the placing of national constraints and caveats by individual nations on their forces operating in a coalition environment is common. The type of conditions imposed by the New Zealand Government and NZDF on NZSAS operations were similar to those imposed by other nations involved in ISAF.
- [51] The two constraints identified at paragraph [49] lead into the question of command and control. Along with other issues, command and control are addressed in documents published from time to time by NZDF dealing with military doctrine.⁷⁴ Military doctrine “provides a military organisation with a common philosophy, a common language, a common purpose, and a unity of effort”.⁷⁵ It is not a topic that we need to discuss in detail in this report. Rather, there are two relevant points to be made.
- [52] First, military doctrine identifies decision-making in relation to conflict as occurring at three interrelated levels—strategic, operational and tactical (see Figure 1 at the end of this chapter).⁷⁶
- (a) The strategic level includes the national political dimension to a conflict and a military dimension. At the national political strategic level, the question is: what strategic objective does the Government seek to achieve by military involvement? The military dimension relates to the way the military supports the national strategic objective—what is the military trying to achieve? How will it go about achieving what it needs to achieve in support of the Government’s objective?
 - (b) The operational level deals with the command and planning of military campaigns and major operations.
 - (c) The tactical level deals with engagements conducted while executing a particular campaign or major operation. It concerns the practical utilisation of all necessary forces—whether air, land and sea—for the particular conflict.
- [53] Second, military doctrine draws a distinction between command and control.⁷⁷ In brief, command is the authority which commanders exercise over those who are subordinate to them by virtue of their rank or assignment. Control (in the present context) is the authority exercised by commanders over groups or organisations that are not normally under their command. *Operational control* is

⁷⁴ See, for example, NZDF “New Zealand Defence Doctrine” (November 2017) <www.nzdf.mil.nz>.

⁷⁵ At 12.

⁷⁶ This brief description is drawn from chapter 3 of NZDF *Foundations of New Zealand Military Doctrine* (2nd ed, November 2008) <www.nzdf.mil.nz>, which was current at the time of the events under review.

⁷⁷ For a full discussion, see NZDF “New Zealand Defence Force Command and Control” (May 2016).

the authority delegated to a commander to direct assigned forces to undertake specific missions or operations.

- [54] Dealing first with command, under the Defence Act 1990, the Chief of Defence Force commands each of the three services—New Zealand Army, Royal New Zealand Navy and Royal New Zealand Air Force—through the chief of each service and commands any joint force through the joint force commander or through the chief of any service.⁷⁸
- [55] As Cabinet confirmed in its deployment decision, the Chief of Defence Force retained full command of the NZSAS contingent while it was deployed to Afghanistan as part of ISAF. The New Zealand force deployed to Afghanistan comprised an element from NZSAS and some non-NZSAS personnel and was named Task Force 81 (TF81)—it was a separate organisation to the NZSAS based in New Zealand and had a separate commander. In accordance with standing practice, the Chief of Defence Force re-assigned specific elements of his full command to other authorised commanders. The Chief of Defence Force delegated operational *control* of TF81 in Afghanistan to the Commander ISAF in Kabul and he assigned operational *command* of TF81 in Afghanistan to the Commander Joint Forces New Zealand, based in Wellington. Commander Joint Forces New Zealand in turn appointed the Commander TF81 as the Senior National Officer, assigning him national command responsibilities in addition to his operational command responsibilities. TF81 had various sub-elements in its structure which Commander TF81 used to achieve assigned tasks.
- [56] Turning to control, operational control of the NZSAS in Afghanistan rested with the Commander ISAF and, through him, with the Commander ISAF Special Operations Forces.⁷⁹ Operational control involves not simply the ability to direct or authorise missions or operations—it also involves control of processes and requirements for missions or operations. Numerous directives and standard operating procedures were issued by the Commander ISAF over time, some of which are described in more detail in chapter 3.
- [57] In the context of the NZSAS deployment to Afghanistan, the Senior National Officer / Commander TF81 and the Squadron Commander TF81 were required to operate:
- (a) within the constraints imposed by Cabinet and the Chief of Defence Force;
 - (b) in accordance with the command and control arrangements made by the Chief of Defence Force; and
 - (c) under the relevant rules of engagement.

It must also be emphasised that the Chief of Defence Force held what Sir Angus Houston described as a “national red card”,⁸⁰ namely the authority to veto the involvement of the NZSAS in a proposed ISAF operation for policy or other reasons.

- [58] To assist understanding, at the end of this chapter is an organisational chart that sets out the command and control structure for the NZSAS’s participation in ISAF (Figure 2).

⁷⁸ Section 8.

⁷⁹ To facilitate liaison, NZDF assigned an officer to ISAF Headquarters. In terms of rank, he was of similar rank to the NZDF Senior National Officer.

⁸⁰ Evidence of Sir Angus Houston, above n 37, at 31.

Democratic accountability for, and control over, NZDF

[59] A government has available to it a variety of means for pursuing its international objectives, one of which is its military capability. Whether or not it deploys that capability in any given circumstance will often be a matter of intense debate within the government and the country. Obviously, where a country is attacked, the decision is likely to be straightforward—the defence of the nation is one of the fundamental duties of the state. But overseas deployments are likely to be more contentious, as experience of the Vietnam War amply demonstrates.

[60] In New Zealand, military power is exercised through a combination of statute law and the royal prerogative. The principal statute is the Defence Act. The Long Title sets out the Act's purposes, three of which are of particular significance here, namely:

- (a) to continue to authorise the raising and maintaining of armed forces for certain purposes;
- (b) to reaffirm that the armed forces are under ministerial authority; and
- (c) to define the respective roles and relationships of the Minister of Defence, the Secretary of Defence and the Chief of Defence Force.

[61] Section 5 provides that the Governor-General may, in the name of the Sovereign, raise and maintain armed forces whether in New Zealand or elsewhere for certain purposes. Two constitutional scholars, Alison Quentin-Baxter and Janet McLean QC, have stated that s 5 appears to cover every contingency “in which the armed forces might need to be deployed”.⁸¹ Most relevant among the authorised purposes in relation to the Afghanistan deployments is the following in s 5(d):

the contribution of forces to, or for any of the purposes of, the United Nations, or in association with other organisations or States and in accordance with the principles of the Charter of the United Nations.

Section 6 goes on to provide that by virtue of being the Commander-in-Chief of New Zealand, the Governor-General “shall have such powers and may exercise and discharge such duties and obligations relating to any armed forces raised and maintained under s 5 as pertain to the office of Commander-in-Chief”.⁸²

[62] However, s 7 makes it plain that ministerial responsibility for the armed forces lies with the Minister of Defence:

Power of Minister of Defence

For the purposes of the general responsibility of the Minister in relation to the defence of New Zealand, the Minister shall have the power of control of the New Zealand Defence Force, which shall be exercised through the Chief of Defence Force.

Various provisions identify the Minister's responsibility for particular matters. For example, s 13(2) provides that the Minister must authorise the maximum number of officers, ratings,

⁸¹ Alison Quentin-Baxter and Janet McLean *This Realm of New Zealand: The Sovereign, The Governor-General, The Crown* (Auckland University Press, Auckland, 2017) at 302.

⁸² This provision raises several interesting (but for our purposes irrelevant) issues: see Quentin-Baxter and McLean, above n 81, at 132–137.

soldiers and airmen in the regular forces; s 15(2) contains a similar requirement in respect of members of the territorial forces. The Minister will, of course, be answerable to Parliament for the exercise of their responsibilities in relation to the armed forces.

- [63] The result is that the power to deploy New Zealand forces abroad “is an element of the executive authority of New Zealand, which is exercisable, through the Governor-General, by Ministers of the Crown, usually acting collectively within Cabinet, but responsible to Parliament for the decisions they make”.⁸³
- [64] Section 8 of the Act provides for the position of Chief of Defence Force. That person is in command of NZDF working through the chiefs of the three armed services—Army, Navy and Air Force. The Chief of Defence Force also commands any joint force established under s 12 of the Act through the Commander Joint Forces New Zealand (or, if applicable, through one of the service chiefs)⁸⁴ and exercises control over NZDF’s civilian staff.⁸⁵ One of the most important of the prerogative powers relating to armed conflict and other operations is the power of command.⁸⁶
- [65] Under s 25(1)(a) of the Act, the Chief of Defence Force is the principal military adviser to the Minister, the Secretary of Defence being the principal civilian adviser.⁸⁷ Importantly, s 25(1)(b)(i) provides that the Chief of Defence Force is responsible to the Minister for carrying out the functions and duties of NZDF *including those imposed by the Government’s policies*. Further, under s 25(2) of the Defence Act the Minister is under a statutory duty to provide the Chief of Defence Force with Terms of Reference that deal with matters such as the obligations and duties of the office and how the Chief of Defence Force is to perform them.
- [66] In his 2002 review of the accountabilities and structural arrangements between the Ministry of Defence and NZDF, Mr Don Hunn, a former State Services Commissioner, made the following pertinent observations:⁸⁸

2.7 As far as the Constitution is concerned there is no room for doubt that both the military and civilian members of the defence system are responsible and accountable to the Government of the day through the Minister of Defence. While the differences between the two are recognized in a number of ways there is no question that for all practical purposes the manner in which they should relate to the Minister is identical. The military profession has its own distinct traditions and values which are crucial in recruitment, in training and in the field, but it cannot claim a “higher loyalty” which distinguishes it from other servants of the Crown. Equally, while NZDF is not a government department and the Ministry is, the ethos which determines their relationship with the Government is the same and Ministers should have the same expectations of both in respect of service and support. It follows, therefore, that the same conventions which apply elsewhere in dealings between Ministers and their senior professional advisers should apply to the defence system also.

⁸³ Quentin-Baxter and McLean, above n 81, at 303.

⁸⁴ Commander Joint Forces New Zealand is responsible to the Chief of Defence Force for operational-level command and control of all joint and/or combined (international) operations and exercises: NZDF “About Us: HQ Joint Forces New Zealand” <www.nzdf.mil.nz>.

⁸⁵ Defence Act, s 61A.

⁸⁶ Kevin Riordan *Defence: Warfare Laws of New Zealand* (LexisNexis, Wellington, 2008) at [17] citing *R v Froggart* (1992) 9 CRNZ 181 [1992] 1 NZCMAR 169 (Court Martial Appeal Court).

⁸⁷ Defence Act, s 24(2)(a).

⁸⁸ D K Hunn *Review of Accountabilities and Structural Arrangements between the Ministry of Defence and the New Zealand Defence Force* (30 September 2002).

...

2.9 For my own part, while I fully agree that the constitutional principle of civilian control is an essential and permanent component of our defence system, I see it as being exercised by the Minister, Cabinet and Parliament and not by public servants. Both civilian and military defence officials enjoy equal status as servants of the Minister – one does not control the other, one should not predominate over the other. Their skills are complementary and should be fused in a partnership.

We agree.

- [67] As we have said, decisions about where New Zealand troops are committed, and on what basis, are policy decisions for the Government. While the Minister of Defence is the Minister responsible for the formulation and implementation of the Government's defence policy, the Cabinet has the power to override the Minister under the constitutional convention of collective ministerial responsibility. Obviously, decisions to send troops overseas and put them in harm's way will closely involve the Prime Minister and Cabinet. But the important point for present purposes is that, constitutionally, there is no doubt that the decisions of successive governments to deploy troops to Afghanistan were decisions which they were entitled to make.
- [68] While ministerial responsibility has numerous dimensions in the defence context, we need only make two points here about the Minister's authority.
- [69] First, the Minister must approve, or recommend to the Prime Minister for approval, the rules of engagement for missions abroad once satisfied they meet the proper legal requirements and are appropriate in policy terms. Rules of engagement are an important mechanism for the implementation of government policy during a particular deployment. Requiring that they be approved by the Executive maintains an element of democratic control and oversight over, for example, the circumstances in which NZDF personnel may use lethal force.
- [70] Second, while there is no doubt about the power of the Minister to direct a deployment overseas, there is an issue about the Minister's power in relation to operational matters. In his evidence at the Inquiry's Public Hearing Module 1, Dr Mapp pointed out that different ministers took different approaches to their relationship with NZDF. He made the following observation:⁸⁹

The Defence Act is couched in general terms to allow a degree of flexibility in how civilian oversight of the Defence Force is exercised. Oversight can be exercised in different ways depending on the needs of the specific deployment and the relationship between the Minister and the Chief of Defence Force.

- [71] Dr Mapp said oversight occurred through regular briefings, both oral and written, from the Chief of Defence Force and other senior officers. The Minister emphasised, however, that he did not approve or select missions for the NZSAS within the Afghanistan context. On a day-to-day basis, the NZSAS operated under the ISAF umbrella. The operations were conducted according to approvals from ISAF but also in accordance with the New Zealand rules of engagement and within the Government's caveats.
- [72] The Policing Act 2008 makes it clear that the Commissioner of Police is not responsible to the

⁸⁹ Evidence of Hon Dr Mapp, above n 46, at 79.

Minister of Police, and must act independently, in respect of certain policing decisions of an operational nature.⁹⁰ In contrast, the Defence Act contains no equivalent provision. This may reflect the fact that maintaining and utilising armed forces and defending the nation were originally within the royal prerogative and that the prerogative remains relevant. It may also reflect the fact that policing decisions are different in nature to military decisions.

- [73] Legal advice provided to Mr Hunn's 2002 review contains this statement from Professor Matthew Palmer, then at the Centre for Public Law at Victoria University:⁹¹

The extent of the powers conferred upon the Minister [by section 7 of the Defence Act] to direct the military is unclear at the margins, and untested in court. It is likely to be affected by the historical evolution of the prerogative in relation to defence matters and the scheme of the current defence legislation. We consider that, if tested in court, the Minister's power would be likely to extend to control over general strategic decisions relating to the deployment of troops and politically sensitive decisions relating to foreign policy. It is unlikely to extend to specific operational decisions in a field of conflict which a court is more likely to find to be the preserve of the CDF. There is a legal grey area here and the circumstances which would test it would require an unfortunate conflict to develop between the Minister and CDF.

- [74] While, in principle, it seems an attractive view that operational decisions in the context of a particular deployment should be the preserve of the Chief of Defence Force,⁹² we think the position much less straightforward than is the case with the police, for the following reasons:

- (a) First, it may well be difficult to specify with precision in a military context what are and are not operational decisions. Put another way, the boundary between what is a policy decision and what is an operational decision may not always be self-evident.
- (b) Second, in general, policing decisions relate to the application of the law to individuals subject to New Zealand's jurisdiction. Separation of powers considerations require that ministers do not intervene in those decisions. By contrast, NZDF operations abroad do not generally affect individuals who fall directly within New Zealand's jurisdiction.⁹³ They are a means of defending New Zealand's interests as a whole and giving effect to government policy and strategy on the world stage. Bias against, or unfair or inequitable treatment of, individuals through political interference is less likely in that context. Moreover (anticipating the next point), military operations are more likely to have significant political and policy implications and to require some form of government response than most operational policing decisions.
- (c) Finally, although Dr Mapp said that he did not approve or select missions for the NZSAS in Afghanistan and that it was not his role to do so, he also said that there may be circumstances where the Minister should intervene to say that a particular operation should not be conducted, especially one in an overseas deployment where New Zealand's international interests and obligations are engaged (or potentially engaged), as we now explain.

⁹⁰ See Policing Act 2008 (NZ), s 16(2).

⁹¹ Hunn, above n 88, at annex F at 59.

⁹² Assuming, of course, that they are consistent with the rules of engagement and with any constraints the Government has placed on the particular deployment.

⁹³ NZDF can, of course, be directed to undertake tasks within New Zealand, as, for example, after the Whakaari/White Island eruption in December 2019.

- [75] As we noted at paragraph [65], under s 25(1)(b)(i) of the Defence Act the Chief of Defence Force is responsible to the Minister for carrying out NZDF's functions and duties arising from the Government's policies. As a member of the Executive, the Minister is accountable to Parliament for policies adopted and implemented. Even if operational decisions are, in general, outside the scope of ministerial authority, such decisions may nevertheless be of vital significance to the Government of the day.
- [76] We take Operation Burnham as a convenient example. That was an operation which the Chief of Defence Force was required to approve if it was to go ahead because it was outside TF81's usual area of operations. But it involved a high level of risk for the forces involved. It was possible that a helicopter carrying New Zealand troops could have been shot down, resulting in the deaths of New Zealanders and other coalition personnel. Such an event would undoubtedly have been a matter of great public and media interest in New Zealand and perhaps internationally. Within New Zealand, it may well have caused public controversy about, for example, New Zealand's commitment of NZSAS personnel to ISAF operations in Afghanistan. This controversy might have led to scrutiny of one of the Government's policy choices. Similarly, if coalition forces became involved in a major fire fight with known insurgents, during which New Zealand troops inadvertently killed civilians, the interests of the New Zealand Government would obviously be engaged given that issues of international accountability could arise.
- [77] The Government has strategic goals for military deployments, and there is a range of potential legal and theoretically justifiable military actions within a deployment that might either help or hinder the achievement of those objectives. Hon Dr Jonathan Coleman, who succeeded Dr Mapp as Minister of Defence at the end of 2011, suggested in his evidence that the participation of New Zealand forces in particular operations may possibly at times be inconsistent with the Government's overall strategic direction for the relevant deployment. In such a case it may be appropriate for the Government to intervene.
- [78] The short point, then, is that some military decisions which might fairly be described as "operational" may potentially have significant governmental and political impacts, particularly those involving Special Forces engaged in operations overseas. This suggests that it is legitimate that the views of the Minister, and in some cases the Prime Minister, are sought before those decisions are implemented. We see this as an element of civilian control of the military rather than as an application of the "no surprises" policy.⁹⁴
- [79] This gives rise to a more general point about accountability to Parliament. Obviously, Parliament must pass any legislation addressing defence issues and a select committee is likely to consider proposed legislation as it moves through the House. But select committees have a broader role than simply perusing proposed legislation. They exercise financial oversight through hearings on estimates and through financial reviews; and beyond those obvious means of control, select committees can seek information on matters of special interest to them. For example, in relation to Afghanistan:
- (a) In November 2010, the Foreign Affairs, Defence and Trade Select Committee sought a briefing from NZDF on New Zealand's rules of engagement in light of New Zealand's obligations as a signatory to Optional Protocol to the Convention against Torture, and that was provided.⁹⁵

⁹⁴ The "no surprises" policy is described in Cabinet Office *Cabinet Manual 2017* at [3.22](a).

⁹⁵ Foreign Affairs, Defence and Trade Committee *Briefing on New Zealand's rules of engagement in relation to our obligations as a signatory to OPCAT* (17 February 2011).

- (b) In February 2011, the Committee received a briefing from the Minister of Defence on the NZPRT in Afghanistan and issued a brief report.⁹⁶
- (c) In August 2012, following the deaths of two NZDF personnel in Afghanistan, the Committee sought a briefing from NZDF on the situation there. The Chief of Defence Force indicated that he considered it was premature to provide a briefing in light of relevant announcements by the Government.⁹⁷

[80] In addition to this, Mr Hunn, made an important observation in his 2002 review. He said:⁹⁸

6.99 Over the past two decades the shift from the primacy of managing defence alliances (which is essentially an Executive function) to the emphasis on overseas deployments as partners in peacekeeping and peace support missions, has led to increasing Parliamentary interest in defence and its management. Recent Governments have chosen to involve Parliament in decisions to deploy the NZDF overseas on operations that may involve combatant situations. The decision to commit forces rests with the Government. However, because of the consequences for personnel deployed overseas and for the need to maintain public support, Governments have recognised that Parliament can play a valuable role in building a national consensus for such deployments.

The process leading to the deployment of New Zealand forces to Afghanistan in 2001 and later in 2009 illustrates Mr Hunn's point.

- [81] To summarise on this aspect, given that New Zealand law places the military under civilian control in the form of the Minister, and that the Minister is answerable in Parliament for the conduct of his portfolio, both NZDF and the Minister must ensure that there is effective accountability to the Minister by NZDF. Effective accountability requires the provision of accurate information. We consider that the Minister is entitled to expect full, accurate and timely reporting from NZDF as to the circumstances of events such as Operation Burnham. Ministers need to be in a position to provide well informed and accurate advice to the Prime Minister and Cabinet, to respond appropriately to questions in the House and from the media and, in some circumstances at least, to determine whether some form of government response is required. One of the matters that we will address in subsequent chapters is whether NZDF met its obligations to provide the Minister with full, accurate and timely information in connection with the allegations of civilian casualties during Operation Burnham.
- [82] The foregoing discussion has focused on democratic accountability and control of NZDF through the Minister and Parliament. There are, of course, other mechanisms which facilitate democratic accountability and control, in particular:
 - (a) the mechanisms established under the Official Information Act 1981 for the release of official information;
 - (b) the obligation under the Protective Security Requirements to keep the classification of material under review so that once the need for classification has passed, the material can become publicly available; and

⁹⁶ Foreign Affairs, Defence and Trade Committee "Briefing on the Provincial Reconstruction Team in Afghanistan" (18 March 2011) <www.parliament.nz>.

⁹⁷ Letter from Lieutenant General Rhys Jones, Chief of Defence Force, to John Hayes, Chairperson Foreign Affairs, Defence and Trade Committee (27 August 2012).

⁹⁸ Hunn, above n 88.

- (c) the record-keeping requirements in the Public Records Act 2005, which are aimed at preserving the public record.

[83] The short point is that keeping proper records of official information and making them available for public scrutiny facilitates transparency and is an important precursor to proper democratic accountability. Transparency enables interested members of the media and the public to raise issues and may prompt Parliamentary interest. As will become apparent, this occurred in relation to detention issues in Afghanistan.⁹⁹

Was Operation Burnham approved by ministers?

- [84] In his private evidence to the Inquiry, Dr Mapp said that he had already planned to travel to Afghanistan in August 2010 before the 3 August attack on the NZPRT patrol in which Lieutenant Tim O'Donnell was killed. He said that the trip took on a "new urgency" as a result of the attack. Dr Mapp was away from New Zealand in the period 17–24 August and was in Kabul with the Chief of Defence Force when Operation Burnham took place. He was given a briefing on the operation the day before it occurred. The briefing was not a full briefing of the type that those participating in the operation would have received but an abbreviated "overview". After hearing the briefing, Dr Mapp considered that the Prime Minister should be informed of the operation because of its nature and in accordance with the "no surprises" approach.¹⁰⁰ Dr Mapp said he understood that this was the biggest mission that New Zealand forces had carried out in Afghanistan and considered that it involved a significant element of risk, given that it was to take place in a remote and mountainous area which had to be accessed by helicopter and where there was an established insurgent presence. He considered that the possibility of significant New Zealand casualties could not be ruled out.
- [85] A telephone call to the Prime Minister was arranged and after some initial discussion, the Minister asked the Chief of Defence Force to explain the operation to the Prime Minister, which he did. Dr Mapp said that the Prime Minister agreed to the operation proceeding. When the operation began, Dr Mapp was offered the opportunity to watch it with the Chief of Defence Force via a live video feed at Camp Warehouse.¹⁰¹ Dr Mapp said that while at a personal level he would have been interested in observing it given his military background, he decided that he should not take up the opportunity as it was an operational matter for the Chief of Defence Force rather than for him as Minister. Dr Mapp also told us that his report to Cabinet on his trip to Afghanistan did not refer to the operation for the same reason.
- [86] As noted above, Dr Mapp said that he did not see his role as approving (or otherwise) individual operations in Afghanistan. Obviously, there was a national interest in Operation Burnham as it was intended to capture two insurgent leaders who had been involved in the 3 August attack. Even so, the decision to undertake the operation was a military one, approved first by the Chief of

⁹⁹ See chapters 10 and 11.

¹⁰⁰ The no surprises policy is set out in the *Cabinet Manual 2017*, above n 94, as guiding the relationship between officials and ministers. A similar principle applies (although the term "no surprises" is not used) to the relationships between ministers. Ministers are directed to "keep their colleagues informed about matters of public interest, importance, or controversy" (*Cabinet Manual 2017* at [5.11]). While this specific statement is made in the context of Cabinet collective decision-making, it is illustrative of the approach taken to ministerial relationships more broadly, including between a minister and the Prime Minister.

¹⁰¹ Camp Warehouse is the name of the NZSAS headquarters in Kabul: Evidence of Lieutenant General (Retired) Sir Jerry Mateparae, Transcript of Proceedings, Public Hearing Module 4 (16 September 2019) at 18.

Defence Force and then by ISAF, which had agreed to provide considerable support in the form of air assets. From a military perspective, checks and balances were operating on the New Zealand side and the ISAF side. In addition, the operation was supported by Afghan authorities, who had issued arrest warrants for Maulawi Neimatullah and Abdullah Kalta.

- [87] It is likely that, as Dr Mapp acknowledged, if the Minister or the Prime Minister had expressed some objection to, or concern about, the operation, the Chief of Defence Force would have taken that into account and decided not to proceed. In that sense, the opinion of the Minister or Prime Minister may have been influential or persuasive so far as the Chief of Defence Force was concerned. This was an operation which posed real risks to the soldiers involved and which may have had significant political repercussions if those risks had eventuated. But ultimately the decision to conduct the operation was a military one.
- [88] In any event, it would have been surprising, in our view, if either the Prime Minister or the Minister had expressed an objection to Operation Burnham going ahead. We say this because:
- (a) Despite the risks involved, there was a clear military justification for the operation. As described in more detail in chapter 3, the NZPRT commander had been concerned for some time at the increasing sophistication of attacks in Bamyān province where the NZPRT operated carried out by insurgents based in the neighbouring Baghlan province. These had culminated in the 3 August attack and the death of one of his men and injuries to others. Intelligence reporting indicated that the insurgents planned further attacks.¹⁰² Justifiably, the NZPRT commander considered that some form of response was required.
 - (b) As we have indicated above, one of the purposes of the deployment of the NZSAS in 2009 was to support NZDF elements in Afghanistan, essentially the NZPRT.¹⁰³ So the operation was within the scope of the deployment as originally envisaged.
 - (c) As described in more detail in chapter 3, the approval process for the operation involved evaluations, first by NZDF and second by ISAF. Indeed, ISAF was prepared to commit considerable resources to it. Further, the Afghan Ministry of the Interior provided arrest warrants. Ministers were entitled to rely on the efficacy of these planning and approval processes.
- [89] To summarise, the role of ministers involved approving the deployment and the rules of engagement, setting any national caveats and ensuring that appropriate arrangements with ISAF and with the Afghan Government were in place, so as to meet New Zealand's international obligations. As a general rule, although they should be informed of operational decisions, ministers should not be involved in individually authorising or denying particular military operations and so taking ministerial responsibility for them. That said, we accept Dr Coleman's point that there may be occasions where NZDF may need to check that particular operations fit within the Government's strategic objectives for the deployment. Operation Burnham may have been such an occasion. In any event, Operation Burnham was an operation conducted outside the area of operations fixed by the Government for the deployment and so required the consent of the Chief of Defence Force under his delegation. It was not surprising then, that Dr Mapp wished to bring the operation to the Prime Minister's attention.

¹⁰² PRT Bamyān SUPINTREP 004-10 (11 August 2010) (Inquiry doc 09/34) at [17]–[19].

¹⁰³ Inquiry doc 01/05, above n 46.

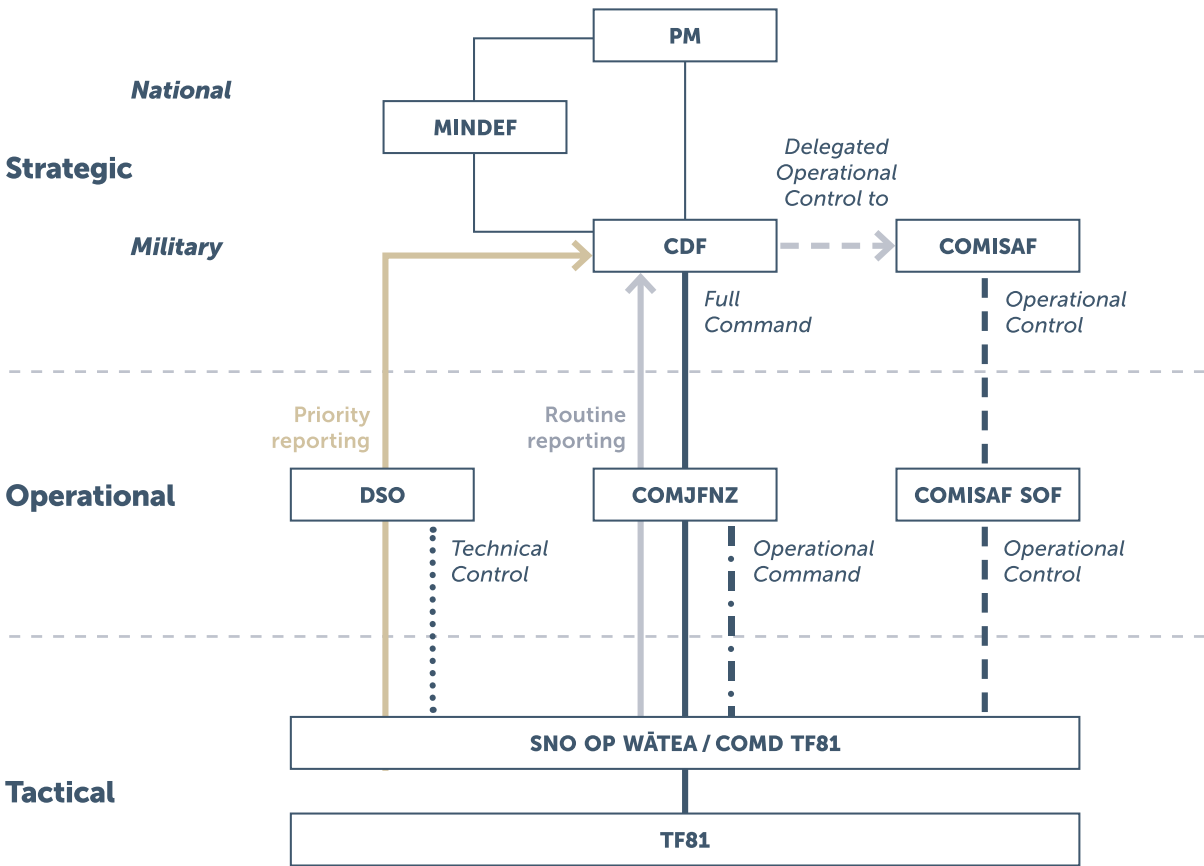
- [90] As noted, ministers must ensure that they are fully informed and are given full and regular briefings in relation to operations abroad, given the potential of such operations to cause public controversy and/or international concern. While the Government had the power to terminate the deployment of the NZSAS to Afghanistan, it did not have the power to directly control ISAF-approved operations (assuming the operation was within the Government's mandate). Operational decisions rested in the final analysis with the Chief of Defence Force from a national command perspective and the Commander ISAF from an operational control perspective, although this was subject to the national "red card".

Figure 1:
Levels of military operations¹⁰⁴



¹⁰⁴ NZDF, above n 74, Figure 2.1.

Figure 2:
Command and control organisational chart
for NZSAS participation in Operation Wātea



PM	Prime Minister
MINDEF	Minister of Defence
CDF	Chief of the Defence Force
COMJFNZ	Commander Joint Forces New Zealand
DSO	Director Special Operations
SNO OP WATEA COMD TF81	Senior National Officer Commander Task Force 81
COMISAF	Commander ISAF
COMISAF SOF	Commander ISAF Special Operations Forces

3

Operations Burnham and Nova: origin and planning

Chapter 3

- [1] In this chapter we address clause 7.4 of our terms of reference, which directs us to report on the “planning and justification/basis for the Operations, including the extent to which they were appropriately authorised through the relevant military chains of command”.¹ We describe why Operations Burnham and Nova were undertaken and the planning and preparation that went into them.
- [2] In chapter 4 we set out what occurred on the two operations. This is a necessary precursor to discussing some of the specific issues on which we are required to report, such as whether the New Zealand Defence Force (NZDF) complied with the applicable rules of engagement and with International Humanitarian Law (including NZDF’s assessment that Afghan nationals were taking a direct part in hostilities or were otherwise legitimate targets during Operation Burnham). We will describe the consequences of the operations, in terms of the casualties and property damage that resulted from them, in chapter 5.
- [3] In this chapter, we will discuss Operations Burnham and Nova under two headings:
- (a) Why were the operations carried out?
 - (b) What planning and preparation was undertaken?
- [4] Before we embark on this, however, there are four preliminary matters we should mention. First, the names of villages in the Tala wa Barfak District pose a challenge for outsiders as names and spellings differ, often markedly. The area where Operations Burnham and Nova occurred is referred to by NZDF and others in the contemporaneous documents as Tirgiran Valley, Tirgiran Village or sometimes just Tirgiran, and by the authors of *Hit & Run* as Khak Khuday Dad and Naik villages. Some NZDF documents also refer to Naik as Dahane Nayak.² In relation to the villages, we will use the names derived from the villagers by the authors—Khak Khuday Dad and Naik—or refer simply to “the villages”. We will refer to the area where the villages are located as Tirgiran Valley.
- [5] Second, as Thomas Barfield notes in *Afghanistan: A Cultural and Political History*, Afghanistan’s physical geography has had a profound impact on the country’s history and culture.³ Geography is particularly relevant to the planning and conduct of Operations Burnham and Nova. The Tala wa Barfak District where the operations took place is mountainous and relatively inaccessible. The particular location of the operations was a remote Y-shaped part of a river valley system bounded by steep, rocky mountain-like ridges.⁴ The valley floor was around 2,600 metres above sea level, and the surrounding ridges were a further 100–500 metres above sea level. The area was not accessible by road. As will become apparent, the area’s remoteness and rugged terrain are important when seeking to understand what happened on the operations.

¹ *Terms of Reference: Government Inquiry into Operation Burnham and related matters* (11 April 2018). Clause 7.4 also requires consideration of “whether there was any Ministerial authorisation of the Operations”, which we addressed in chapter 2.

² See for instance RTAF 2307 ABDUL KALTA (12 August 2010) (Inquiry doc 07/18) at 4; KTIC TIC 03 AUG 10 (Inquiry doc 09/01) at 2.

³ Thomas Barfield *Afghanistan: A Cultural and Political History* (Princeton University Press, Princeton, 2012) at 42.

⁴ Refer to Figure 3 at the end of the chapter.

- [6] Third, it is important to understand the basic configuration of the New Zealand military force at the time of Operations Burnham and Nova. The force was known within the International Security and Assistance Force (ISAF) as Task Force 81 (TF81). It comprised approximately 70 people, mostly New Zealand Special Air Service (NZSAS) personnel with some attached specialist support personnel.⁵ Its Commander, also the Senior National Officer for the NZSAS contingent, was a Lieutenant Colonel. We refer to him as the Senior National Officer throughout this report. The nucleus of TF81 was an NZSAS Squadron, commanded by a Major. In Operation Burnham, the Squadron Commander acted as the Ground Force Commander. Under his command were some specialist force elements, or troops, commanded by captains. One of the captains was the Troop Commander, who acted as the Assault Force Commander for Operation Burnham. TF81 was based in Kabul.
- [7] Finally, we note that ISAF's command structure was organised around five regional commands, each of which was responsible for a designated geographic area of Afghanistan. The Provincial Reconstruction Teams (PRTs) were assigned under the operational control of a regional command. So, for example, the New Zealand Provincial Reconstruction Team (NZPRT) was located in an area under the operational control of Regional Command East, in respect of which the United States was the lead nation. Alongside the regional commands was a separate ISAF Special Operations Forces command in Kabul. This command grouped similar forces, with similar missions, under a unified command with a whole-of-Afghanistan remit. TF81, being a Special Forces unit with the capacity to carry out complex operations, was assigned under the operational control of ISAF Special Operations Forces.⁶ The decision-making steps to achieve approval of an operation were intricate and demanding, as we indicate below.

Why were the operations carried out?

- [8] *Hit & Run* has been interpreted as alleging that Operations Burnham and Nova were intended to avenge the death of Lieutenant Tim O'Donnell (that is, they were revenge raids aimed at those responsible for the 3 August attack).⁷ Certainly, many references in the book (some being quotes from sources) support that interpretation of it. For example, Operation Burnham is described as a retaliation or revenge raid;⁸ particular conduct during the operation is described as being motivated by "retaliation and punishment";⁹ the actions of the NZSAS on Operation Nova are

5 10 August 2009 Cabinet Decision Minute – Afghanistan 2009: Deployment of NZSAS (10 August 2009) (Inquiry doc 01/06) at [1.16].

6 The command and control structure is discussed in chapter 2 at [53]–[56].

7 Media commentary following the book's launch interpreted it in this way. See, for example: New Zealand Media and Entertainment (NZME) "SAS revenge raid killed civilians: Hager" *Otago Daily Times* (online ed, 21 March 2017) ("A 'revenge' raid by the Special Air Service to pay back Taliban insurgents for New Zealand's first fatality in Afghanistan was a 'fiasco' that led to the death of six civilians, a new book has alleged"); Danyl McLauchlan "Hit & Run: A depressingly credible account of blunder, bloodshed and cover-up" *The Spinoff* (online ed, 22 March 2017) ("Hager and Stephenson make much of the fact that this was a 'revenge raid' or reprisal"); David Fisher "The complete guide to the NZSAS raid and the allegations civilians were killed" *The New Zealand Herald* (online ed, 2 April 2017) ("[*Hit & Run*] alleges the motivation for the raid was vengeance for the death ... of Lieutenant Tim O'Donnell ... It claims that the NZSAS deliberately torched houses in the villages that were the target of the raid and returned two weeks later to destroy more with explosives"); David Fisher "Hit & Run: Why doesn't NZDF start by answering this question?" *Pundit* (online ed, 6 April 2017) ("Put to one side about whether civilians were actually killed, if revenge motivated the raid (a claim I personally find incredibly hard to accept), if international laws were broken and come back to this six-year position put by NZDF"). NZDF witnesses interviewed by the Inquiry had also interpreted the book as alleging the operations were "revenge raids".

8 Nicky Hager and Jon Stephenson *Hit & Run: The New Zealand SAS in Afghanistan and the meaning of honour* (Potton & Burton, Nelson, 2017) at 18, 24, 26, 28 and 79.

9 At 61. See also at 40, 44 and 109.

attributed to revenge and punishment;¹⁰ and the NZSAS is described as being on a “campaign of retaliation and revenge” or similar in relation to the various operations.¹¹

- [9] Obviously, to accuse a military unit of conducting revenge raids is to strike at the professionalism and integrity of that unit. Such an allegation is particularly grave when made against a unit that sees itself as being a highly trained, elite unit, such as the NZSAS. It suggests that the operations concerned were not conducted for legitimate military objectives and were not subjected to normal oversight controls, but rather were predominantly driven by emotions and vengeful motives.
- [10] Mr Hager, who was primarily responsible for writing *Hit & Run*,¹² told us that the book did not allege that Operation Burnham was a revenge raid;¹³ rather, the operation was in “retaliation” (in a military sense) against particular insurgents. However, he said there was “a ‘mood’ to the operation”—some NZDF personnel had “a mood of anger or vengeance over the death of their colleague during the operation”.¹⁴ This “mood” affected the way they acted.¹⁵ As we have said, this was not how the book was understood when it was released; nor is it how we have understood it, having read it many times.¹⁶
- [11] We address the question whether the conduct of TF81 personnel during Operation Burnham was influenced by a desire for revenge in chapter 5.¹⁷ In this chapter, we focus on the reasons for the operation. We begin with the contemporaneous documents: what do they indicate was the purpose of the operations?

Operation Burnham

- [12] Bamyan province, where the New Zealand Provincial Reconstruction Team (NZPRT) operated, was relatively peaceful. The bulk of the population were Hazaras, who were Shia Muslims and had been persecuted by the Taliban. Despite its generally peaceful nature however, there was some insurgent activity in Bamyan. When he took over command of the NZPRT in April 2010, the NZPRT Commander was advised by his predecessor of an insurgent threat from the adjoining province, Baghlan. Intelligence from numerous sources¹⁸ over at least the preceding year had indicated that some middle-rank insurgent leaders had homes in the Tala wa Barfak District of Baghlan, as did some lower-level insurgents under their command.¹⁹ The reporting indicated that

¹⁰ At 79–81.

¹¹ At 71, 85, 90 and 110.

¹² As the Preface to the book explains (at 7), Mr Stephenson brought the majority of the sources to the project and Mr Hager did the writing.

¹³ Nor, Mr Hager said, were the other operations following the 3 August attack.

¹⁴ Nicky Hager *Submission concerning Inquiry Minute No. 4* Submission to Inquiry (5 October 2018) at 13.

¹⁵ Mr Hager has also stated that from the perspective of the villagers, who were interviewed extensively for *Hit & Run*, it would have been easy to interpret the operation as a revenge raid.

¹⁶ To be clear, we do not read the book as alleging that civilians were deliberately targeted in Operation Burnham.

¹⁷ Chapter 5 at [150]–[155].

¹⁸ See, for example, NZPRT BAMYAN DAILY INTSUM 165-09 (29 June 2009) (Inquiry doc 08/20) at [7]; Maulawi NEMATULLAH (Inquiry doc 08/19); SUPINTREP 004 10 31 MAY 10 (GRAPHIC) (31 May 2010) (Inquiry doc 08/22). The NZPRT had access to intelligence from multiple sources, including material sourced from Afghan government agencies, although it did not have the range of intelligence material available to the NZSAS.

¹⁹ Tala wa Barfak was populated mainly by Tajiks, who were Sunni Muslims (see Ian Traynor “Lunch bill brawl that turned a civil war” *The Guardian* (online ed, 16 October 2001)). There are reports of Hazaras being the subject of discrimination and killing in Tala wa Barfak (Center for Civilians in Conflict *Saving Ourselves: Security Transition and Impact on Civilian Protection in Afghanistan* (2016) at 15; Afghan Independent Human Rights Commission *Attacks against Hazaras in Afghanistan* (2017) at 3).

“Tirgiran village” was a “significant support area” for the Taliban—Taliban flags were flown and insurgent leaders held meetings there.²⁰

- [13] It appears the Afghan National Police did not have a significant presence in Tala wa Barfak and local government had limited impact in the area. Further, there was no effective coalition presence. According to intelligence reports, Taliban insurgents used Tala wa Barfak as a “safe haven” and a base for their operations into Bamyan and other areas, and travelled from there to Pakistan from time to time for further training and resources or to keep a low profile for a period.²¹ In addition, intelligence reporting indicated there was a Taliban training camp in Tirgiran Valley, near where some of the leaders had their family homes. Areas such as this were not unusual and existed throughout Afghanistan, even though coalition forces had been in the country for almost nine years by this time.

- [14] We point out here that the contemporaneous intelligence reporting of a Taliban or insurgent presence in Baghlan generally, and Tala wa Barfak in particular, in 2008 and later, is confirmed in a recently published book by an expert on the Taliban in Afghanistan, Antonio Giustozzi. In *The Taliban at War 2001 – 2018* he writes:²²

In many locations the Taliban had some pockets of core support, which continued to host Taliban even at the most challenging times. For instance, in Baghlan province, which had certainly not been a Taliban stronghold in earlier days, they managed to find roots from 2006 onwards not only in places such as Gadya (Baghlan Jadid), or the Pashtun settlements in Dand-e Ghor, but also among some Uzbek communities in Burka district. These communities even reached out directly to IMU²³ leaders in Pakistan for support, allowing the IMU to establish a direct presence in Baghlan by 2008–9. Due to the inactivity of ISAF troops, the Taliban expanded undisturbed in the northern districts of Baghlan-e Markazi, Baghlan-e Jadid and Burqa. Non-Pashtun districts of Baghlan increasingly came under Taliban influence due to their exploitation of disputes over land and pasture rights, which sometimes dated back decades. Increasingly, a quarrelling party would request their involvement to strengthen the disputant’s position. This occurred in the districts of Nahrin, Tala wa Barfak and Burka.

- [15] On 9 April 2010, soon after the NZPRT Commander had arrived to take command of the NZPRT, an NZPRT patrol was attacked in the Kahmard District of Bamyan province near the border of Baghlan province. There were no casualties, but the attack confirmed the existence of an insurgent threat from across the Baghlan border—a threat which was assessed to be significant. However, Tala wa Barfak was outside the area of operations of NZPRT, which was, in any event, not mandated or organised to undertake operational strikes to deal with insurgent threats. Baghlan fell within the area of operation of ISAF’s Regional Command North, in respect of which Germany was the lead nation. Bamyan, where the NZPRT operated, was within Regional Command East’s area, which was under United States command.
- [16] The NZPRT Commander monitored the position in Tala wa Barfak closely. He had an initial discussion with the headquarters of Regional Command North about the perceived insurgent build-up in Tala wa Barfak, but they had other priorities. There was a Hungarian PRT based in

²⁰ NZPRT BAMYAN DAILY INTSUM 268-09 (9 October 2009) (Inquiry doc 08/18) at [1]–[2]; Inquiry doc 08/22, above n 18.

²¹ See, for example, Inquiry doc 08/22, above n 18, at 12.

²² Antonio Giustozzi *The Taliban at War 2001–2018* (G Hurst and Co (Publishers), London, 2019) at 232 (footnotes omitted).

²³ IMU is an acronym for the Islamic Movement of Uzbekistan, an al-Qaida and Taliban-affiliated militant organisation subject to sanctions pursuant to United Nations Security Council Resolution 1333 (2000).

Baghlan, but it was fully occupied in dealing with significant insurgent activity near its Pol-e Khomri base. Further, like the NZPRT, the Hungarian PRT was not organised for offensive operations. The NZPRT Commander also sought the assistance of Task Force Wolverine. Task Force Wolverine was a United States Army manoeuvre force under Regional Command East, responsible for conducting full spectrum operations and partnering with PRTs and Afghan forces to improve security.²⁴ While those at Task Force Wolverine shared the NZPRT Commander's concerns, Baghlan was outside their area of operations.

- [17] In addition, the NZPRT Commander engaged with key leaders in Bamyan province and the Tala wa Barfak District to discuss the insurgency situation and was involved in formal meetings with Afghan national and local government officials. During this period one of the insurgent leaders, Qari Musa, was nominated to the Joint Prioritised Effects List by TF81 on behalf of the NZPRT.
- [18] In May 2010, following an “in-theatre” visit, the Chief of Defence Force, Lieutenant General Jerry Mateparae, expressed concern to the Director of Special Operations about the developing insurgent situation in Baghlan province. He indicated that if the situation continued to deteriorate and to affect the NZPRT's area of operations, he might look at tasking TF81 to assist. This was consistent with the Cabinet mandate under which TF81 operated. That allowed national tasks to be given priority, with one such task being to provide support to the NZPRT.²⁵ Around this time, TF81 began providing intelligence and analytical assistance to the NZPRT to assess the insurgent network operating in Bamyan.²⁶
- [19] The nature and extent of the threat from the insurgents in Baghlan became even more apparent in the attack of 3 August 2010, which resulted in Lieutenant O'Donnell's death. The NZPRT Commander considered the 3 August attack showed a worrying level of sophistication and expertise on the part of the insurgents. It intensified his concerns about the security of the NZPRT and about its ability to maintain the local population's trust and confidence that it could provide a secure environment in Bamyan.
- [20] As we discuss in more detail in the next section, planning for a possible operation began almost immediately, the intended targets being two of the insurgent leaders thought to be responsible for the attack—Abdullah Kalta and Maulawi Neimatullah. For now, we only need note that the concerns which the NZPRT Commander identified throughout the planning process were reflected in the purpose of the operation. So, for example, TF81's concept of operations²⁷ identified two principal effects for the proposed operation.²⁸

²⁴ Specialist James Wilton “Red Bulls assume Wolverines AO” Defense Visual Information Distribution Service (4 December 2010) <www.dvidshub.net>; Specialist Charles Thompson “Cyclone and Wolverine commanders visit Bamyan” Defense Visual Information Distribution Service (13 March 2010) <www.dvidshub.net>; Department of the Army *Permanent Order 158-94* (6 June 2012) <history.army.mil>.

²⁵ See, for example, 3 July 2009 Cabinet Paper Cover Sheet – Afghanistan: 2009 Deployment of the NZSAS (Operation Watea) (3 July 2019) (Inquiry doc 01/03) at [14], [19] and [26]. Operation Burnham was not a “national task” from a military perspective. If it had been, it would not have gone through the ISAF approval process and the CRU would not have been involved in it. Rather, Operation Burnham was an ISAF operation with national significance for New Zealand.

²⁶ See OP WAATEA OP CRIB Co-operation on Targeting Threat Groups to the NZPRT (Inquiry doc 08/06).

²⁷ A concept of operations (or CONOPS) is a document that sets out a commander's objectives for an operation and how the commander proposes to achieve them. In Afghanistan, the concept of operations for proposed operations by ISAF forces, including TF81, had to be approved through the ISAF chain of command.

²⁸ 100822-ISAF-SOF-NSI-TF81 OP RAHBARI OBJ BURNHAM CONOPS (Inquiry doc 06/06) at 9.

- (a) to protect the NZPRT, Afghan security forces and the local population from insurgent activity, both generally and in relation to a possible imminent attack identified by intelligence sources;²⁹ and
- (b) to enhance the authority and legitimacy of the Afghan Government.

The Ground Force Commander's orders for Operation Burnham identified similar objectives, albeit in different language, namely to disrupt the insurgents' attack network and to increase security for Bamyan province.³⁰

[21] To summarise, then, we consider that the contemporaneous documents and the evidence of the NZPRT Commander show:

- (a) From the time the NZPRT Commander took command of the NZPRT in April 2010, he was concerned about insurgents coming into Bamyan province from Tala wa Barfak to attack the NZPRT and Afghan authorities. He was actively trying to address that concern.
- (b) The NZPRT Commander's wish to disrupt insurgent activities in Tala wa Barfak was based on both the force protection of the NZPRT and his desire to build the local population's confidence in the NZPRT and Afghan authorities by ensuring their security.
- (c) These two factors, coupled with the fact that the insurgents had conducted a successful attack on 3 August and that intelligence reporting indicated they planned further attacks in Bamyan in the near future, were the drivers for Operation Burnham.

The contemporaneous documents do not support the view that Operation Burnham was a revenge raid. Rather, the documents identified objectives that the NZPRT Commander had been pursuing for some time and which were plainly legitimate from a military perspective.

Operation Nova

[22] Within a few weeks of Operation Burnham (which, as we discuss in chapter 4, did not result in the capture of either of the two targeted insurgent leaders), planning began for a return operation, now referred to as Operation Nova. *Hit & Run* says of the return operation that "it is hard to see their [TF81's] actions were born of anything but revenge".³¹ It goes on to claim that the purpose of the operation was to "wreck the houses again, this time more thoroughly".³² *Hit & Run* quotes an anonymous NZSAS source, who stated that the purpose of the operation was to punish the insurgents by destroying the houses, and it was "pure revenge".³³ According to the book another anonymous NZDF source stated that an internal report said the goal of the operation was to scare the insurgents and discourage further attacks.³⁴ Again, the question is what do the documents show was the purpose of Operation Nova?

²⁹ In relation to possible further attacks being planned, see PRT Bamyan SUPINTREP 004-10 (11 August 2010) (Inquiry doc 09/34) at [17]–[19].

³⁰ OP RAHBARI ORDERS (Inquiry doc 09/39) at 34.

³¹ At 79.

³² At 80.

³³ At 81.

³⁴ At 81.

- [23] Intelligence indicated that the insurgents had regrouped following a period of hiding after Operation Burnham and were intent on conducting more attacks into Bamyan before winter.³⁵ Operation Nova was another attempt to capture Maulawi Neimatullah, conducted on 3 October 2010, some six weeks after Operation Burnham. There was nothing unusual about conducting a repeat operation in an area such as Tala wa Barfak, where neither the Afghan National Police nor coalition forces had a permanent presence, and where there continued to be intelligence reporting about the presence of insurgents and the threat they posed to the NZPRT and others in Bamyan. The troop orders for Operation Nova describe the purpose of the operation in similar terms to those for Operation Burnham: to disrupt the Baghlan insurgent network and to enhance the security of Bamyan.³⁶
- [24] The position, then, is that the planning documents do not support the notion that Operations Burnham and Nova were revenge raids. That is not the end of the matter, however. Whatever the view reflected in the documents, the reality on the ground may have been different. Some of those carrying out the operations may have been in an angry or vengeful mood and that may have affected what they did. As a consequence, we explored this topic with NZDF witnesses, particularly when examining certain occurrences during Operation Burnham. We come back to this issue in chapter 5.³⁷

What planning and preparation was undertaken?

- [25] Given the nature of most modern conflicts, New Zealand forces are likely from time to time to deploy overseas to operate in conjunction with other forces or as a member of a coalition, as they did in Afghanistan. When the NZSAS is deployed overseas as a Special Operations Force within a coalition such as ISAF, it will necessarily be subject to the coalition's priorities. Further, in some instances New Zealand will not be able to deploy sufficient suitable equipment (assets) to support NZSAS operations—an obvious example being helicopters. In such circumstances, the NZSAS may have to use coalition assets for some operations. When nations deploying to Afghanistan contributed forces and resources, they also determined whether those assets were for national requirements or whether they were to be assigned under ISAF to be used more broadly. ISAF allocated the use of such assets based on its operational priorities.

Operation Burnham

- [26] The planning process for an operation such as Operation Burnham followed a well-established pattern.³⁸ While it could be considered complex given factors such as the number of different force elements involved and the range of possible contingencies and risks faced, the planning process followed a standard concept employed generally by Special Operations Forces in Afghanistan. There is no doubt that TF81 was competent and qualified to undertake such an operation.³⁹

³⁵ NZPRT Meeting Record (15 September 2010) (Inquiry doc 10/19).

³⁶ Orders Op Nova (Inquiry doc 11/02) at 6 and 22.

³⁷ Chapter 5 at [116]–[155].

³⁸ We focus on the planning and preparation for Operation Burnham. The process for Operation Nova was essentially the same.

³⁹ NATO assessed the NZSAS task force before it was deployed to Afghanistan to ensure it had the capability to be accepted into ISAF operations.

- [27] While TF81 had completed numerous operations since deploying to Afghanistan in October 2009, most were ground-based, vehicle-mounted operations, carried out in and around Kabul and its six surrounding provinces. Operation Burnham was different, in that it involved the use of multiple supporting aircraft and a drone to surveil and access targets in a remote location outside TF81's usual area of operations. Hon Dr Wayne Mapp, the Minister of Defence at the time, told the Inquiry that he understood that Operation Burnham was the biggest operation that New Zealand forces in Afghanistan had carried out.
- [28] As well as gathering intelligence and planning the operation, TF81 had to obtain approvals and meet specified requirements. In the case of Operation Burnham, TF81 required approval through both its national (New Zealand) and operational (ISAF) chain of command:
- (a) **National approval:** The Chief of Defence Force had to approve the operation as it was to be conducted outside TF81's mandated area of operation. When Cabinet agreed to the deployment in mid-2009, it defined TF81's operating area as Kabul and the six surrounding provinces but allowed operations outside this area if approved by the Chief of Defence Force.⁴⁰ The Chief of Defence Force approved the conduct of Operation Burnham on 12 August 2010. Apart from authorisation by the Chief of Defence Force for an "out of area" operation, no further national approvals were required.
 - (b) **Operational approval:** Gaining approval from ISAF involved a set process. The Afghan Government had to give its approval, which was obtained through the Ministry of Interior.⁴¹ Regional Command North had to give its concurrence because it was the "owner" of the area where Operation Burnham was to occur (known as the Battle Space Owner).⁴² This was to ensure TF81's planned operation did not conflict with any operations planned by Regional Command North. Having met these requirements, TF81 had to submit a concept of operations (or CONOPS) to ISAF's Special Operations Forces Headquarters (the approving authority on behalf of the Commander ISAF) to obtain final approval to conduct the operation.⁴³ An ISAF Legal Advisor's concurrence was also obtained as part of the concept of operations process.⁴⁴
- [29] We have had access to TF81's planning material, which is extensive. By way of illustration, the Ground Force Commander, who is responsible for all that occurs on the ground, gave lengthy written orders that covered all aspects of Operation Burnham.⁴⁵ The orders were presented in a standard military format, covering situation, mission, execution, administration and logistics, and command and signals. This format enables a concise presentation to troops on key matters, such as the terrain and intelligence; the specified task; how the force will go about achieving that task; the administrative and logistic support available; and how the force will be organised. In addition, the Troop Commander, who was the designated Assault Force Commander for the operation, gave orders covering the roles and responsibilities of the assault force, including how the three buildings identified as associated with the targeted insurgents (referred to as A1, A2 and A3) were to be secured and entered.⁴⁶ They are quite detailed. The Ground Force Commander referred in

⁴⁰ Inquiry doc 01/03, above n 25, at [30].

⁴¹ Inquiry doc 06/06, above n 28, at 1 and 8.

⁴² At 1 and 8.

⁴³ TF81 (Rotation1) Operational directive 001 (Sep 2009) (Inquiry doc 05/09) at [20].

⁴⁴ Inquiry doc 06/06, above n 28, at 8.

⁴⁵ Inquiry doc 09/39, above n 30.

⁴⁶ Accompanies OP RAHBARI ORDERS (Inquiry doc 09/38).

his orders to anticipating possible insurgent reinforcements from the surrounding area, although the orders did not identify the direction of any threat.⁴⁷

- [30] As we are not experts in military planning, we are not in a position to evaluate the overall competence of the planning process, although it appears to us to have been methodical, detailed and adaptive to changing circumstances. As will be obvious from what we have just described, the requirements and independent scrutiny incorporated into the national and ISAF approval processes indicate that the planning was of an appropriate standard. It aligned to ISAF's requirements as set out in its Standard Operating Procedures and to NZDF's doctrine. The Inquiry's military expert considered that the planning process met the requirements and was of an equivalent standard to comparable forces conducting similar operations. But ultimately a detailed assessment of the planning process is unnecessary for the Inquiry's purposes. It is sufficient that we focus on those aspects of the planning and preparation that bear directly on the issues that remain in contention.
- [31] Accordingly, we will give a general outline of the planning process and then address in more detail four aspects that are particularly important, namely:
- (a) How did the planning approach and assess risks?
 - (b) What preparation was there in relation to the protection of civilians?
 - (c) What were the operational command and control arrangements between the ground force and the air assets?
 - (d) What information did TF81 have to indicate that the targets would be present when Operation Burnham was carried out?

Overview of the planning process

- [32] We begin with a general description of how the planning for the operation evolved and the necessary approvals were obtained.
- [33] As we have said, the NZPRT Commander had been concerned about the insurgent threat to Bamyān emanating from Tala wa Barfak since arriving in Afghanistan in April 2010, and had been in touch with both Regional Command East and Regional Command North about dealing with the situation. It became clear that both regional commands had other more pressing operational priorities. In May 2010, following the unsuccessful insurgent attack of 9 April on the NZPRT, TF81 began to gather intelligence on the insurgent networks operating in Bamyān.⁴⁸
- [34] Soon after the 3 August 2010 attack, the NZPRT Commander contacted the TF81 Senior National Officer about a response. Around this time, TF81 began focusing its intelligence collection efforts on determining who specifically had been involved in the attack and would therefore likely be central in organising further attacks.⁴⁹ Intelligence reporting from a variety of sources soon identified the leaders as including Abdullah Kalta, Maulawi Neimatullah and Qari Miraj.⁵⁰

⁴⁷ Inquiry doc 09/39, above n 30, at 33. The Ground Force Commander said in evidence that he was aware of intelligence indicating there was an insurgent training camp to the south of Naik and expected that reinforcements might come from that area, but this was not spelled out in his orders.

⁴⁸ Inquiry doc 08/06, above n 26.

⁴⁹ Email from WAATEA.OPS to Colonel Kelly ([redacted] – HQNZDF.DSO) "RE: External Release TF81 Tgt Efforts in BAMYAN" (4 August 2010, 08.37) (Inquiry doc 08/05).

⁵⁰ See, for example, Inquiry doc 09/34, above n 29, at [5].

The NZPRT and TF81 were already aware of these individuals, as they were part of the Tala wa Barfak insurgent network that the NZPRT had been monitoring for some time.⁵¹ Earlier reporting had indicated that Kalta had a home in Naik⁵² and that Miraj was originally from the same area, although he had since moved to another village called Anadarah, about 16 kilometres north of Naik as the crow flies.⁵³ Additional reporting received in the days following the 3 August attack provided further confirmation that Kalta had a residence in Naik and indicated that Neimatullah lived in the same village.⁵⁴ The intelligence reporting also said that Miraj and Kalta were planning a further attack on a NZPRT or Afghan security force patrol.⁵⁵

- [35] On about 10 August, the TF81 Squadron Commander (who was the Ground Force Commander for Operation Burnham) travelled to Bamyan, accompanied by intelligence officers, to discuss the situation with the NZPRT Commander and his intelligence staff. By 11 August 2010, planning for a possible operation into Tirgiran Valley was gathering pace.
- [36] From the outset, TF81 personnel in Kabul had kept NZDF Headquarters in Wellington apprised of developments. The Chief of Defence Force was concerned to ensure that TF81 was progressing plans to target the insurgent group responsible for the attack.⁵⁶ The Senior National Officer sent regular updates to Wellington, mainly through the Director of Special Operations. The Chief of Defence Force granted formal approval for TF81 to conduct an operation outside its mandated area on 12 August.⁵⁷
- [37] The operation required approval through the ISAF chain of command as the TF81 troops and necessary supporting air assets were under the operational control of the Commander ISAF and the operation was being conducted within ISAF's area of operational command. To obtain the necessary air support, TF81 submitted an Air Mission Request to Regional Command North on 11 August 2010. The request:
 - (a) sought provision of two CH-47 Chinook helicopters to transport personnel and two AH-64 Apache attack helicopters as escorts for the Chinooks;
 - (b) noted that TF81 would be partnering with the Afghan Crisis Response Unit (CRU);
 - (c) referred to the operation as a deliberate detention operation;⁵⁸ and
 - (d) said the purpose of the operation was to disrupt a threat from Baghlan and demonstrate the security of Bamyan to the local people.

The focus of the operation was on detention. On operations of this type, no firing was intended or planned, although, of course, it might occur.

⁵¹ See, for example, Inquiry doc 08/22, above n 18; Maulawi NEMATULLAH (Inquiry doc 08/19).

⁵² See, for example, NZPRT Meeting Record NDS (January 2010) (Inquiry doc 08/21).

⁵³ Inquiry doc 08/22, above n 18. See also Inquiry doc 09/34, above n 29, annex C at [28](c).

⁵⁴ Inquiry doc 09/34, above n 29, at [15] and annex C at [7](e), [28](e) and [28](g); RTAF 2307 ABDUL KALTA (Inquiry doc 07/18) at 8 and 12.

⁵⁵ See, for example, Summary sensitive intel reporting (Inquiry doc 09/40).

⁵⁶ See email from Colonel Kelly (HQNZDF.DSO) to Lt Col McKinstry (WAATEA.SNO) and others "Watea Update" (9 August 2010, 1.38pm) (Inquiry doc 09/08).

⁵⁷ OP RAHBARI Mission Approval (12 August 2010) (Inquiry doc 09/28).

⁵⁸ A deliberate detention operation is a type of operation conducted by ISAF Special Operations Forces involving detaining a target. Some of the planning material referred to Operation Burnham as a deliberate detention operation; other material referred to it as a "kill/capture" operation. As we understand it, these terms were interchangeable and did not indicate any difference in the nature of particular operations—both names related to operations that were primarily directed at capturing the particular target.

[38] The Commander Regional Command North needed to give his concurrence for the operation since it would be conducted in his battlespace. Accordingly, the Senior National Officer and Ground Force Commander had at least one, and perhaps more, video conferences with the Commander Regional Command North and one of his deputies, a United States Brigadier General, to discuss the proposed operation. The possibility of Regional Command North conducting the operation itself was raised but, after consideration, the Commander indicated that Regional Command North would not conduct an operation in the area. The Commander ultimately gave consent to the operation on 16 August 2010, attaching three conditions, namely that:⁵⁹

- (a) a liaison officer from TF81 be situated at the Regional Command North's Tactical Operations Centre;
- (b) the ground forces conduct a "soft knock" before entering any "compound of interest" (that is, the buildings associated with the insurgent targets);⁶⁰ and
- (c) there be "key leader engagement".⁶¹

The first of these conditions ensured that there was a direct line of communication between TF81 and Regional Command North and provided the Commander Regional Command North with an immediate awareness of events should anything go wrong on the operation. The remaining two conditions reflected the Commander ISAF's guidance on night raids, which is discussed below.

[39] On 15 August TF81 submitted applications for Abdullah Kalta (Objective Burnham), Maulawi Neimatullah (Objective Nova) and Qari Miraj (Objective Yamaha) to be placed on the Joint Prioritised Effects List.⁶² These applications were approved over the following days.⁶³ As the intent of the operation was to arrest and detain Kalta and Neimatullah,⁶⁴ the Afghan Ministry of the Interior organised the issue of arrest warrants for both men.⁶⁵ The intention was that the CRU would execute these warrants during the operation if one or both of the insurgents were found at their houses.⁶⁶

[40] On or about 16 August 2010 the concept of operations was submitted for approval to ISAF Special Operations Forces Headquarters, which was responsible for briefing up to ISAF Headquarters as required and providing approval for the operation (under delegated authority from the Commander ISAF).⁶⁷ The Commander of ISAF Special Forces Operations granted approval around 18/19 August 2010.

⁵⁹ Inquiry doc 06/06, above n 28, at 1 and 8.

⁶⁰ The Ground Force Commander said that coming into the area by helicopter meant that a true soft knock could not be conducted. Instead, it was agreed to use a call out where the assault force asked that the women and children be allowed to leave the target compounds so as to be safe.

⁶¹ Key leader engagement involves troops seeking to communicate and cooperate with local tribal, community and/or religious leaders.

⁶² Email from WAATEA.S2 to ARIKI.COMD and SWAN – JFNZ.J2 "RE: Targeting Insurgents" (15 August 2010, 10.44pm) (Inquiry doc 07/12).

⁶³ 2010-08-16 MINDEF & CDF Brief TF81 Command Brief (August 2010) (Inquiry doc 06/05) at 28 (we understand these slides were prepared on 16 August and briefed on 19 August); CDF Intelligence Brief (17 August 2010) (Inquiry doc 07/16) at 5.

⁶⁴ Qari Miraj was not a target of Operation Burnham.

⁶⁵ Inquiry doc 06/06, above n 28, at 1 and 8.

⁶⁶ Inquiry doc 06/06, above n 28, at 15.

⁶⁷ See, for example, TASK FORCE 81 (OP WATEA) OPERATIONAL DIRECTIVE 002 EMPLOYMENT OF TF81 (April 2010) (Inquiry doc 08/24) at [18] and [20].

- [41] The concept of operations outlined the reason for and the intent of the operation, provided a scheme of manoeuvre, assessed the risks involved in the operation, explained how and to what extent “Karzai’s 12”⁶⁸ would be complied with and provided justification for conducting a night raid in accordance with the Commander ISAF’s Night Raids Directive. The TF81 legal officer was involved in preparing the concept of operations to ensure that the planned operation met the necessary legal requirements.
- [42] As noted, the objective of the operation was to detain the two insurgent leaders who had been identified as living in Naik: Kalta and Neimatullah. To achieve this, TF81 proposed to travel to the area by helicopter during the hours of darkness,⁶⁹ after receiving intelligence confirming the targets were present. Troops would secure and then enter three buildings that were believed to be associated with the targets, who would be detained and arrested in the first instance if they were present. The buildings would also be searched for explosives and evidence to support a later Afghan prosecution.
- [43] By chance, the Chief of Defence Force and Minister of Defence were in Afghanistan on a pre-arranged visit in the days leading up to Operation Burnham. The purpose of their visit was to show support for the NZPRT following Lieutenant O’Donnell’s death and to discuss New Zealand’s ongoing commitment to ISAF.⁷⁰ On 19 August the Senior National Officer and the Ground Force Commander briefed them on the operation.⁷¹ The Minister’s approval was not required for the operation—the Chief of Defence Force had authority to approve operations outside Kabul and the surrounding area and had already done so. The briefing occurred because the Minister happened to be present and this was TF81’s current operation. However, given the size and significance of the operation, the Minister made a phone call to the then Prime Minister, Rt Hon John Key, and asked the Chief of Defence Force to inform him of what was planned.⁷² The Chief of Defence Force did so, and the Prime Minister was apparently comfortable with the proposed course of action.⁷³
- [44] Also on 19 August, the Ground Force Commander went to Bagram Airfield to brief the commander of the air assets that would be supporting the operation. He was accompanied by the Troop Commander, the Air Liaison Officer (who was responsible for submitting requests for air support), the Joint Tactical Air Controller (JTAC) and helicopter landing zone security personnel. They discussed the nature of the support TF81 would require during the operation. The Ground Force Commander also briefed the General in charge of the CRU, as the operation was to be a partnered one (as most TF81 operations were). CRU personnel would principally form part of the security force for the main helicopter landing zone and the aerial response force.
- [45] In the days leading up to the operation, TF81 received intelligence to the effect that the two targets were in Naik.⁷⁴ On 20 August 2010 final approval of air asset support was confirmed, which

68 “Karzai’s 12” was a set of conditions agreed between General Petraeus and Afghan President Hamid Karzai in an attempt to ensure cultural sensitivity during operations and keep civilian casualties to a minimum.

69 The Chinooks were not available to fly into an area like Tirgiran Valley in daylight hours.

70 10 September 2010 Cabinet Paper – Report on Overseas Travel Hon Dr Wayne Mapp (10 September 2010) (Inquiry doc 01/08) at [2].

71 Inquiry doc 06/05, above n 63, at 25–28. Although these slides were prepared on 16 August, we heard evidence that the briefing occurred on 19 August.

72 Response of Dr Wayne Mapp to question from Nicky Hager, Transcript of Proceedings, Public Hearing Module 2 (23 May 2019) at 89–90.

73 Again, in legal terms, the Prime Minister had no formal role in approving the operation: see chapter 2 at [75]–[81].

74 Inquiry doc 09/40, above n 55.

would allow the operation to proceed on the night of 21/22 August. TF81 made final preparations over the course of 20 August. The Ground Force Commander and the Troop Commander gave the troops their orders, and they conducted rehearsals for the operation. Troops had time to call their families at home, which some did. As we explain below, the operation was considered to be a relatively high-risk one for the TF81 personnel involved. They were going into an area where armed resistance might well be encountered and there was a chance they would not see their families again.

Risk assessment

- [46] Operational risk assessment is an important part of the planning process. Commanders need to identify risks and plan for them; those under their command need to be told of likely areas of risk so that they are prepared. Operational risk is part of the concept of operations and is presented as “risk to force” and “risk to mission”. What do the planning documents for Operation Burnham say about risks?
- [47] In his orders for the operation, the Ground Force Commander referred to intelligence indicating that the insurgents Kalta and Neimatullah were both confident, that Taliban fighters in the area walked about fully armed and that the insurgents had access to rocket-propelled grenades (RPGs) and PK machine guns (general purpose Russian-made weapons which are commonly used by insurgents in Afghanistan).⁷⁵ He stated that Kalta led a group of 14–20 fighters and Neimatullah was one of his associates. It was assessed that the targets might use RPGs to defend their compounds, in the expectation that reinforcements would come from surrounding areas to inflict casualties on coalition ground forces.
- [48] The concept of operations for Operation Burnham assessed that the overall risk to the coalition force was “high” due to the likely insurgent presence, the assessed insurgent response and the absence of an ISAF or Afghan security force presence in the area.⁷⁶ Given the available intelligence and the risk assessment, air support was critical and, as a practical matter, Operation Burnham could not have proceeded without it.
- [49] As part of the planning for the operation, the Ground Force Commander and the Troop Commander assessed the areas around the valley in which the operation was to take place and identified the most likely areas where a threat could materialise. These were areas where troops would be most vulnerable to incursion by any enemy forces approaching from surrounding areas. Air assets would be tasked to monitor those areas and to protect ground troops, by firing their weapons if necessary. Although, as previously noted, it was anticipated that insurgent reinforcements might appear from the surrounding area, nothing was said about the direction from which they might come, perhaps because the available intelligence was thought to be insufficiently specific in this respect.

Protection of civilians

- [50] Turning to the question of how the planning addressed the protection of civilians, we note that the concept of operations indicated that the overall risk of civilian casualties was “low”.⁷⁷ The

⁷⁵ Inquiry doc 09/39, above n 30, at 31–33.

⁷⁶ Inquiry doc 06/06, above n 28, at 17.

⁷⁷ Inquiry doc 06/06, above n 28, at 17.

basis for that assessment is not stated explicitly. The Inquiry's military expert suggested this risk assessment would likely have been based on a number of mitigation strategies developed in the course of planning. These include: knowledge obtained from earlier "pattern of life" assessment; conducting the operation at night when the majority of civilians would be inside their houses and coalition forces had a tactical advantage; the fact that pre-emptive or other deliberate air strikes were not planned; the intention to conduct a "soft knock call out"; and the employment of escalation of force measures as prescribed by the Commander ISAF.⁷⁸ Witness evidence aligned with that assessment and it is further supported by Sir Angus Houston's response to questions from Counsel for the Villagers.⁷⁹

- [51] Reflecting an awareness of the need to protect the civilian population, the orders to ground troops before the operation noted that:
- (a) troops were to be prepared to encounter women and children when clearing the compounds of interest;⁸⁰
 - (b) if any casualties occurred, the troop medic was to provide medical support while medical evacuation was arranged, if required;⁸¹ and
 - (c) in the event of a death—whether enemy or civilian—troops were directed to collect DNA samples and search and photograph the body (while treating the person with dignity).⁸²
- [52] A number of directives or requirements relevant to the protection of civilians applied to the operation.⁸³ These included ISAF's Night Raids Directive, a set of standards or requirements known as "Karzai's 12" and the Tactical Directive issued by General David Petraeus in August 2010. As noted already, a concept of operations submitted to ISAF needed to address how the Night Raids Directive and Karzai's 12 would be complied with, as ISAF command took this into account when deciding whether to approve the operation. In addition, "pattern of life" analysis was also relevant to the protection of civilians. We deal with each in turn.

ISAF's Night Raids Directive

- [53] Civilian casualties resulting from night raids appear to have been relatively low⁸⁴—possibly because civilians were more likely to be inside their homes at night. Despite this, the local Afghan population perceived night raids as more invasive than daytime raids and strongly opposed them. The Night Raids Directive issued by General Stanley McChrystal on 5 March 2010 began by saying

⁷⁸ These measures were intended to minimise death or injury of innocent civilians. Examples included the use of unambiguous and repeated signs, signals and warnings (visual and audible). See General David McKiernan *Tactical Directive* (HQ ISAF/COM/08, 30 December 2008) <www.nato.int> at [4](c).

⁷⁹ Sir Angus Houston *Response from Sir Angus Houston to questions from Counsel for the Afghan Villagers* Submission to Inquiry (6 September 2019).

⁸⁰ Inquiry doc 09/39, above n 30, at 39.

⁸¹ Inquiry doc 09/39, above n 30, at 54–55; Inquiry doc 09/38, above n 46, at 41.

⁸² Inquiry doc 09/38, above n 46, at 41.

⁸³ The background to these directives is explained in chapter 2 at [40]–[45].

⁸⁴ See, for example, United Nations Assistance Mission in Afghanistan (UNAMA) *Afghanistan Midyear Report 2011: Protection of Civilians in Armed Conflict* (Kabul, July 2011) at 3–4, 22 and 25–26; ISAF HQ Public Affairs "ISAF Issues Guidance on Night Raids in Afghanistan" (5 March 2010) Defense Visual Information Distribution Service <www.dvidshub.net>. The UNAMA report notes, however, the difficulty in obtaining accurate civilian casualty data for night raids (at 3, footnote 28): "obtaining accurate data on night search operations is difficult given the lack of transparency, frequency and wide scope of such operations conducted by ISAF ... UNAMA may be under-reporting the number of night raids involving civilian casualties."

that it was preferable for ISAF forces to explore all other feasible options before conducting a night raid targeting compounds and residences.⁸⁵ The directive required Afghan National Security Forces to be involved in all night raids, including the planning process, and provided that Afghan forces should take the lead in entering compounds and conducting searches. The directive also required troops to record all property seized or damaged, and to leave a receipt with instructions for claiming compensation. Overall, the directive did not forbid the use of night operations; rather, it caused coalition forces to be more thoughtful and discriminating about their use and, where they were used, imposed conditions on how they should be conducted.

- [54] The reasons given in the Operation Burnham concept of operations for conducting a night raid were to minimise the potential for civilian casualties, to minimise the threat of an insurgent response and to increase the chances of successfully detaining Kalta.⁸⁶ The document indicated the CRU would be involved in the operation, although it is clear from the orders issued to troops that it was not intended the CRU would take the lead in entering compounds—that would be done by TF81 personnel. Witnesses explained this was because of the security situation and the fact that the CRU personnel were not used to participating in this type of operation (that is, in a remote location where insurgents were expected to be present). This was not strictly in accordance with the Commander ISAF's intent as expressed in the Night Raids Directive. However, this was not a violation of the directive as there was justifiable reason for not adhering strictly to it—ISAF personnel were always permitted to ensure their own force protection and self-defence.

Karzai's 12

- [55] As noted earlier, Karzai's 12 was a set of conditions agreed between General Petraeus and Afghan President Hamid Karzai in an attempt to ensure cultural sensitivity during operations and keep civilian casualties to a minimum. The conditions included coordinating with local officials and tribal elders, ensuring troops received training on local culture and customs, attempting a "soft knock" before forcing entry to a compound and using interpreters.⁸⁷
- [56] The concept of operations explained that coordination with local officials had not been conducted due to the potential for the mission to be compromised.⁸⁸ However, troops had received training in local culture and customs and a "soft knock" or call out would be used before entering compounds. Again, while satisfying all 12 conditions was preferable, an operation could still proceed where some conditions were not met, provided there was a sufficient explanation for the non-compliance.

COMISAF's Tactical Directive

- [57] General Petraeus, as the Commander ISAF, issued a Tactical Directive in August 2010 prior to Operation Burnham.⁸⁹ The aim of the directive was to "reduce the loss of innocent civilian life to an absolute minimum and reinforce the concept of disciplined use of force in the fight against the insurgency". Among the protections set out in the directive were fire control measures

⁸⁵ The following press release contains unclassified extracts from the Directive: "ISAF Issues Guidance on Night Raids in Afghanistan", above n 84.

⁸⁶ Inquiry doc 06/06, above n 28, at 2.

⁸⁷ At 12.

⁸⁸ At 12.

⁸⁹ The following press release contains unclassified extracts from the Directive: ISAF Public Affairs Office "Gen. Petraeus updates guidance on use of force" (4 August 2010) United States Central Command <www.centcom.mil>.

directing when and under what conditions commanders could use fires.⁹⁰ The directive stated that a commander authorising a strike must determine that no civilians were present. If civilians were present, the directive still permitted the use of fires in certain circumstances, one of which was self-defence. The directive acknowledged that protecting the Afghan people required killing, capturing, or “turning” insurgents. The directive also encouraged partnering with Afghan troops during the planning and execution stages of operations. It said partnering would help to avoid misunderstandings or ignorance of local customs or behaviours (which could result in casualties), ensure greater situational awareness, alleviate the anxiety of the local population and build confidence in Afghan security forces.

Pattern of life analysis

- [58] In the published literature, pattern of life analysis is most commonly associated with targeted killings by rockets fired from drones. Before a targeted drone strike, the targeting force carries out a pattern of life analysis of the target’s habits and patterns of daily life. In addition, the targeting force gathers information about the patterns of life of civilians in the particular locality. This enables the force to plan the strike in a way that gives the maximum chance of striking the target while minimising the risk of civilian casualties.
- [59] In its report *Troops in Contact: Airstrikes and Civilian Deaths in Afghanistan*, Human Rights Watch made the point that most civilian casualties from air strikes in Afghanistan were caused in what it described as unplanned situations, as when troops under attack from insurgents called in air strikes for tactical support.⁹¹ Human Rights Watch said that where air strikes were planned, civilian risk mitigation procedures could be undertaken in advance and these minimised the risk of civilian casualties. One of these procedures was “pattern of life” analysis. The report said:⁹²

Planned attacks allow the US and NATO to use civilian risk mitigation procedures, including formal risk estimates to model and minimize civilian casualties. This includes a “pattern of life analysis”, which looks for civilians in the area for hours or days before an attack using “eyes on the target” ranging from ground observers to technical reconnaissance.

The purpose of such analysis is to build a picture of daily life in the relevant area—in relation both to the target and any cohabiting family members, and to civilians more broadly (women and children in particular)—and to identify any facilities in the immediate area that are granted special protections under International Humanitarian Law, such as cultural and religious sites.⁹³

- [60] While the literature primarily focuses on targeted strikes, pattern of life analysis is also conducted before other types of operations (although the analysis required is particularly detailed in the case of targeted strikes). Such analysis assists in building the intelligence picture of the situation likely to be encountered during the operation and in assessing the risks to troops. It also facilitates planning on how to reduce the likelihood of civilian casualties and other collateral damage. Pattern of life analysis is conducted through a variety of means, including intelligence reporting and aerial surveillance.

⁹⁰ As discussed in chapter 2 at [44]–[45], the impetus for the issue of the sequence of tactical directives that culminated in this directive from General Petraeus was the number of civilian casualties resulting from aerial bombardments and other forms of air strike directed at ground-based insurgents and their facilities.

⁹¹ Human Rights Watch *Troops in Contact: Airstrikes and Civilian Deaths in Afghanistan* (Human Rights Watch, New York, 2008) at 29–30.

⁹² Human Rights Watch, above n 91, at 29.

⁹³ ISAF forces were not to fire at mosques or any cultural or religious site except in self-defence. See HQ ISAF *Tactical Directive* (6 July 2009) NATO <www.nato.int>.

- [61] Pattern of life analysis was used in the planning of Operation Burnham. Before the operation, a drone conducted various reconnaissance trips over the objective area. The purpose of this reconnaissance was to map the layout of Kalta's and Neimatullah's compounds so as to gain an understanding of the terrain. This included identifying any areas that may be at risk of collateral damage and observing whether (and where) women and children were present. The drone observed numerous people coming and going from the targets' compounds.⁹⁴ Most were men, although children and a probable female were seen at Neimatullah's residence. Possible mosques were also identified.⁹⁵ The drone imagery was not detailed enough to identify specific individuals (for example, to confirm whether the targets were at the compounds).
- [62] In summary, the pattern of life analysis (including intelligence collected) confirmed that the targets' compounds were located in a village, Naik, and that civilians were likely to be in the compounds, or in their general vicinity. This was reflected in the orders given to the troops, which directed them to be prepared to encounter women and children when clearing compounds.⁹⁶

Arrangements between air assets and ground forces

- [63] Because Operation Burnham was to occur in a remote and inaccessible location, and because of the anticipated risk of an insurgent response, air asset support was essential to allow the safe conduct of the operation and to ensure its timely completion. The air assets required included:⁹⁷
- (a) two Chinook helicopters to transport the main ground force;
 - (b) two UH-60 Blackhawk utility helicopters to transport the command group and the aerial response force;
 - (c) two Apache attack helicopters (referred to as the Air Weapons Team) to escort the Chinooks and to provide, in conjunction with an AC-130 Spectre gunship, security for ground troops; and
 - (d) a remotely piloted aircraft (drone) to monitor developments on the ground before, during and after the operation.
- [64] As we have said, TF81 submitted a formal request for air support to Regional Command North on 11 August 2010. Ultimately, however, the supporting air assets came primarily from Regional Command East. It appears that the timing of the operation was in part determined by air asset availability: final confirmation of air asset support for the operation was only received on 20 August 2010. As noted above, the Ground Force Commander, the JTAC and others briefed the Air Mission Commander on 19 August, explaining the Ground Force Commander's intent for the mission and the areas where air support would be required.
- [65] The air assets were contributed by the United States and operated by United States air crew.⁹⁸

⁹⁴ See, for example, ISR SLIDES (Inquiry doc 09/06). The images are redacted because they are partner material, but the captions provide an indication of what they showed.

⁹⁵ "STORYBOARD: CLOSE UP 4" and "STORYBOARD: CLOSE UP 3" (25 July 2010) Inquiry doc: United States Government FOIA release at 75–76.

⁹⁶ See Inquiry doc 09/39, above n 30, at 39.

⁹⁷ Other air assets were involved, but they are not relevant for our purposes.

⁹⁸ Some of the air assets had been assigned to ISAF, but others (such as the AC-130) may have remained under the control of USFOR-A or other United States command.

They would provide support for the TF81 mission but remained under the command and control of their own commanders and subject to their own national rules of engagement.⁹⁹ As one of the air crew put it: “The Air Mission Commander has the final clearance of fires for air assets conducting the mission.”¹⁰⁰

- [66] In practical terms, this meant the air assets would coordinate with TF81 and seek to act in a manner consistent with the Ground Force Commander’s intent. They would seek clearance before firing at a target, particularly in areas near ground troops. However, they did not require approval from the Ground Force Commander to fire and could choose to engage without clearance if, for example, it was necessary for their own safety or the safety of ground forces. They would act in accordance with the orders of their own Air Mission Commander and could engage a target if they considered it was in accordance with their national rules of engagement, which governed their conduct at all times (whether or not they had clearance to fire).
- [67] As we describe in more detail in chapter 8, the United States Forces—Afghanistan (USFOR-A) conducted an investigation under Army Regulation 15-6 (the AR 15-6 investigation) into Operation Burnham.¹⁰¹ This was conducted in the last two weeks of September 2010. As part of the AR 15-6 investigation, the aircrews of the Apache helicopters were interviewed. In the course of the interviews, the air crew described the information they were given during their pre-operation briefings.¹⁰² Although there are some discrepancies in the descriptions given, it seems from analysing them together that the air crew were told they were the first coalition forces to go to the area in 10 years and that there was likely to be “enemy resistance”.¹⁰³ The briefings addressed patterns of life in the area. Some air crew said that they knew civilians would be in the locality and that they had to be cautious with fires, while others said they did not remember any discussion about women and children. One of the air crew said: “During the brief it was stated that anyone leaving the objective was declared hostile.”¹⁰⁴ It is not clear what the “objective” referred to was in this particular context, although that term was often used to refer to the buildings to be entered and searched during the operation.
- [68] The complex task of communicating with the air assets and coordinating their movements fell to the JTAC, a TF81 Corporal who was specifically trained for that role. The JTAC would be positioned with the Ground Force Commander during the operation and would relay to the Ground Force Commander any requests that the air assets made for clearance to engage a target. The JTAC would then relay the Ground Force Commander’s decision to the air assets. The Ground Force Commander retained ultimate responsibility for clearing engagements, although he would consider advice from the JTAC and other sources before doing so.
- [69] While the Ground Force Commander and the JTAC received information from a variety of sources, inevitably, given the location, the air assets would have a better view of what was happening on the ground during the operation than they did. Accordingly, the Ground Force Commander and the JTAC would have to rely in part on information reported by the air assets to assess whether a

⁹⁹ Rules of engagement are discussed in detail in chapter 6.

¹⁰⁰ Headquarters United States Forces—Afghanistan “Exhibit 4” *AR 15-6 Investigation – Tigiran Village* (30 September 2010) (Inquiry doc: United States Government FOIA release) at 22.

¹⁰¹ Inquiry doc: FOIA release, above n 100.

¹⁰² We understand TF81 personnel would likely have provided information about the anticipated insurgent presence in the villages and United States personnel would have addressed potential threats to the air assets (for example, the likelihood of surface-fired weapons both in transit and on location).

¹⁰³ “Exhibit 4” and “Exhibit 6” in Inquiry doc: FOIA release, above n 100, at 22 and 30.

¹⁰⁴ “Exhibit 12” in Inquiry doc: FOIA release, above n 100, at 55.

proposed target was directly participating in hostilities and whether the risk of collateral damage was within acceptable limits, so that clearance to engage could properly be given.¹⁰⁵ Even if clearance to engage was granted, the air assets would still need to be satisfied that the engagement complied with their rules of engagement and that friendly forces would not be endangered. In some cases, the Ground Force Commander might explicitly grant clearance on a conditional basis—for example, by saying that air assets were cleared to engage if the target was positively identified and there were no collateral damage issues. As we discuss in chapter 4, this occurred on one occasion during Operation Burnham.

Information about the whereabouts of the targets

- [70] As discussed above, Operation Burnham had been planned based on intelligence suggesting that both Kalta and Neimatullah had residences in Naik. However, intelligence also showed that they moved about frequently, whether within Tala wa Barfak, into an adjoining province such as Bamyan or even to Pakistan.¹⁰⁶ For the detention operation to be successful, TF81 would need up-to-date intelligence indicating that the targets were likely to be at their compounds (or in the general vicinity) at the time of the operation. The concept of operations indicated there would be a “HUMINT trigger”—that is, TF81 would be relying on human intelligence reporting about the location of the targets.¹⁰⁷
- [71] As we have noted, intelligence reporting in the days leading up to the operation indicated that the targets were in Naik. As far as we have been able to establish, this was the confirmatory intelligence TF81 relied on when beginning the operation. For various reasons evident on the documents we have received, it was not possible in the circumstances to obtain positive identification of the targets at their compounds immediately before the operation. Given that the operation aimed to detain the targets and did not involve any planned strikes, we accept that reliance on human intelligence in this way was justifiable. Further, as we discuss later, the intelligence received was largely accurate.¹⁰⁸

Capture of suspected insurgents

- [72] The concept of operations indicated that the CRU would be responsible for making any arrests in accordance with Afghan warrants during the course of the operation, and detainees would be handed over to the Afghan Ministry of the Interior for prosecution.¹⁰⁹ However, the orders of the Ground Force Commander and the Troop Commander for the operation stated that the assault force (which did not include any CRU) would enter the buildings and detain the targets if they were present.¹¹⁰ Any detainees would be taken first to the NZPRT’s base in Bamyan for identification, then—if they were confirmed as the targets—to TF81’s base in Kabul before being handed over to the Afghan National Directorate of Security in Kabul.¹¹¹ We return to the issue of detention in chapters 10 and 11.

¹⁰⁵ The JTAC had the capability to take a video feed from the drone, but for an operational reason did not use this capability during Operation Burnham.

¹⁰⁶ See, for example, Inquiry doc 08/22, above n 18, and Abdul Kalta (RTAF2307)-Obj BURNHAM (Inquiry doc 08/15).

¹⁰⁷ Inquiry doc 06/06, above n 28, at 9. “Human intelligence” or “HUMINT” is intelligence gathered through interpersonal contact rather than by technical means (such as signals intelligence (or SIGINT)).

¹⁰⁸ See chapter 5 at [14]–[39].

¹⁰⁹ Inquiry doc 06/06, above n 28, at 9, 12 and 15.

¹¹⁰ Inquiry doc 09/39, above n 30, at 39 and 41; Inquiry doc 09/38, above n 46, at 22. Presumably, the intention still was that the arrest warrants were to be executed by Afghan personnel.

¹¹¹ Inquiry doc 09/39, above n 30, at 25, 35 and 43; Inquiry doc 09/38, above n 46, at 22.

Operation Nova

- [73] Although the coalition forces failed to capture Abdullah Kalta or Maulawi Neimatullah during Operation Burnham, TF81 considered that the Tala wa Barfak insurgent network had been disrupted by the loss of materiel and personnel during the operation. Despite this assessment, by mid-September, intelligence reporting indicated that Neimatullah was living in his house in Tirgiran Valley and was “looking for revenge” for Operation Burnham.¹¹² Accordingly, TF81 senior leadership began planning a return operation to Tirgiran Valley to conduct another deliberate detention operation targeting Neimatullah only, relying on the same warrant that the Afghan Ministry of Interior issued before Operation Burnham.
- [74] Between at least 23 and 26 September 2010, TF81 leadership engaged in discussions with Regional Command North seeking permission for another operation in Tirgiran Valley to “remove or at least disrupt” Neimatullah.¹¹³ Regional Command North appeared concerned that the Taliban would claim civilian casualties following the operation regardless of whether or not they occurred. We do not have a record of the exact date Regional Command North granted permission for the operation, but this seems to have occurred by 29 September 2010, when the Chief of Defence Force approved a deliberate detention operation in Tirgiran Valley targeting Neimatullah on the night of 2–3 October 2010.¹¹⁴ On 1 October 2010, the Chief of Defence Force and Director of Special Operations briefed the acting Prime Minister on the operation.¹¹⁵ The planning process and the risk assessment for Operation Nova were similar to those for Operation Burnham, which we have described above. We will not repeat that detail here. We simply note that we did not see anything in the material available to us to indicate there were inadequacies in the planning undertaken.
- [75] The operation was to involve a combined TF81 and CRU force landing in the valley to search A3 for Neimatullah.¹¹⁶ The United States again provided transport and supporting air assets. The most significant difference to Operation Burnham was that the helicopter landing zone was to be in the stretch of valley about halfway between A1 and A3, rather than to the north of Khak Khuday Dad as it had been for the previous operation.
- [76] Overall, the Inquiry is satisfied with the planning process for Operations Burnham and Nova.

¹¹² Inquiry doc 10/19, above n 35.

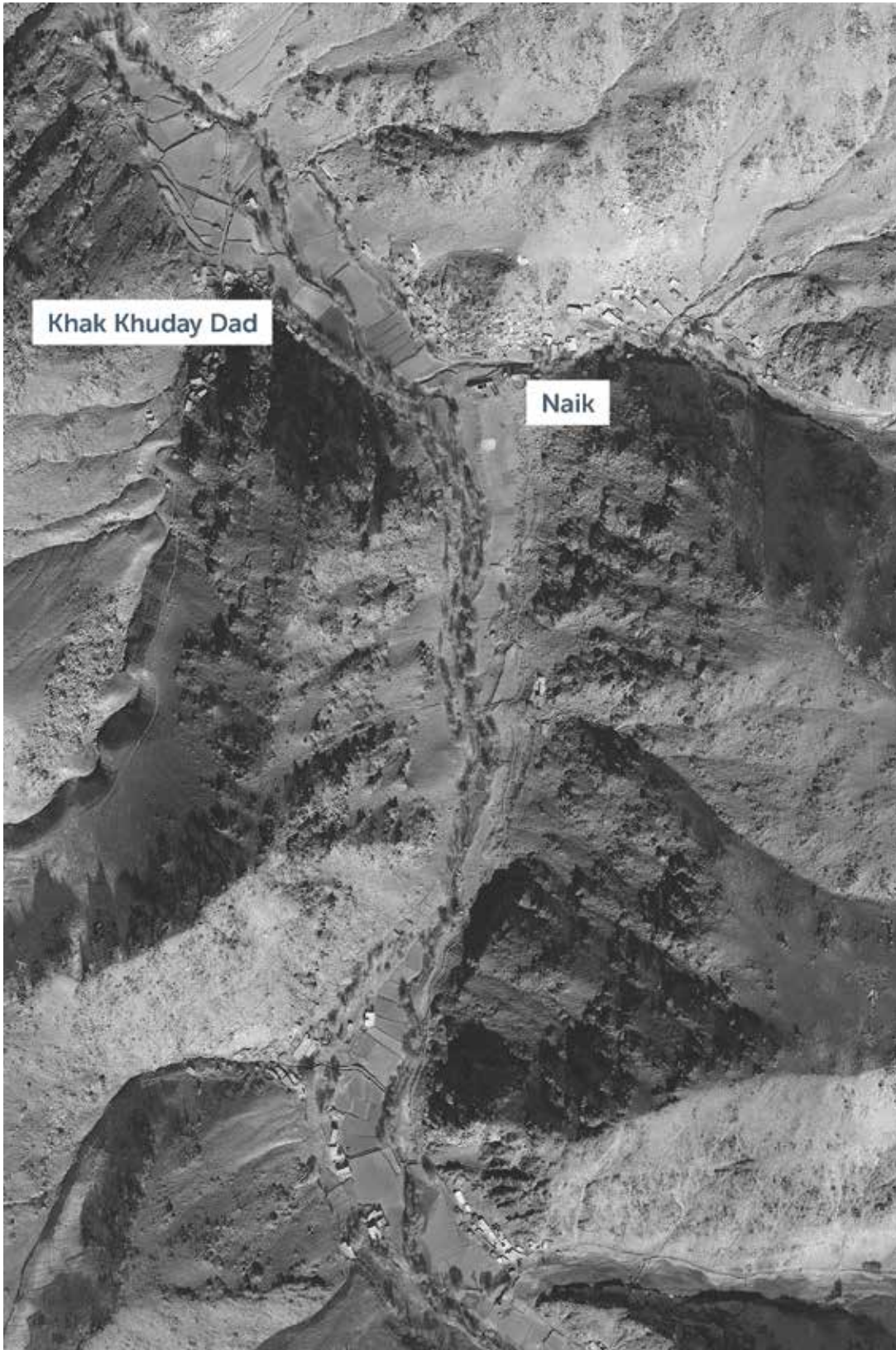
¹¹³ Email from Lt Col Parsons (WAATEA.SNO) to ARIKI.COMD “RC-N Cmd” (23 September 2010, 9.13am) (Inquiry doc 10/10).

¹¹⁴ OPERATION RAHBARI 02 OCT 10 OBJ NOVA CDF Mission Approval (Inquiry doc 11/06).

¹¹⁵ Email from Colonel Kelly (HQNZDF.DSO) to Lt Col Parsons (WAATEASNO) and @CO “OBJ NOVA MISSION” (1 October 2010, 1.54pm) (Inquiry doc 10/21).

¹¹⁶ Inquiry doc 11/02, above n 36.

Figure 3:
Tirgiran Valley, Baghlan province, Afghanistan



Satellite image dated 25 April 2010, source: Digital Globe



What happened on Operations Burnham and Nova?

Chapter 4

- [1] The principal purpose of this chapter is to set out what happened on Operations Burnham and Nova. This is relevant to several aspects of our Terms of Reference. One of the purposes of the Inquiry is to “Seek to establish the facts in connection with the allegations of wrongdoing on the part of NZDF personnel during the Operations”.¹ We are to examine, in particular, the conduct of the New Zealand Defence Force (NZDF) forces during Operations Burnham and Nova.² Our objective at this stage is simply to set out the sequence of events, leaving questions relating to casualties and the extent of damage to property until chapter 5, and our assessment of the knowledge and conduct of NZDF personnel during the operations until chapter 6.
- [2] However, following our outline of what happened on Operation Burnham, we will also address in this chapter two issues which arise out of the operation and are important to the discussion in later chapters. These are:
- (a) The interactions between the Joint Tactical Air Controller (JTAC) and the air assets in the course of Operation Burnham. We will describe these interactions in the course of the factual narrative, but will make some brief general observations about their nature at the conclusion of the relevant section.
 - (b) Whether Operation Burnham can accurately be described as an operation led by the Afghan Crisis Response Unit (CRU), supported by Task Force 81 (TF81).
- [3] We deal with each operation in turn.

Operation Burnham

- [4] The following account of what happened on Operation Burnham is drawn from various sources, including:
- (a) Contemporaneous video footage made available to the Inquiry on a confidential basis. The Inquiry has had access to weapons system video from the two AH-64 Apache attack helicopters, part of which United States authorities have now cleared for public disclosure, and video footage from a drone which overflew the area during and after the operation. The weapons video is edited, but the drone video footage is not. The editing of the weapons video was, according to a subsequent investigation by United States military authorities, carried out in accordance with standard operating procedures.³ The Inquiry has also had access to some video footage and accompanying audio from the AC-130 Spectre gunship.
 - (b) A transcript of the audio from the Apache weapons video, which records some of the communications between the JTAC and the United States air assets.

¹ *Terms of Reference: Government Inquiry into Operation Burnham and related matters* (11 April 2018), cl 6.1.

² Clause 7.1 and 7.3.

³ Headquarters United States Forces—Afghanistan “Findings and Recommendations” at 1, *AR 15-6 Investigation—Tigiran Village* (30 September 2010) (Inquiry doc: United States Government FOIA release) at 6.

- (c) Reports of two investigations carried out after the operation, one by the International Security Assistance Force (ISAF) Incident Assessment Team and another by an investigating officer of the United States Army (the AR 15-6 Report). The AR 15-6 Report, a redacted version of which has been cleared for public release by United States authorities, contains accounts of the operation given by United States air crew, and a short transcript and three still images from portions of video footage, most of which was available to the Inquiry.⁴
 - (d) NZDF reports and correspondence from immediately after the operation until this Inquiry was announced.
 - (e) The account in *Hit & Run*.
 - (f) Evidence given to the Inquiry by those involved in the operation.
 - (g) Accounts given by Afghan villagers and other people with knowledge of events at issue in statements to lawyers in Afghanistan engaged by the Inquiry, interviews with Mr Jon Stephenson and affidavits prepared for a judicial review proceeding in 2017.
 - (h) Contemporaneous reports in news media and by human rights and similar organisations.
- [5] We also received assistance from our expert military adviser and from an independent imagery and geospatial analyst, who conducted an analysis of the Apache weapons video and the drone footage. To assist understanding, we have included at the end of this chapter images of the area with the important locations marked (Figure 4). We have also included images of the three target buildings, which NZDF designated as A1, A2 and A3, both before and after the operation (it will be recalled that A1 and A2 belonged to Abdullah Kalta and A3 to Maulawi Neimatullah) (Figures 5 and 6). For ease of reference, there is a timeline at the conclusion of the chapter.

Ground forces and their operational tasks

- [6] The planning for Operation Burnham provided that the ground force would comprise five distinct groups:
- (a) A command (or overwatch) group. This consisted of the Ground Force Commander; a communications element, which included the JTAC; and two marksmen.⁵ The Ground Force Commander had overall command of the ground force and, through the JTAC, cleared the activities of the air assets.
 - (b) A security detail to protect the helicopter landing zone. This consisted of members of the CRU and their embedded TF81 trainers. There was also a medic positioned with the security detail, who could be called forward if needed.

⁴ Inquiry doc: FOIA release, above n 3.

⁵ We use the term “marksman” as opposed to the term “sniper” used in *Hit & Run*. The terms have different meanings in a military setting. Unlike snipers, who often act independently, marksmen normally operate as part of a fire team. Marksmen are also usually issued with automatic or semi-automatic weapons instead of the bolt-action rifles generally used by snipers (see, for example, Slobodan Lekic “German gunmaker starts deliveries of US Army’s new squad marksman rifles” *Stars and Stripes* (online ed, 10 April 2020) <www.stripes.com>). The two men with the command group during Operation Burnham are more accurately described as marksmen than snipers.

- (c) An assault force. This included the Troop Commander and two assault groups comprising members of TF81. The assault force was tasked with entering, clearing and securing A1, A2 and A3, and detaining the targets if they were present.⁶
- (d) An exploit and Explosive Ordnance Destruction (EOD) group. This included a specialist search team whose role was to search A1, A2 and A3, and personnel trained to dispose of any captured weapons and ammunition by controlled detonation.⁷
- (e) An aerial response force. This involved marksmen and CRU personnel flying above the ground troops in a UH-60 Blackhawk helicopter in case the ground force required assistance.

The operation's sequence of events

- [7] The joint force of TF81 personnel and members of the CRU left Kabul on two CH-47 Chinook helicopters at 10.17pm on 21 August 2010 and flew to Bagram Airfield where they arrived at 10.50pm. There were also two Blackhawk helicopters, one carrying the command group and the other the aerial response force. The two Apache helicopters left Bagram Airfield at 11.11pm and arrived over Tirgiran Valley at 12.22am to carry out a visual inspection of the proposed landing zone for the Chinooks. Just before midnight, the drone took position over the villages and began its video feed, which continued until 7.30am on 22 August 2010. The video feed went live to TF81's base in Kabul. The JTAC was able to communicate with the drone operator, although direct communications were patchy and some messages had to be relayed through the AC-130 Spectre gunship.
- [8] After the Apaches and the AC-130 had checked the landing site, the first Chinook landed at 12.30am and the members of the ground force aboard disembarked, including TF81 and CRU personnel. The landing zone was approximately 140 metres north of Khak Khuday Dad. After disembarking its passengers, the Chinook lifted off again. While there was an almost full moon that night,⁸ it was very dark on the valley floor. The TF81 personnel had night vision goggles, but the CRU members did not. The assault force immediately began to move southeast along the valley beside a stream to A1 (Kalta's compound), which was about 400 metres away. They went past Khak Khuday Dad and as they went along the valley, there was to their right (that is, to the southwest) a thick line of trees and vegetation. The CRU members and their embedded TF81 trainers formed a security party at the helicopter landing zone.
- [9] Within a minute or so of the first Chinook landing, the pilots in one of the Apache helicopters saw a group of people close to two buildings in Khak Khuday Dad, about 250 metres across the valley from A1. Analysis of the video footage suggests this group consisted of seven people: five males and two probable females. There is no indication that the air crew were aware there may have been females in the group, nor was that communicated to the JTAC or Ground Force Commander. Some of the men were seen exiting one of the buildings carrying several weapons, including a rocket-propelled grenade (RPG) launcher with a bipod deployed and two or three long arm weapons.⁹ NZDF described this building as the "cache house" in its public presentation at

⁶ OP RAHBARI ORDERS (Inquiry doc 09/39) at 38–39; Accompanies OP RAHBARI ORDERS (Inquiry doc 09/38) at 28 and 36. See chapter 10 at [7]–[12] for references to the contemporaneous documents on the issue of detention.

⁷ Inquiry doc 09/38, above n 6, at 37.

⁸ The moon had been up since before dark and set around 3am on 22 August 2010.

⁹ The term "long arm weapon" encompasses a variety of long, two-handed firearms that are designed to be braced against the shoulder when firing, such as hunting and assault rifles. Our imagery and geospatial analyst used the term when he was unable to determine from the imagery exactly what type of firearm was involved.

the public hearing for Module 1,¹⁰ while Mr Hager has referred to it as Abdul Ghafar's house.¹¹ We will use the term "cache house" simply because it is the building from which weapons were observed being removed.

- [10] Initially, the Apaches had some difficulty contacting the JTAC to obtain clearance to engage the armed men. At this stage, the Blackhawk helicopter carrying the Ground Force Commander and the JTAC had not yet landed—its designated landing place had turned out to be unsuitable, so the pilot was looking for an alternative. However, after a few minutes, the Apache crew were able to make contact with the Blackhawk carrying the Ground Force Commander and advised that they had positively identified five individuals with weapons manoeuvring towards the landing zone.¹² The Ground Force Commander gave clearance to engage the five individuals if they were moving tactically around the area.
- [11] There was no immediate engagement, however. The assault force was by this stage moving down towards A1 in single file alongside the thick line of trees running along the southwestern side of the valley. The Apache helicopters saw two men on the other side of the tree line (at the base of the ridge) as the assault force was passing. They identified the two men as armed insurgents but did not seek clearance to fire on them given their close proximity to the assault force. At least two members of the assault force saw movement on the other side of the tree line and walked over to take a look. They decided not to take action as they could not determine whether the individuals were armed, and instead re-joined the file of soldiers heading towards A1.¹³
- [12] The Apaches then turned their attention back to the cache house. At 12.37am, they observed two men removing objects from the building. One man was carrying what appears to be a bag (possibly containing munitions or other similar equipment, although that cannot be verified), which he handed to another man; the second man was carrying some form of long arm weapon. In addition, two further men were near the doorway, one of whom appears to have been carrying a long arm weapon. Two women and three children are also visible on the video footage taken by the Apaches, exiting the cache building and entering the neighbouring building to the southeast. There is no indication that either the crews of the Apaches or any TF81 personnel were aware of the presence of women and children at that time.
- [13] At about the same time, the security detail at the landing zone saw six individuals they identified as civilians at a building just to the north.¹⁴ Four went off along a track to the north (including an older man, who re-appeared at a later stage), but two women remained. Some CRU personnel went over and told them to stay in the building.
- [14] Around 12.41am, the assault force was approaching A1. By this stage, the command group had managed to disembark from the Blackhawk helicopter on the ridge west of A3 overlooking the valleys. The place where they disembarked was some distance away to the south from where the

10 Colonel Grant Motley "Location and events of Operation Burnham" (Public Hearing Module 1, 4 April 2019); Evidence of Colonel Grant Motley, Transcript of Proceedings, Public Hearing Module 1 (4 April 2019) at 103.

11 Boris Jancic "Secret video of Kiwi soldiers' attack on Afghan village released" *The New Zealand Herald* (online ed, 28 June 2019) <www.nzherald.co.nz>. Abdul Ghafar was an insurgent leader.

12 The men can be seen on the Apache footage moving towards the southeast, away from the main landing zone. The Apache crew may have been referring to the command group's intended landing zone, which was in the general direction that the men were heading.

13 The men on the other side of the tree line would, presumably, not have had night vision goggles, so may not have been aware that the assault force was passing.

14 S50 HLZ STATEMENT OBJ BURNHAM (24 August 2010) (Inquiry doc 02/06); S52 HLZ STATEMENT OBJ BURNHAM (24 August 2010) (Inquiry doc 02/07).

command group was supposed to be.¹⁵ As a result, after leaving the helicopter, the group went as rapidly as possible along the ridge in the direction of the intended overwatch position. As they were going along the ridge, one of the Apache helicopters sought clearance to engage two people who were part way up the ridge behind the cache house. The JTAC was advised that the men were now up on high ground, that they had been positively identified with weapons and that collateral damage was not an issue.¹⁶ After conferring with the Ground Force Commander, the JTAC told the Apache crews that they were cleared to engage if weapons were confirmed and the targets were clear of friendly forces and collateral damage issues. This was at 12.48am, just as the second Chinook was landing (at the same helicopter landing zone as the first) to drop off the remainder of the ground force. It had approached the landing zone earlier but had been warned off by the Apaches because they were concerned about the men they had seen carrying weapons close to the landing zone.

- [15] Between 12.54am and 1am the Apaches were involved in three engagements with around six men they identified as insurgents on the ridge above Khak Khuday Dad, and the AC-130 in an additional one.¹⁷ Three of these four engagements occurred on the eastern side of the ridge and one on the western side. Following the Ground Force Commander's initial clearance to engage, the JTAC provided clearance for each subsequent engagement based on information from the air assets that they were pursuing "enemy movers". Video footage of the engagements shows that at least one target was killed, and others may have been killed or wounded. Our imagery and geospatial analyst considered that at least two of the men engaged were probably carrying long arm weapons.
- [16] At 1.05am, the Apaches engaged a man coming down the ridge approximately 20 metres south of the building beside the cache house. This man appears from the video to have been injured and unarmed. The Apaches sought clearance to engage, advising the JTAC that the man was an "enemy mover" and that he had a weapon; they did not advise that he was injured. On receiving clearance, the Apaches fired on the man but did not hit him. The rounds fell to the south of the man and the buildings.
- [17] At this point, one of the pilots informed the JTAC that a group of people was standing next to a building approximately 200 metres from the ground patrol, and that at least one was female. The JTAC "copied" but said nothing further.¹⁸ On the video footage, this group is visible outside the building neighbouring the cache house on the southeastern side. The group appears to include two women and two children. This is the same building into which women and children could be seen entering at 12.37am. The JTAC was not informed of the exact location of the group or of their proximity to the man being targeted by the Apaches.
- [18] When Counsel Assisting the Inquiry questioned the JTAC about this exchange with the Apache pilot, he said he had no recollection of being told about the huddled group or the presence of a female and was unaware that the target was near buildings. He said if he had been aware of this, he would have asked for more information about whether the engagement was necessary. We are satisfied that although the JTAC did say he "copied", he did not appreciate the true nature of the situation—that is, that the target of the engagement was near buildings and a group of people that

¹⁵ Estimates vary, but the party probably landed about a kilometre from their planned location.

¹⁶ "Collateral damage" was a reference to effects on civilians or civilian structures/buildings.

¹⁷ We use the term "engagement" to mean a burst or series of near-continuous bursts of fire at a target or group of targets. A single engagement may (and on some occasions did) involve simultaneous firing by several different aircraft.

¹⁸ This exchange is recorded in a transcript attached to the AR 15-6 Report: "Exhibit 18" in Inquiry doc: FOIA release, above n 3, at 63.

included at least one female. There were difficulties with the communication links between the air assets and the JTAC at various times throughout the operation, so the JTAC may not have been able to hear all of what the Apache pilot attempted to communicate to him.

- [19] The apparently injured man continued to move north toward the buildings and the group. The Apaches fired at him twice more, missing him but impacting on the roofs of the cache house and the neighbouring building.¹⁹ When interviewed as part of the AR 15-6 investigation, the crews of the Apaches and AC-130 said they were not aware of the impact at the time,²⁰ and the JTAC was not informed of it. As we discuss in subsequent chapters, the impact was later assessed to have resulted from problems with weapon accuracy.²¹ We are satisfied that the JTAC and Ground Force Commander had no knowledge of these weapon problems during the operation. The air crew do appear to have observed people outside the building neighbouring the cache house after the impact.²² The Apaches ceased firing at this stage because the man had moved too close to the buildings and the group of people.²³
- [20] Before these engagements occurred, the assault force had reached A1. The interpreter who was with the Troop Commander did a call out, using a loud hailer. The effect of the call out was to tell the insurgents that Afghan National Security Forces were outside and that there was no escape, so they should come out, or let their women and children come out so that they would be safe. This provided an opportunity for anyone inside the building who wished to exit peacefully to do so. When no response was received, the assault group which was to enter the building²⁴ prepared to place an explosive charge on the building's western wall to breach it so that they could gain entry.²⁵ (Like other houses in the vicinity, A1's walls were made of stone.) The team leader of the group looked through a window to see whether anyone was in the immediate vicinity of the intended breach. He saw no one, so the charge was placed, the personnel involved withdrew to a safe place and the charge was detonated. The wall was breached at 12.53am.
- [21] When the team leader went to climb into the building through the partially breached wall, using the windowsill as leverage, the wall collapsed on top of him, causing him severe injuries. Another member of the assault group suffered minor injuries in the collapse. A further breach was made on the southern wall of A1 and entry was obtained through that. The soldiers entering the house let off at least one flashbang²⁶ before searching the house for occupants. The house turned out to be empty, although it showed signs of recent occupation. The exploit team found arms and ammunition in the building: an RPG launcher and its components (explosive warheads and rockets), a bipod, a pistol holster and various types of ammunition, including ammunition for light/medium and heavy machine guns.²⁷

19 This is shown and/or referred to in the AR 15-6 Report: "Exhibits 16–18" in Inquiry doc: FOIA release, above n 3, at 61–63.

20 "Exhibits 6 and 10" in Inquiry doc: FOIA release, above n 3, at 30 and 46.

21 See chapter 8 at [17].

22 "Exhibit 18" in Inquiry doc: FOIA release, above n 3, at 63. One of the air assets is recorded saying there are about 20 people now at the building the target is moving towards. It is then noted on the transcript in brackets that there are "possibly more personnel coming out of the building – same building that rounds just landed on top of".

23 "Findings and Recommendations" at 6–7, in Inquiry doc: FOIA release, above n 3, at 11–12.

24 As noted at paragraph [6](c), the assault force was made up of two assault groups.

25 Explosives were generally used to create a new entry point after a call out to which there was no response. Explosives were used because the call out would have warned any occupants of the impending entry and they could have set up booby traps or ambushes behind doors and such like.

26 A flashbang is a non-lethal, grenade-like explosive that causes a loud noise, a flash of light and a sudden change in air pressure. It is used to disorient any people in close proximity.

27 EOD INCIDENT REPORT-OBJECTIVE BURNHAM (23 August 2010) (Inquiry doc 09/11).

- [22] Obviously, some re-organisation of the operation had to be undertaken as a result of the serious injuries suffered by the team leader of the assault group. At 1.26am the Blackhawk helicopter carrying the aerial response force landed and the force disembarked to act as a reserve at A1 while the assault force went to A3. In addition, the medic who had remained at the helicopter landing zone went forward to A1 to look after the injured team leader (who was not evacuated by helicopter until around 2.30am).
- [23] A2, a building around 20 metres to the east of A1, was also cleared by the assault force. It was empty and did not appear to have been occupied. There were indications that it had been used as an agricultural building.
- [24] While this was happening, at 12.59am the JTAC was advised by one of the air assets that a “mover” from the earlier engagements near the cache house was climbing up the ridge behind Khak Khuday Dad towards the overwatch position. The Ground Force Commander gave evidence that he was also told by someone at base camp in Kabul, where TF81 personnel were watching the live drone feed, that an “insurgent” was approaching. The man was being tracked by the drone and another air asset. The Ground Force Commander’s understanding was that he had come from the same area where people had been seen with weapons earlier.²⁸ The Ground Force Commander ordered the marksmen who were with the command group to look for him and, once he came into view, to keep him under watch. Only one of the marksmen was able to see the man through the night sight on his weapon. Because of the rocky nature of the terrain and the difficult lighting conditions, the marksman could only spot the man briefly every 50 metres or so, and was unable to determine whether the man was armed.
- [25] Ultimately, when the man was within 50 metres of the overwatch position—about 20 minutes after the JTAC was first informed that the man was approaching—the Ground Force Commander ordered the marksman to shoot. At around 1.21am, the marksman fired two shots. The first struck the man and he immediately disappeared. The second shot hit a rock. The AC-130 air crew observed the man rolling down the side of the ridge and then ceasing movement, and informed the JTAC accordingly. The two marksmen went down to where the man had fallen to check on him. After searching for some time on what was a very rocky side of the ridge, they found his body. He had fallen about 20 to 30 metres down the side of the ridge. The marksmen checked the man and determined that he was dead. They said he appeared to be somewhere around 45 to 50 years of age and was bearded and ragged looking, as if he had been sleeping rough. He had a small pocket knife and a torch in his pockets. The marksmen looked about for a weapon but found nothing.²⁹
- [26] A minute or so after the marksman had shot the man, the Apaches engaged three men who were walking along a track on the valley floor about 700 metres to the south of A3. They were moving toward the south (that is, away from the ground force). One of the men had stopped and was crouching among the shrubs.³⁰ The other two men were walking in single file, with a gap of several metres between them. One had a long arm weapon slung across his back. The helicopters

28 The drone footage does not show the man until he was part way up the ridge, so does not show exactly where he came from.

29 This does not mean the man was not carrying a weapon. Our imagery and geospatial analyst said that it was possible that he was carrying a long arm weapon slung over his shoulder. Given the terrain in which he was killed and the distance he fell, any weapon he was carrying (if there was one) may not have been found. We discuss the circumstances of the man’s death further in chapter 5.

30 Based on what Qari Miraj told Mr Stephenson, it appears that this person was Qari Miraj, who said he hid in the bushes with his bodyguard.

engaged the men, killing at least the armed man and possibly also the man walking in front of him, although it is more likely that the latter walked on a little further before being killed. We discuss this in more detail in chapter 5. No clearance was sought from the JTAC before this engagement, which, we were told, led the JTAC to remind the helicopter crews that they should get clearance before engaging.

- [27] After they had finished at A1 and A2, the assault force moved on to A3. It was about 320 metres away to the south. The men arrived at the house around 1.45am. They attempted an explosive entry at the northern wall, but when the charge failed to breach the wall, they entered through the front door. This involved shooting the hinges and lock off the door with a shotgun (which fired cartridges containing a single slug rather than pellets) and then entering.³¹ Again, the assault force let off flashbangs before entering the rooms in the house. They found no-one, but there were signs that the occupants had made a hasty exit—there was hot food and drink, and a cooking fire was still burning.
- [28] For reasons we explain later,³² we consider there is little doubt that Maulawi Neimatullah and Qari Miraj, two of the insurgent leaders involved in the attack that killed Lieutenant O'Donnell, were staying at A3 with their bodyguards that night, although they were somewhere else nearby when the helicopters arrived. They fled to the south when they heard the approaching helicopters. Miraj stopped at the house on his way to warn Neimatullah's father and brother, who then set off to the south with him.
- [29] By 2.10am, A3 and a small building to the south of it had been cleared. An AK-47 was found in A3.³³
- [30] Shortly after the assault force arrived at A3, the drone began tracking a group of people who were travelling north along a different valley to the southeast of A3. They were moving towards a village located about 500 metres to the south of A3, where the two valleys intersected. When they reached the village, several other people joined the group and they all left towards the south (eight people in total), travelling along the same valley in which A3 was located but away from it. The group passed the location where the three men had been engaged earlier, around 700 metres south of A3. They stopped there for a few minutes, perhaps looking at the body of the man who had been carrying a weapon. The group then continued along the track but appeared to be panicked by something (possibly the sound of aircraft) and scattered, before re-grouping and seeking shelter under a rocky outcrop. The group then began to climb the ridge on the eastern side of the valley, breaking into smaller groups as they went. By this stage, they were about a kilometre to the south of A3.
- [31] Around this time the assault force was preparing to leave A3. The air assets were reporting to the JTAC that there were insurgents to the south of A3 who were climbing up to high ground. This was being passed on to the Ground Force Commander, who was with the JTAC at the overwatch position, and to the Troop Commander on the valley floor at A3. Some members of the

³¹ The operations summary (OPSUM) for Operation Burnham refers to shots being heard from A3 at 1.54am, OP-RAHBARI-OBJ-BURNHAM-OPSUM (22 August 2010) (Inquiry doc 02/14). We consider that this is a reference to the shotgun being used to gain entry.

³² See chapter 5 at [15]–[19].

³³ One NZDF document indicates a RPG motor was also found in A3 (OBJ BURNHAM POST OP TGT SKETCHUP RENDERS (Inquiry doc 11/30) at 6), but this does not appear in the EOD report (Inquiry doc 09/11, above n 27) and was not corroborated by other evidence. The document also indicates a mobile phone was found at A3.

assault force at A3 took up position just south of A3 to provide security against a possible enemy incursion from the south.³⁴ Further north, troops were also stationed up behind A1 to watch for any insurgents approaching from the east on the high ground above A1. As we discuss further in chapter 6, although the group of people climbing the ridge was in fact about a kilometre south of A3, the Ground Force Commander understood them to be significantly closer and moving in a direction that would take them above ground troops.³⁵

- [32] The Ground Force Commander was concerned that the group would attempt to shoot down helicopters once they gained the high ground. The JTAC said in his evidence that the group was climbing towards the air corridor for the helicopters and could threaten the extraction of the ground force. He referred to the intelligence they had received before the operation indicating insurgents in the area had access to heavy machine guns,³⁶ which experience suggested would be kept on ridgelines for use against aircraft. He also said the Apaches had made a number of low warning passes over the group, but they continued to climb in an organised formation.
- [33] Shortly before 2.30am, as the assault force was leaving A3, the Troop Commander noticed through the open front door that a fire, about the size of a small campfire, was burning (he had remained outside the building in an oversight role).³⁷ He advised the Ground Force Commander of the fire but was told he did not need to do anything about it. As the operation continued, the fire in A3 became more intense, so that ultimately, two rooms on the south end of the house were burnt out.³⁸ According to *Hit & Run*, one of the rooms contained religious books, which were destroyed in the fire.³⁹
- [34] By 2.31am the assault force was moving back to A1. Meanwhile, back at A1 the EOD team stacked the munitions⁴⁰ that had been found in the building in a pile on the ground outside, close to the wall.⁴¹ The pile was then destroyed by a controlled detonation. This detonation had two results:
- (a) First, a number of small fires started in the vicinity as a result of pieces of hot munitions falling in dry grass and other vegetation. This was referred to by witnesses and is clearly visible in the drone footage.
 - (b) Second, a section of the walls and roof of A1 collapsed adjacent to where the munitions pile was detonated. While not all witnesses agreed that this had happened, the collapsed section is clearly visible on the drone footage, and, given the timing, must have resulted from the explosive destruction of the weapons.

³⁴ OP SUMMARY (Inquiry doc 02/03) at 1–2. This was confirmed by oral evidence. See also chapter 6 at [110](c)–[113].

³⁵ See chapter 6 at [112]–[113] and [116].

³⁶ See Inquiry doc 09/39, above n 6, at 31–33 (discussed in chapter 3 at [47]).

³⁷ There is an issue as to how this fire started. We address that in chapter 5 at [134]–[141].

³⁸ This is shown clearly on the drone footage and in a Battle Damage Assessment image released by the United States under the Freedom of Information Act along with the AR 15-6 Report. This image shows A3 with the roof over two rooms at the southern end of the building missing, although the walls remained intact (see “STORYBOARD CLOSE-UP 2” in Inquiry doc: FOIA release, above n 3, at 79).

³⁹ Nicky Hager and Jon Stephenson *Hit & Run: The New Zealand SAS in Afghanistan and the meaning of honour* (Potton & Burton, Nelson, 2017) at 68.

⁴⁰ The RPG launcher was retained and taken back to Camp Warehouse, and then to New Zealand for educational purposes. See: Letter from Air Commodore Woods to [redacted] re “OIA Request 2018-3234” (27 September 2018) New Zealand Defence Force <www.nzdf.mil.nz>.

⁴¹ A1 was an L-shaped building. The weapons were stacked outside the building in the corner created by the L, probably about five or so metres from the wall. We were told that the weapon pile was placed in this way to protect the ground troops from the explosion and any fragmentation of the munitions.

- [35] Around the same time the munitions were destroyed, the Troop Commander was informed that some villagers were approaching from the houses to the east of A1.⁴² He sent the interpreter to talk to them. The interpreter also made a call out using a loudhailer, informing villagers that the operation was conducted by Afghan National Security Forces to target insurgents and apologising for the disturbance. A similar message was also conveyed through posters left behind by troops.⁴³
- [36] At 2.52am, the Apaches and the AC-130 were cleared to engage the people climbing up the side of the ridge a little over a kilometre to the south of A3. As part of this engagement, the AC-130 fired a number of 40mm and 105mm rounds and one of the Apaches fired a Hellfire missile. The AC-130 reported that four people were killed in this engagement.⁴⁴
- [37] An operational summary document prepared by the Ground Force Commander immediately after the operation indicates he thought the group targeted in this engagement was moving towards ground troops rather than away from them.⁴⁵ It was clear from the JTAC's evidence to the Inquiry, however, that the JTAC knew the targets had gathered in the village to the south of A3 and had moved further south before climbing the ridge. In any case, once the firing began it would have been visible from the command group's location, as was confirmed in oral evidence.
- [38] Between about 3am and 3.30am, the assault force left A1 and moved back to the landing zone to be picked up. During the return to the landing zone, one of the CRU members lost his pistol and it could not be found.⁴⁶ By 3.45am, all the ground forces had been extracted and, after refuelling in Bamyan, they arrived back at their Kabul headquarters shortly after 5am. At some stage after troops left A1, it caught fire. This is visible on the drone footage by 3.58am.
- [39] No battle damage assessment was undertaken on the ground in the areas where the air asset engagements occurred (although the drone continued its surveillance of the villages for several hours). The Ground Force Commander considered that attempting to conduct a battle damage assessment would have created an unnecessary risk to troops, given the earlier presence of armed individuals in the area, and in the case of the engagement to the far south, would have been impossible, bearing in mind that troops were preparing to be evacuated by helicopter and time was limited.⁴⁷ However, other usual post-operation assessment and reporting processes took place. For example, when TF81 returned to base, there was a "hot wash", which is a debriefing held immediately after an operation where issues about the operation can be raised.
- [40] The Minister of Defence at the time, Hon Dr Wayne Mapp, told us that after the operation his sense was that the Chief of Defence Force and other senior officers were a bit "flat". Although

⁴² The Troop Commander later expressed some doubt about the timing of this in correspondence to the Inquiry. However, taking all the evidence together it appears most likely these events occurred around the time of the detonation. In any event, nothing turns on the exact timing of this interaction.

⁴³ Hager and Stephenson, above n 39, states a large piece of cloth was left behind after the operation, which included on it a phone number to call for assistance in the event of civilian casualties. The book says villagers called the number but no assistance was received: at 69. The Inquiry was provided with a copy of the posters left behind at the scene (see GIROA-ISAF Partnering Operation IO Message (Inquiry doc 09/26)). The posters did not contain a phone number or instructions for seeking assistance – they simply explained the purpose of the operation and apologised for any disturbance.

⁴⁴ Inquiry doc 02/14, above n 31, at 2.

⁴⁵ 4x contacts during obj BURNHAM (Inquiry doc 02/08) at [4]: "NE direction of route confirmed to take pers above [friendly forces] A1 and overwatch of HLZ. Progress meant suspected INS would arrive in position prior to exfil."

⁴⁶ This is referred to in *Hit & Run* (Hager and Stephenson, above n 39, at 43) and we are satisfied on the basis of witness evidence that it did occur. The fact that a pistol was lost during the operation is also mentioned in NZPRT Meeting Record (Inquiry doc 10/19) at 2.

⁴⁷ The Chinooks had to leave the area before daybreak.

the operation was seen as a success in terms of disrupting the insurgent networks, neither of the main objectives of the operation, Kalta and Neimatullah, had been arrested and detained. Later, Dr Mapp described the operation to a friend as a “fiasco”, a remark that he confirmed publicly he had made.⁴⁸ When we asked Dr Mapp about this, he said that all he meant was that the operation had failed to achieve what it set out to achieve. He acknowledged that his language is sometimes a little “flamboyant”.

Interactions between the JTAC and the air assets

[41] In the course of the foregoing narrative, we have referred to the interactions between the JTAC and the air assets. Those interactions are fundamental to our consideration of at least one of the matters which the Terms of Reference direct us to consider, namely NZDF’s compliance with the rules of engagement and International Humanitarian Law.⁴⁹ This is a matter to which we will return in chapter 6. For present purposes, it is sufficient to make two comments.

[42] First, although Operation Burnham was an ISAF operation to which ISAF’s rules of engagement applied, the individual force elements involved (relevantly, TF81 and the United States air assets) were each governed by their own national rules of engagement. Accordingly, the ultimate question for the air assets was whether the engagements they entered into complied with their national rules of engagement. That was a decision which they had to make. Whether or not they were compliant is not something that we have jurisdiction to assess. We do note, however, that the AR 15-6 investigation carried out by United States forces into the operation concluded that the engagements were compliant with the relevant United States rules of engagement and with the Tactical Directive.⁵⁰

The IAT [Incident Assessment Team] executive summary stated that all engagements appeared to be in accordance with appropriate ROE and the Tactical Directive ... This investigation concurs with the IAT’s findings.

[43] Second, much of the commentary on Operation Burnham has described the JTAC’s role as being to “call in” or “direct” fire from the air assets. On some operations, a JTAC may do precisely that; for example, a JTAC may direct air assets to target a particular building or group of people presenting a threat to the operation or to ISAF personnel. As we said earlier,⁵¹ during Operation Burnham neither the Ground Force Commander nor the JTAC could see the situation on the ground. They could not see where people who had exited buildings in Khak Khuday Dad were; whether they were carrying weapons; whether they were in close proximity to obvious civilians such as women and children; and so on. They had to rely on what was relayed to them by the crew of the air assets (including the drone operator), ground troops and TF81 personnel at Camp Warehouse. In general, rather than directing or calling in fire, the Ground Force Commander and the JTAC cleared the air assets to engage, sometimes conditionally, based on the advice they were given. As we explain in chapter 6, however, the final engagement was of a slightly different character.⁵² While the air assets were still “cleared” to engage rather than directed to, unlike in the previous engagements the Ground Force Commander declared the targets hostile before the engagement.

48 Morning Report “Mapp: SAS not guilty of war crimes, operation a ‘fiasco’” *Radio New Zealand* (online ed, 23 March 2017) <www.rnz.co.nz>.

49 *Terms of Reference*, above n 1, cl 7.1.

50 “Findings and Recommendations” at 6, in Inquiry doc: FOIA release, above n 3, at 11. The AR 15-6 Report went on to explain after the passage quoted, however, that the air assets could have done some things better.

51 Chapter 3 at [69].

52 Chapter 6 at [114]–[116].

A CRU-led operation?

[44] Operation Burnham has been referred to in a way that indicates it was a “CRU-led” operation on a number of occasions, particularly in advice to ministers. For example:

- (a) NZDF’s written briefing to the Minister of Defence dated 10 December 2010, three and a half months after the operation, noted the attack on the New Zealand Provincial Reconstruction Team (NZPRT) patrol on 3 August 2010 and stated that “... the CRU, supported by the New Zealand Special Air Service (NZSAS), developed an operation plan targeting the insurgent leadership ...”⁵³
- (b) Similarly, the Ministerial briefing of 13 December 2010, which was prepared on the basis that it might be publicly released, noted the 3 August attack and said:⁵⁴

Following this attack, the Afghan Ministry of Interior (MOI) Crisis Response Unit (CRU) supported by the NZSAS Task Force and other ISAF coalition partners, commenced planning to disrupt this insurgent group’s capacity and capability to target coalition forces, including the NZPRT within the Baghlan-Bamian border region.

- (c) The Vice Chief of Defence Force’s talking points for an oral briefing to the Prime Minister on 23 March 2017 stated:⁵⁵

In the wake of the [3 August attack] Afghan MOI’s CRU supported by SAS and coalition partners started gathering intelligence and planning to disrupt this insurgent group that posed a threat to the NZ PRT within the Baghlan–Bamian border area.

This was consistent with the way partnered operations were generally described. For example, a document prepared by the Ministry of Foreign Affairs and Trade dated 2 September 2010 refers to partnered operations as “CRU-led”.⁵⁶ We discuss this further in chapters 10 and 11 where we discuss detention issues.

[45] In our view, this characterisation of Operation Burnham as a CRU-led operation, supported by NZSAS, was misleading and likely to result in misunderstandings on the part of ministers and the public. We say this for four reasons:

- (a) First, as we outlined in chapter 3, although Operation Burnham was an ISAF operation with all the requirements and disciplines that such operations involved, the push for an operation into Tirgiran Valley came from the New Zealand forces. While the insurgents from that region posed a threat for Afghan authorities and the general population in Bamyan province, they posed a serious and immediate threat to the security of the NZPRT, as they had recently demonstrated. It was NZDF’s desire to deal with that immediate threat that drove the operation.

⁵³ NZSAS (TF81) OPERATIONS IN BAGHLAN PROVINCE AUGUST AND SEPTEMBER 2010 (10 December 2010) (Inquiry doc 09/12).

⁵⁴ CRU AND NZSAS OPERATIONS IN BAGHLAN PROVINCE AUGUST AND SEPTEMBER 2010 (13 December 2010) (Inquiry doc 09/27).

⁵⁵ “Dot point brief for VCDF” (22 March 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 261.

⁵⁶ Cable re Visit of Minister of Defence and CDF to Afghanistan 18 022 August [2010] – Detainees (2 September 2010) (Inquiry doc 05/36) at [2].

- (b) Second, in reality the CRU was not sufficiently equipped or experienced either to plan or to execute an operation of the complexity of Operation Burnham. For example, the CRU personnel on Operation Burnham did not even have working night vision goggles. Nor did they have the operational skills to undertake an operation of that type. This is presumably the reason that their primary tasks were to guard the helicopter landing zone and to be part of the aerial response team, which was a reserve emergency force. The statement of the TF81 group commander of a helicopter landing zone security group, which included CRU personnel, provides some insight into their level of experience.⁵⁷ During the operation one of the CRU members fired a round at an unarmed man (but did not hit him). The group commander instructed him to stop shooting. The group commander's statement says "[i]t must be understood that to that time there had been a lot of support fire coming into the area and the [CRU] pers were young and had not been exposed to this type of situation before ...". This is, however, not to say that the CRU had no real role to perform on the operation. Apart from protecting the helicopter landing zone, some CRU personnel did go to A1, and events could have developed in a way that required them to play a more active role, for example if significant interactions with the local people became necessary for some reason.
- (c) Third, the General in charge of the CRU was not even briefed on the operation until 19 August 2010, two days before it took place.⁵⁸ Clearly, he and his staff would have had little opportunity to participate in the planning of the operation, which was by that stage well advanced. Indeed, the concept of operations specifically stated that the CRU's involvement in planning the operation was "low".⁵⁹
- (d) Fourth, Sir Jerry Mateparae (the Chief of Defence Force at the time of the operation) seemed to accept in evidence before the Inquiry that NZDF led the operation.⁶⁰ NZDF has also stated in its unclassified account of events for the Inquiry that the operation was a national task approved by the Chief of Defence Force.⁶¹

[46] We accept that Afghan authorities were involved in the operation to some extent. For example, the Afghan Ministry of Interior approved the operation and facilitated the issuing of arrest warrants for Kalta and Neimatullah on about 16 August 2010.⁶² In addition, CRU personnel were present during the operation, albeit largely in a passive role, although they could have become more involved if matters had developed differently. But to suggest that the CRU planned or led the operation, or were even involved in the planning or leading of the operation in a meaningful way, is inaccurate and misleading.

⁵⁷ Inquiry doc 02/06, above n 14.

⁵⁸ See chapter 3 at [44].

⁵⁹ 100822-ISAF-SOF-NSI-TF81 OP RAHBARI OBJ BURNHAM CONOPS (Inquiry doc 06/06) at 13.

⁶⁰ Evidence of Sir Jerry Mateparae, Transcript of Proceedings, Public Hearing Module 4 (16 September 2019) at 54.

⁶¹ NZDF *Memorandum for New Zealand Defence Force on the public and unclassified account of events at issue in Government Inquiry into Operation Burnham* Submission to Inquiry (7 November 2018) at 6.

⁶² Inquiry doc 06/06, above n 59, at 1 and 8.

Operation Nova

- [47] As we have said, the return operation to the villages took place almost six weeks after Operation Burnham, in the early hours of 3 October 2010.⁶³ The allegation that it was a revenge raid and that houses were “wrecked”⁶⁴ is not borne out by the information to which the Inquiry has had access.
- [48] After a slight delay due to aircraft availability, the ground force landed at approximately 2am at the landing zone halfway between A1 and A3. Part of the ground force went northwards along the valley towards A1. While the intention was that they would secure the area between A1 and A3 and only enter and search A1 and A2 if necessary, they did in fact enter and search both buildings. A1 and A2 were not locked and were clearly unoccupied. They were entered and searched without the use of explosives or a shotgun and did not appear to have been occupied since Operation Burnham.
- [49] The other part of the ground force entered and searched A3. Neither group found any items of interest or any people in any of the three buildings. They then searched the tree line to the west of the valley between A1 and A3 looking for possible tents which had been spotted on earlier drone footage, but none were found. Both groups returned to the helicopter landing zone and left the valley by helicopter at approximately 3am. During their time on the ground, the ground forces did not see or engage with anyone, nor did the supporting air assets.
- [50] The entrance to A3 sustained some damage during the operation when it was breached. However, this damage was not significant, and photographs from the operation show a rudimentary door hanging off a rope hinge.⁶⁵ Video footage shot on the operation by TF81 personnel has also been made available to the Inquiry and does not show any other damage caused to A3. The damage caused by the fire on Operation Burnham was still evident, although it had been repaired.
- [51] The statement in *Hit & Run*⁶⁶ that the houses were more damaged in this operation than they were in Operation Burnham is not supported by other information. Commercially available satellite imagery from 11 November 2010 shows that the only discernible damage to either building that was not visible on the drone footage immediately following Operation Burnham was a collapsed roof on the short side of the “L” at the eastern end of A1.⁶⁷ On the basis of evidence available to us, we are satisfied that this damage did not occur on Operation Nova. The cause of the damage is unclear but it is likely that the structural damage the building sustained during Operation Burnham was a contributing factor to the roof collapsing.
- [52] Although the operation was stated to be a deliberate detention operation in relation to Maulawi Neimatullah,⁶⁸ it is not clear whether the TF81 leadership considered it likely that he would be captured. It may be that the primary purpose of the operation was not so much to capture Neimatullah but rather to maintain pressure on the insurgent group and to signal to them that Tirgiran Valley was not a safe haven. We say this because the intelligence that Neimatullah would be present on the night was somewhat ambiguous, and the sources available to us suggest that an important purpose of the operation was to make a point so as to reduce the threat to the NZPRT

63 Task Force 81-OpWatea-SITREP 40-10 (3 October 2010) (Inquiry doc 10/18).

64 Hager and Stephenson, above n 39, at 80–81.

65 Untitled-Nova 3 (3 October 2010) (Inquiry doc 10/17).

66 Hager and Stephenson, above n 39, at 80–81.

67 10 November 2010 is the earliest date after Operation Burnham on which commercially available satellite imagery shows a clear view of the valley.

68 DSO-CDF Brief Op Watea 05 Oct 2010 (5 October 2010) (Inquiry doc 10/40) at 12.

in Bamyan by forcing the insurgents to leave the Tala wa Barfak District. The operation was successful in this respect. Intelligence reporting indicated that, following the operation, locals put pressure on the insurgent leaders to leave the district.⁶⁹ Shortly after, Kalta and Neimatullah went to Pakistan.

Concluding comment

[53] Before leaving this description of the operations, we should make three points:

- (a) First, several media stories immediately after Operation Burnham stated that prisoners had been taken in the operation. The District Governor of Tala wa Barfak, Mohammad Ismail, was reported in one story as saying that four people were arrested; in another he was reported as saying that nine people were arrested.⁷⁰ In fact, no one was arrested during the operation.
- (b) Second, *Hit & Run* claims that besides searching A1, A2 and A3, teams of TF81 and CRU personnel conducted “house-to-house” searches in Naik.⁷¹ It says that one team searched five houses and another about 10 houses.⁷² In fact, the only buildings searched in the operation were A1, A2 and A3, and A2 was an agricultural building.
- (c) Finally, *Hit & Run* records the account of Din Mohammad, one of those said to have been injured in the operation. He said that he was staying with his family in three tents about 250 metres from the helicopter landing zone. He said that when the helicopter landed, their stock ran away and their tents were blown over. The adults took the children to holes in the ground to hide.⁷³ He said he was injured as a result of flying shrapnel. However, there is no support for this account in the video footage. Further, villagers interviewed by the lawyers who assisted the Inquiry in Kabul said that Din Mohammad was staying at Abdul Razaq’s house on the night of the operation. As we explain in chapter 5, it is likely this was the cache house.⁷⁴

⁶⁹ See, for example, 2010-10-08 Baghlan Atmospherics (Inquiry doc 06/03) at 2.

⁷⁰ See chapter 5 at [68] for further details.

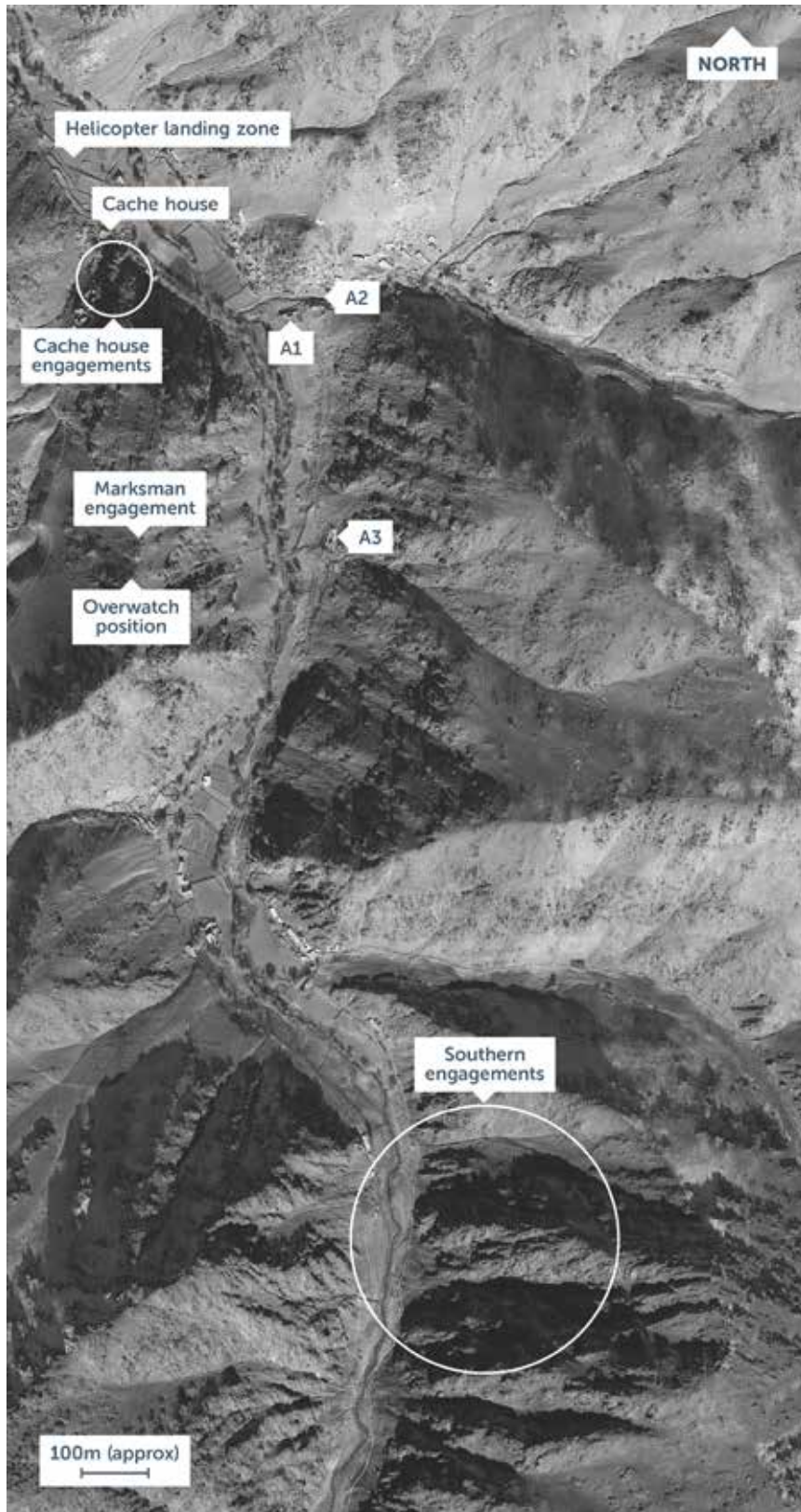
⁷¹ At 38.

⁷² At 40.

⁷³ At 48–50. Note that *Hit & Run* uses the spelling “Deen Mohammad”.

⁷⁴ See chapter 5 at [24]–[25].

Figure 4:
Key locations in Tirgiran Valley



Satellite image dated 25 April 2010, source: Digital Globe

Figure 5:
A1 and A2 before and after Operations Burnham and Nova



Before (satellite image dated 25 April 2010, source: Digital Globe)



After (satellite image dated 11 November 2010, source: Digital Globe)

Figure 6:
A3 before and after Operations Burnham and Nova



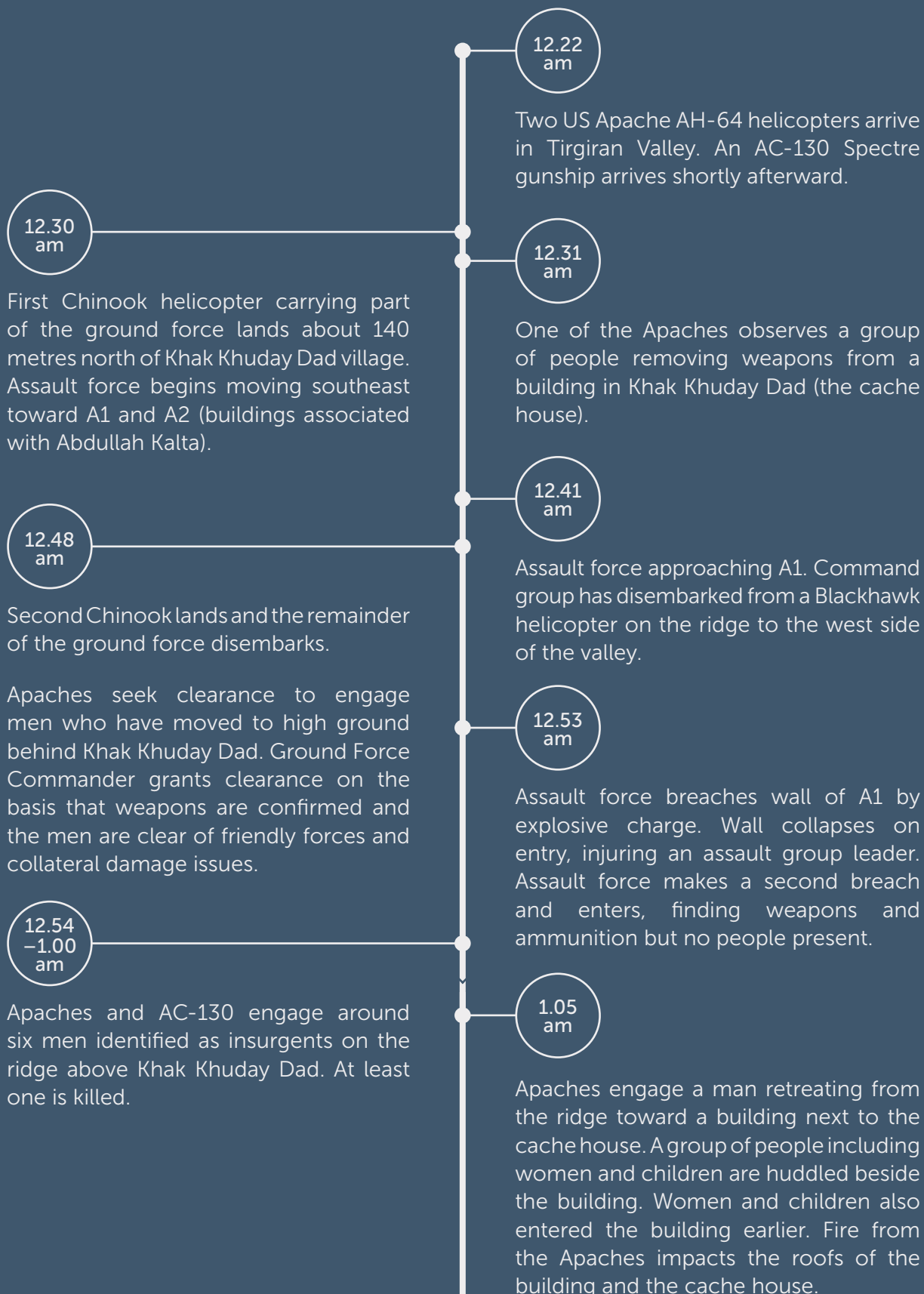
Before (satellite image dated 25 April 2010, source: Digital Globe)

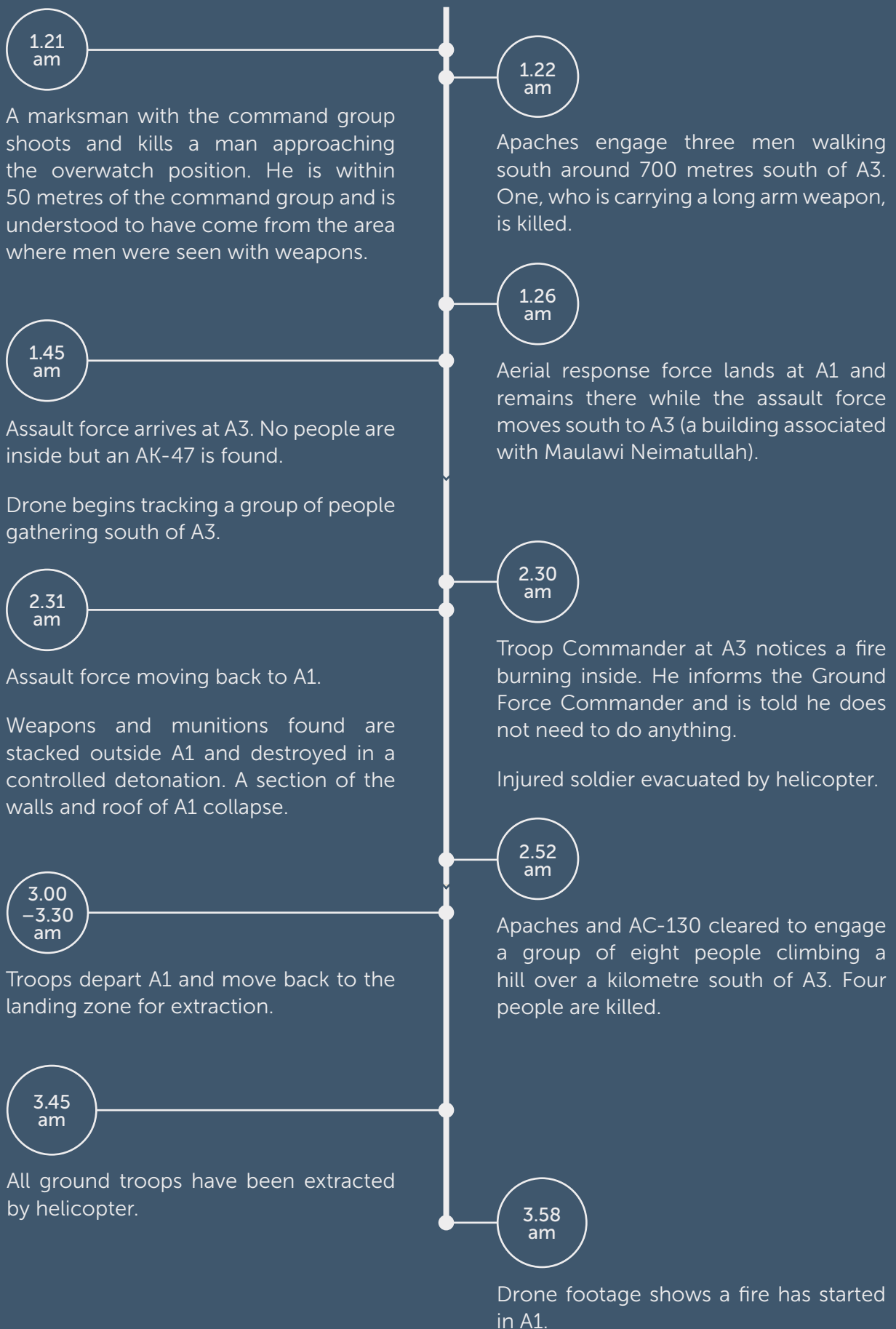


After (satellite image dated 11 November 2010, source: Digital Globe)⁷⁵

⁷⁵ Note that the fire damage that A3 sustained on Operation Burnham was repaired before Operation Nova on 3 October 2010. 11 November 2010 was the date of the first available commercial satellite imagery following Operation Burnham.

Timeline of key events during Operation Burnham 22 August 2010





5

Operations Burnham and Nova: casualties and property damage

Chapter 5

Analysing what happened

- [1] In chapter 4 we described what happened on Operations Burnham and Nova. We now move on to analyse what happened so as to consider two of the major allegations in *Hit & Run*, namely that:
- (a) Six civilians were killed and 15 were injured in the course of Operation Burnham.¹
 - (b) During the operations, much damage was inflicted on property in both Khak Khuday Dad and Naik by the New Zealand Special Air Service (NZSAS) personnel on the ground and by helicopter fire directed by the NZSAS. This damage was deliberate and motivated by a desire for revenge.²
- [2] In relation to casualties, the New Zealand Defence Force (NZDF) says that nine insurgents died in Operation Burnham,³ but accepts the possibility that some civilians may have been killed or injured as a result of errant rounds from one of the AH-64 Apaches.⁴ By contrast, *Hit & Run* says that those killed during the operation were all innocent civilians, since no insurgents were in the villages at the time.⁵ Similarly, their accounts of the extent of damage to civilian property differ. NZDF accepts that some rounds from a misaligned weapon on one of the Apache helicopters hit one or two of the houses in Khak Khuday Dad⁶ and that A1 and A3 in Naik were damaged;⁷ *Hit & Run* alleges the deliberate and systematic destruction of 12 houses in the two villages.⁸
- [3] *Hit & Run* also alleges that Operation Burnham was based on faulty intelligence, and that there were no insurgents in the village at the time.⁹ NZDF claims that there were insurgents in the villages on the night of the operation.¹⁰

1 Nicky Hager and Jon Stephenson *Hit & Run: The New Zealand SAS in Afghanistan and the meaning of honour* (Potton & Burton, Nelson, 2017) at 48–63 and 126.

2 At 39–41, 50 and 60–62.

3 Transcript: Lieutenant General Tim Keating answers questions on Operation Burnham as part of the Press Conference with Commodore Ross Smith and Colonel Lisa Ferris (28 March 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 343.

4 Colonel Grant Motley “Location and events of Operation Burnham” (Public Hearing Module 1, 4 April 2019) at 7–8; NZDF “Operation Burnham Information Pack” <www.nzdf.mil.nz> at 9, 18 and 24; New Zealand Defence Force *Memorandum for New Zealand Defence Force on the public and unclassified account of events at issue in Government Inquiry into Operation Burnham (“Unreferenced account of events”)* Submission to Inquiry (7 November 2018) at 8; Transcript: Lieutenant General Tim Keating answers questions on Operation Burnham at Press Conference, above n 3, at 7–9.

5 At 30–31, 55 and 63.

6 NZDF’s Unreferenced Account of Events at Issue indicates that one house was hit, while the Operation Burnham Information Pack says two (*Unreferenced account of events*, above n 4, at 8; NZDF *Operation Burnham Information Pack*, above n 6, at 9).

7 *Unreferenced account of events*, above n 4, at 10–11.

8 At 36–37, 39–41, 50–53, 61 and 130.

9 At 30–31, 44, 54 and 68.

10 See, for example, NZDF “NZDF operations in Bamyán Province on 22 August 2010” (20 April 2011) New Zealand Defence Force <www.nzdf.mil.nz>; CRU AND NZSAS OPERATIONS IN BAGHLAN PROVINCE AUGUST AND SEPTEMBER 2010 (13 December 2010) (Inquiry doc 09/21) at [3]; *Unreferenced account of events*, above n 4, at 7.

- [4] These allegations are primarily reflected in two clauses in the Terms of Reference. First, one of the Inquiry's purposes is to seek to establish the facts in connection with the allegations of wrongdoing on the part of NZDF personnel during the operations.¹¹ Second, the Terms of Reference require us to consider the basis for the operations.¹² In relation to Operation Burnham, that includes the question whether there were any insurgents in the villages at the time of the operation.¹³
- [5] Against that background, this chapter addresses the following questions:
- (a) Were insurgents in the villages during Operation Burnham?
 - (b) Were innocent civilians killed or injured during the operation?
 - (c) What was the extent of damage to property in the villages?
 - (d) Was the conduct of Task Force 81 (TF81) personnel on the operation motivated by a desire for revenge?
- [6] The analysis in this chapter seeks to establish what actually happened during the operation, as opposed to what was known or believed by NZDF personnel at the time. The knowledge of NZDF personnel is discussed in chapter 6, where we address a related aspect of our Terms of Reference, requiring us to consider NZDF's assessment as to whether Afghan nationals in the area of Operation Burnham were taking a direct part in hostilities or were otherwise legitimate targets.¹⁴ Chapter 6 sets out the applicable legal framework and its application to the facts, including the requirements that must be met before a person can be regarded as a legitimate target in a non-international armed conflict; and the basis for NZDF's assessment that people engaged in the operation were legitimate targets.
- [7] Before we begin our analysis of the contending positions, we should say something about the use of the term "insurgents". As we discuss in more detail in chapter 6, whether individuals were subjected lawfully to direct attack in an operation in a non-international armed conflict depended on whether they were:
- (a) members of an organised group that was party to the conflict, in this instance principally the Taliban; or
 - (b) directly participating in hostilities.

When the authors of *Hit & Run* said that no insurgents were in the villages during Operation Burnham, they presumably had both of these categories in mind. That is, they were saying that no

¹¹ *Terms of Reference: Government Inquiry into Operation Burnham and related matters* (11 April 2018), cl 6.1.

¹² Clause 7.4.

¹³ From the perspective of the NZDF forces involved in Operation Burnham, the significant question is not whether there were in fact insurgents in the villages but rather whether they had reasonable grounds to believe that there were. However, we are considering whether insurgents were in fact in the villages because *Hit & Run* alleges there were none, and that the operation was based on faulty intelligence.

¹⁴ Clause 7.2. As we discuss further in chapter 6, the Inquiry has no jurisdiction to consider the assessments made by the United States air assets. Our focus is on the actions and knowledge of TF81 personnel. An investigation was conducted by United States authorities shortly after the operation and it concluded the actions of the United States air assets were in accordance with the applicable rules of engagement and tactical directives: see Headquarters United States Forces—Afghanistan "Findings and Recommendations" *AR 15-6 Investigation—Tigiran Village* (30 September 2010) (Inquiry doc: United States Government FOIA release).

members of the Taliban or other insurgent groups were in the villages at the time, and no people in the villages were directly participating in hostilities during the operation.

- [8] However, from the Inquiry's perspective, the distinction between these two categories is important. Operation Burnham was directed at capturing two people from the first category, both identified on the Joint Prioritised Effects List (JPEL) as known insurgents. It is relevant to know whether they were in fact in the villages at the time, and whether they had any associates with them, as this goes to the justification for the operation, in particular whether the intelligence relied on by TF81 was accurate.
- [9] Once the operation commenced, a different analysis applies. As matters transpired, none of those killed were identified during the operation as particular individuals who were known members of an organised group that was party to the conflict in Afghanistan—identification of that type was not possible in the circumstances. Rather, those killed must have been perceived as being in the second category—persons directly participating in hostilities (or reasonably perceived as directly participating in hostilities).
- [10] For the purposes of this chapter we propose to use the term “insurgents” in the broad sense used by the authors, and “civilians” to describe others. In the first section, we will address the evidence relevant to whether the objectives of the operation—Maulawi Neimatullah and Abdullah Kalta—or other insurgents known to NZDF were in the area at the time of the operation. We will also address what the evidence indicates about whether other insurgents were present during the operation. This latter analysis is relevant to, but not determinative of, the issue of whether any innocent civilians were killed during the operation.
- [11] Before we begin, it is important to note two limitations that affect the analysis in this chapter. First, although there is a legal requirement to register deaths in Afghanistan, there is no penalty for not doing so. A document jointly produced by the World Health Organization and Afghan Government in 2015 stated that “[t]here is little death registration and cause of death data is often not recorded accurately”.¹⁵ Death certificates are not routinely issued in Afghanistan.¹⁶ The Independent Directorate of Local Government document listing dead and wounded from the operation, which is reproduced in *Hit & Run*¹⁷ and will be referred to in more detail later, appears to have been an ad hoc document endorsed by a local official at the request of the villagers, rather than a standardised, formal record of death and injury. As far as we can tell, no Afghan government official visited Khak Khuday Dad and/or Naik at the time to independently verify the villagers' claims. In fact, given the significant insurgent presence in the area, it may not have been safe for them to do so.
- [12] Second, Afghan naming conventions create some difficulties for outsiders. Many Afghans share the same names and, even within the small population in Khak Khuday Dad and Naik, we have seen multiple cases of two or three individuals sharing the same name. Surnames are uncommon, and first names are often compounds of two names, but an individual will often only be known by the less common of the two. The use of honorifics, sometimes on what appears to be an inconsistent basis, adds to the confusion. Further, transliterations vary widely depending on

¹⁵ World Health Organization, Afghan Ministry of Interior and Afghan Ministry of Public Health *Afghanistan Civil Registration and Vital Statistics Country Strategic Plan 2016 to 2020* (December 2015) at 11.

¹⁶ Ministry of Foreign Affairs of the Netherlands *Country of Origin Report on Afghanistan* (November 2016) at 54.

¹⁷ At 126–127.

who has written the name down.¹⁸ NZDF documents are inconsistent when transliterating even common names such as Mohammad. All this makes identifying specific individuals referred to in documentary evidence a difficult task and one which not only the Inquiry but also NZDF and the authors of *Hit & Run* have had to confront. That said, in respect of men at least, it seems common to identify them by reference to their fathers (for example: AB, son of XY), which does provide some assistance where that information is available.

- [13] Finally, we note that some of the villagers in Naik and Khak Khuday Dad were important sources for the account in *Hit & Run*.¹⁹ As we will explain in the pages that follow, there are aspects of their accounts which we cannot accept because they are inconsistent with the objective evidence available to us. Even so, the fact that a person gives an account that contains errors or misperceptions does not necessarily mean that they are seeking to deceive or that their entire account must be rejected. As is well known, people perceive and recall events in different ways and human memory is fallible. Further, even if we were to conclude that a person had been deliberately misleading in some respect(s), that would not necessarily mean that all they say must be rejected.²⁰

Were insurgents in the villages?

- [14] As we have said, *Hit & Run* says no insurgents were in the villages at the time of Operation Burnham as they had all gone up into the mountains. It claims that the intelligence indicating insurgents would be in the villages was faulty.²¹
- [15] However, it is now not disputed that at least two leaders of the insurgent group involved in the 3 August attack resulting in Lieutenant O'Donnell's death were in Naik on the night of the operation. They were Maulawi Neimatullah (Objective Nova) and Qari Miraj (Objective Yamaha). Both have confirmed this to Mr Stephenson directly.²² Miraj also confirmed he had two bodyguards with him, and that he, his bodyguards and Neimatullah were armed. Although Miraj was not a specific target of the operation, he was on the JPEL.²³ He told Mr Stephenson that his presence in Naik before the operation was well known, as he attended the mosque five times a day.
- [16] The house referred to by NZDF as A3 was Neimatullah's house. The evidence indicates that Neimatullah and Miraj had been at the house with their bodyguards on the night of the operation, and were nearby (although not actually in the house) when the helicopters approached. Neimatullah's father and brother were at the house and Miraj returned to warn them. Miraj, one of Miraj's bodyguards and Neimatullah's father and brother all fled the village together, travelling along the valley to the south. They were engaged by air assets and Neimatullah's father and brother were killed (as we discuss further below), but Miraj and his bodyguard escaped into the

¹⁸ Karine Megerdooian *The Structure of Afghan Names* (MITRE Corporation, November 2009).

¹⁹ The Inquiry also conducted its own interviews with some of the villagers, through lawyers it engaged in Afghanistan.

²⁰ See, for example, *R v A (CA301/05)* [2007] 2 NZLR 218 (CA) at [77].

²¹ At 30–31, 54–55, 75–77 and 107.

²² Mr Jon Stephenson "Insurgent leaders admit they were in Afghanistan village raided during NZ SAS's Operation Burnham" *Stuff* (online ed, 20 June 2019) <www.stuff.co.nz>. We understand Mr Stephenson conducted his interviews with Miraj and Neimatullah in 2017.

²³ Qari MIRAJ Storyboard OP TRENTAM TBC 3 Sept 2010 (3 September 2010) (Inquiry doc 10/13) at 2.

mountains.²⁴ It appears that Neimatullah also fled into the mountains, but separately from this group, although we cannot be certain of this on the evidence available to us.

- [17] The conclusion that Miraj and Neimatullah were in Naik on the night of the operation is consistent with the state of A3 at the time it was searched²⁵ and is based both on contemporaneous post-operation intelligence reporting and on information provided by Miraj and Neimatullah to Mr Stephenson after the publication of *Hit & Run*. It may be that Abdullah Kalta (Objective Burnham) was also in Naik and fled when the helicopters arrived, although the evidence on this is equivocal. Kalta's house, A1, showed signs of recent occupation but that does not necessarily mean he was there on the night of the operation.
- [18] Two of the three villagers who filed affidavits in the judicial review proceedings that preceded this Inquiry deposed that no insurgents were in the area at the time of the operation. Some villagers who were interviewed on our behalf by lawyers in Afghanistan acknowledged that members of the Taliban had homes in the villages, including Neimatullah and Kalta, but said that they were recruiters rather than fighters. However, another Afghan interviewee indicated that Neimatullah and Kalta were active fighters and that between 10 and 15 of their supporters were in the area, which is consistent with the contemporaneous intelligence reporting.²⁶
- [19] Our conclusion is that Neimatullah and Miraj were in Naik at the time of the operation, along with Miraj's two bodyguards. We cannot be certain that Abdullah Kalta was present, but he may have been. It follows from this that we do not accept the allegation made in *Hit & Run* that the intelligence that led to the operation was faulty—in reality, it was substantially accurate.
- [20] As we indicated in chapter 3,²⁷ the intelligence reporting available to the New Zealand Provincial Reconstruction Team (NZPRT) and to TF81 had, since at least 2009, identified the Tala wa Barfak District as having a significant insurgent presence.²⁸ It indicated that some insurgent leaders and their followers regarded the area as a safe haven and used it as a base for their attacks into other areas. Reporting identified Tirgiran (and sometimes Naik specifically) as a place where several insurgents or their families had homes and where, from time to time, significant numbers of insurgents gathered or were present.²⁹ Reporting indicated that the Taliban may have had a patrolling guard force in the valley at night.³⁰ In short, it was a place frequented by insurgents.
- [21] This assessment is supported by what came to light in the course of the operation, in particular the weapons discovered in buildings in Naik (A1 and A3) and observed in Khak Khuday Dad

²⁴ Mr Jon Stephenson told us that during one of his interviews with Qari Miraj in 2017, Miraj said as he was escaping from Naik he attempted to shoot down a helicopter that was flying low over a ridgeline close to his position. However, the rocket-propelled grenade (RPG) launcher he was using malfunctioned and the grenade failed to fire. The Inquiry has been unable to confirm whether this incident occurred. The available video footage does not show anyone to the south of A3 carrying an RPG launcher, although that is not determinative as the footage is limited in its coverage.

²⁵ A3 showed signs of recent occupation and a hurried exit. The house was warm, the cooking fire was burning and there was warm food.

²⁶ See, for example, 100822-ISAF-SOF-NSI-TF81 OP RAHBARI OBJ BURNHAM CONOPS (22 August 2010) (Inquiry doc 06/06) at 6; PRT Bamyān SUPINTREP 004-10 (11 August 2010) (Inquiry doc 09/34) at 2; Reported ORBAT of Ins Involved (Correct as 0081230 Aug 10) (8 August 2010) (Inquiry doc 08/23).

²⁷ See chapter 3 at [12]–[14].

²⁸ NZPRT Bamyān Daily Intsum 268-09 (09 October 2009) (Inquiry doc 09/37); SUPINTREP 004 10 31 MAY 10 (31 May 2010) (Inquiry doc 08/22).

²⁹ See, for example, Inquiry doc 08/22, above n 28, at [6], [17], [28], [32] and [40].

³⁰ 100819-ISAF-SOF-NSI-TF81-OP-RAHBARI-OBJ-BURNHAM-CONOPS (19 August 2010) (Inquiry doc 07/13).

(as shown in the video footage of men removing weapons from the so-called cache house),³¹ as well as other video footage showing men carrying long arm weapons, as we now explain in more detail.

- [22] At least three houses (including those of Kalta and Neimatullah) contained weapons or weapons caches, and some of the weapons found can only be explained as weapons for use in the insurgency. Besides AK-47s (which are military weapons but may be capable of innocent explanation given Afghanistan's history), the weapons found or observed on the video footage included RPG launchers and their associated components (rockets and explosive warheads) and ammunition for both heavy machine guns and light/medium machine guns. These types of weapons are capable of bringing down aircraft.
- [23] The ground forces found an AK-47 (and possibly also an RPG motor, but the evidence is conflicting) in Maulawi Neimatullah's house in Naik (A3).³² In addition, Neimatullah's father took an AK-47 with him when he fled.³³ The ground force also found a weapons cache in Abdullah Kalta's house in Naik (A1). This contained an RPG launcher with seven grenades and a bipod, five RPG rocket motors, a full 7.62mm magazine, a drum magazine, five tins of loose 7.62mm ammunition, one tin of 14.5mm armour-piercing incendiary ammunition, two non-disintegrating belts of 7.62mm ammunition, some 9mm rounds and a leather pistol holder.³⁴ Finally, there was a weapons cache in what NZDF described as the cache house in Khak Khuday Dad.³⁵ This house was not connected with an objective (or target) of the operation and so was not searched, but the weapons system video from the Apache helicopters shows men removing an RPG launcher with bipod deployed, and at least two and possibly three long arm weapons³⁶ from this house shortly after the first CH-47 Chinook landed and disembarked members of the ground force. A later video clip shows a man moving away from the house with what appears to be a heavy bag (which could have contained ammunition or other weaponry, although that could not, for obvious reasons, be verified) and handing it to another man carrying a probable long arm weapon.³⁷
- [24] Mr Hager said in his public comments that the so-called cache house belonged to the parents of another insurgent, Abdul Ghafar.³⁸ He said that the people removing the weapons from the house were other villagers "helping to hide Abdul Ghafar's two weapons in case the house is searched

31 Some of the video footage has been publicly released by the United States in conjunction with the public release of a redacted version of the AR 15-6 Report (Inquiry doc: FOIA release, above n 14): see, for example, "Operation Burnham: Helicopter videos show men with weapons" (28 June 2019) *Radio New Zealand* <www.rnz.co.nz>.

32 EOD INCIDENT REPORT-OBJECTIVE BURNHAM (Inquiry doc 09/11) at [3]; OBJ BURNHAM POST OP TGT SKETCHUP RENDERS (Inquiry doc 11/30) at [6].

33 Miraj interview with Mr Stephenson, referred to in "Insurgent leaders admit they were in Afghanistan village raided during NZ SAS's Operation Burnham", above n 22. Miraj referred to the weapon carried by Mohammad Iqbal as a Kalashnikov (AK-47 is an abbreviation for Avtomat Kalashnikova model 1947, which is also commonly shortened to Kalashnikov).

34 Inquiry doc 09/11 above n 32, at [2].

35 Colonel Grant Motley "Location and events of Operation Burnham" (Public Hearing Module 1, 4 April 2019) at 5.

36 The image quality precludes identification of these weapons but they are obviously not either handguns or weaponry larger than a long arm.

37 The weapons analysis in this paragraph and elsewhere is based on the advice of the Inquiry's independent imagery and geospatial analyst. He used the term "long arm weapon" where he did not consider he could properly identify the particular type of weapon and used the terms "confirmed", "probable" and "possible" in his analysis.

38 Boris Jancic "Secret video of Kiwi soldiers' attack on Afghan village released" (online ed, 28 June 2019) *The New Zealand Herald* <www.nzherald.co.nz>; Nicky Hager "Briefing on new US Freedom of Information Act (FOIA) materials on Operation Burnham" (28 June 2018) <www.nickyhager.info> at 5. *Hit & Run* claims that Abdul Ghafar (one of the three sons of Abdul Razaq) was the NZSAS's main target in Khak Khuday Dad, above n 1, at 54. The book says that he was not present during the operation and the TF81's intelligence was faulty in respect of Abdul Ghafar's whereabouts. However, the material available to the Inquiry makes it clear that Abdul Ghafar was not in fact a target of the Operation.

and the weapons get the family into trouble”.³⁹ *Hit & Run* states that Abdul Ghafar was one of the sons of Abdul Razaq, that Razaq’s house was deliberately attacked during the operation, and that his wife, daughters and grandsons were among the injured.⁴⁰

- [25] We agree that Abdul Ghafar was an insurgent and that the cache house did likely belong to his father, Abdul Razaq. However, we have some difficulty with other aspects of Mr Hager’s explanation.
- [26] First, the available video clips show more than two weapons either being removed from the house or in the vicinity of the house soon after the first Chinook landed and disembarked its passengers. We have described these in paragraph [23]. We are satisfied that the weapons cache in Abdul Razaq’s house was more extensive than the two weapons to which Mr Hager refers.
- [27] Second, it appears from the interviews conducted with Afghan villagers that several houses in the immediate vicinity of the cache house belonged to members of Abdul Razaq’s extended family. This included the families of four of Abdul Razaq’s nephews who are referred to in *Hit & Run*: Abdul Faqir and Abdul Qayoom, both of whom were allegedly killed in the operation, and Abdul Khaliq and Abdul Qadus, whose wives and children are alleged to have been among the injured. We are satisfied based on intelligence material available to us that this extended family had various links to the insurgency apart from Abdul Ghafar. It seems probable that some of the male members of that extended family are those seen on the video footage taking weapons from the cache house. We emphasise that this does not mean no civilian casualties occurred in the area or that all members of the family were insurgents (we return to these issues below). However, it is relevant to identifying whether the men seen with weapons, and subsequently engaged by the air assets, were civilians or insurgents.
- [28] Third, the explanation that the people moving the weapons from Abdul Razaq’s house were non-combatant villagers or family members who were seeking to disassociate themselves from his activities seems implausible in light of the available video evidence and our assessment of how innocent civilians might have been expected to act in the circumstances. Certainly, no villager conveyed such an explanation to the Inquiry (indeed, they maintained that there were no weapons in Khak Khuday Dad except hunting rifles). Moving weapons such as an RPG launcher with bipod deployed in the open during a military operation with helicopters circling overhead would place an innocent civilian in a very dangerous situation—so obviously dangerous that it is difficult to see why an innocent civilian would do it.
- [29] Having retrieved the weapons from the house, the men began to climb the hill behind the cache house in small groups of two or three. Our independent imagery and geospatial analyst assessed some of them to be carrying probable long arm weapons. Again, this seems an unsafe and implausible action for innocent civilians to take. If removing and hiding Abdul Ghafar’s weapons was the objective, one would expect the men to have returned to the relative safety of their homes once the weapons were safely hidden. In their homes, they would not be visible to aircraft or passing troops.
- [30] *Hit & Run* suggests the men were running to high ground to escape firing from the Apaches⁴¹ and/or because “[l]ocals across Afghanistan had heard about people being killed or taken away

³⁹ Hager, above n 38, at 5.

⁴⁰ At 53–54.

⁴¹ At 59–61.

to detention centres during night-time special forces raids.”⁴² We do not find that a convincing explanation, for three reasons:

- (a) First, it is clear that, at the time the men began climbing the hill behind the cache house, the aircraft had not yet fired any rounds. It is difficult to accept, therefore, that the men were seeking to escape fire from those aircraft.
- (b) Second, women and children remained in and around the buildings that the men left. It seems surprising that civilian men would have fled their houses to escape aircraft fire while leaving women and children behind in harm’s way.
- (c) Third, in the interviews conducted with Afghan villagers by lawyers in Afghanistan for the Inquiry, none referred to a fear of detention by Special Forces as a reason why men may have fled their houses. In this respect we note that the villages were remote and had not previously been the location of coalition operations. Even if fear of detention existed in other parts of Afghanistan where night raids were common, we have seen no evidence to suggest the same fear existed in these villages. Rather, interviewees said the men killed were fleeing the helicopter fire (an explanation we do not accept).

- [31] It is possible that the men who removed the weapons from the cache house intended to hide them in a cache site among the rocky outcrops to the south of the houses, despite what we have said above. But that does not explain the fact that men with probable or possible long arm weapons can be observed on the video footage at various places, although some could have been the same individuals moving to different locations. For example, besides the people mentioned above, the Inquiry’s imagery and geospatial analyst identified two men, both with probable long arm weapons, on the other side of the tree line from the assault force moving to A3; a third man with a possible long arm weapon running from a compound near A2; and a fourth man with a possible long arm weapon walking along a track below A3.
- [32] This view of what the imagery shows is reflected in an email sent by TF81’s Senior National Officer to the Director of Special Operations in Wellington on 27 August 2010.⁴³ Attached to it were two still images taken from the Apache weapons video. One image is of the two men behind the tree line when the assault force was moving from the helicopter landing zone to A1. The email says that the two men were armed and were later engaged and killed by the Apaches. The text notes that, although the still image is “grainy”, “in full motion video, weapons types and PKM ammunition belts are crystal clear”. The second image shows the men emerging from the cache house with weapons, which are identified as being “AK47, RPG and PKM” (a PKM is a light machine gun).
- [33] In light of the video evidence, we consider it likely that the men who removed the weapons were attempting to obtain a strategic position on high ground, from which they could, if the opportunity arose, fire on aircraft and/or the ground force. Such action would be consistent with the intelligence reporting before the operation, which indicated a significant armed insurgent presence in the area.

⁴² At 56.

⁴³ Email from Lt Col McKinstry to Col Kelly and Lt Col Parsons “External Release Update Obj Burnham Op 21 Aug 10 Update 4” (26 August 2010, 11.27pm) (Inquiry doc 02/13). The text was reproduced for a briefing to the CDF: see 2010-08-31 CDF Ops Brief (Inquiry doc 13/22).

- [34] We return for a moment to the topic of “pattern of life” analysis, referred to in chapter 3.⁴⁴ As we said earlier, pattern of life analysis is intended to assist forces who are planning an operation to obtain some understanding of behaviour, habits, living circumstances and such like of both the target(s) of an operation and the general population in the locality where the operation is to occur. Pattern of life analysis has an additional role, however.
- [35] Through their experience over multiple deployments in Afghanistan, coalition forces, including the NZSAS, considered that they had developed an understanding of the way in which civilians and insurgents were likely to behave during operations. That experience indicated that innocent civilians generally remained in their houses during night raids. This was because the civilian population in Afghanistan had realised over time that remaining inside was the safest strategy during an operation, and that was often what innocent civilians were advised to do on “call outs”.⁴⁵ While the fact that a person left a house during a night raid was insufficient on its own to make that person a legitimate target, leaving did raise a question about their intentions, and this was something that coalition forces could consider alongside other factors. Accordingly, when, during the course of a night operation, men were observed in the open, carrying weapons and acting in an organised or tactical way (for example, walking in a spaced single file to an apparent objective or going as an organised group to high ground), coalition forces might well conclude that there could be no innocent explanation for their behaviour.
- [36] There is a reservation to be noted, however. As we indicated earlier, there had been no coalition presence in Tirgiran Valley for some years, if ever. Nor was there any significant central Afghan Government presence. Accordingly, it may be that civilians in the villages did not act exactly as civilians would have acted in areas where coalition or government activities were more common. As we described in chapter 4, some people who were obviously innocent civilians did venture from their homes during Operation Burnham, albeit not many. Further, as we have already said, the fact that people run away from their houses during an operation does not, of itself, mean that they are insurgents or actively participating in hostilities.⁴⁶
- [37] Despite that reservation, we consider that the pattern of life analysis does assist in determining whether individuals were insurgents. In the context of Operation Burnham, the air crews identified men who took up weapons, including an RPG launcher with bipod deployed, as the first Chinook arrived. Some began to climb the ridge behind Khak Khuday Dad. Two armed men had been observed behind the line of trees as the assault force went towards A1. On the face of it, none of this appears to be the conduct of innocent civilians.

⁴⁴ See chapter 3 at [58]–[62].

⁴⁵ Early in an operation, an announcement was often made explaining what was happening and advising innocent civilians to remain inside their homes. Such call outs also often called on the alleged insurgents to leave their homes and surrender peacefully.

⁴⁶ For the sake of completeness, we note that some Non-Governmental Organisations suggested that ISAF forces may have interpreted “hostile intent” more broadly during night operations than they would have during daylight operations, resulting in avoidable civilian casualties: Open Society Foundations and The Liaison Office *The Cost of Kill/Capture: Impact of the Night Raid Surge on Afghan Civilians* (19 September 2011). However, as the planning documents for Operation Burnham show, one of the attractions of night operations from an operational perspective was that generally fewer civilians were out and about, and therefore civilian casualties were considered to be less likely (see Inquiry doc 07/13, above n 30, at 2). In any event, this is not a matter we are able to assess. As we noted in chapter 3, data reported by UNAMA in 2011 indicated that night raids resulted in relatively few civilian casualties, but UNAMA observed that it was difficult to obtain accurate data so the true number may have been greater: United Nations Assistance Mission in Afghanistan *Afghanistan Midyear Report 2011: Protection of Civilians in Armed Conflict* (Kabul, July 2011) at 3 and footnote 28.

- [38] We acknowledge that there is no evidence that any of the weapons carried by men visible on the video footage were fired during the operation.⁴⁷ However, in terms of International Humanitarian Law and the rules of engagement that is not a pre-requisite for determining that people were actively participating in hostilities. As we discuss in more detail in chapter 6, preparatory measures may be treated as forming part of the required hostile act.⁴⁸
- [39] Accordingly, we are satisfied that there were insurgents in the villages on the night of Operation Burnham. These included Maulawi Neimatullah (one of the targets of the operation), Qari Miraj (another known insurgent on the JPEL) and Miraj's two bodyguards in Naik, and some men in Khak Khuday Dad who had probable links to the insurgency and acted in a way that appeared consistent with direct participation in hostilities (a matter to which we return in chapter 6). The intelligence which was the basis of the decision to conduct the operation was substantially accurate.⁴⁹ That leads us to the question whether there were civilian casualties, to which we now turn.

The casualties—civilians, insurgents or both?

- [40] This aspect of the Inquiry has proved the most difficult. As we have said, the authors of *Hit & Run* allege that six named civilians were killed, including a child (Fatima); and that 15 civilians, also named, were injured. They say none were insurgents. The Inquiry has attempted to examine these claims in a number of ways. Before describing what we have done and stating our conclusions, we make three important preliminary points.
- [41] First, if the Inquiry were to determine that no civilians were in fact killed or injured in the course of Operation Burnham, that would not end the matter. Even without civilian casualties, there would still be issues as to TF81's conduct during the operation and whether NZDF should have conducted its own investigation (apart from any investigation carried out by or on behalf of the International Security Assistance Force (ISAF)), given the persistent reports of civilian deaths and injuries. We return to these issues in chapters 6, 8 and 9.
- [42] Second, as is common in situations of armed conflict, the parties to the conflict in Afghanistan carried out "information operations" aimed at winning the hearts and minds of the local population. Civilian casualties resulting from coalition operations have been described as a "common and powerful theme" of Taliban information operations.⁵⁰ Although the Taliban caused the majority of civilian deaths in Afghanistan,⁵¹ they used reports of civilian casualties on coalition operations as a way to erode international and local support for the coalition. Taliban information operations "frequently exaggerated, and at times entirely fictionalized, civilian casualties" from coalition

47 As noted in footnote 24, it is possible that Qari Miraj attempted to shoot at a helicopter but that is not shown on the video footage and we have been unable to confirm whether it occurred.

48 Chapter 6 at [43](a).

49 As we noted in footnote 13, from TF81's perspective, the decisive question was whether they had reasonable grounds to believe that insurgents were in the villages. Consequently, if the intelligence had turned out to be incorrect, that would not necessarily have meant that the operation was unjustified.

50 See Mercedes Stephenson "Information Operations in Afghanistan from 2001–2012" (Thesis submitted in partial fulfilment of requirements for degree of Master of Strategic Studies, Graduate Program in Military and Strategic Studies, Calgary, Alberta, December 2014) at 40–49.

51 United Nations Assistance Mission in Afghanistan, Afghanistan Independent Human Rights Commission, *Afghanistan Annual Report 2010, Protection of Civilians in Armed Conflict* (March 2011) at 1.

operations.⁵² Further, the Taliban were effective in using the international media and often claimed “inflated or fictitious civilian casualties in inaccessible areas, where, for security reasons, international journalists could not travel to verify accounts”.⁵³ We mention this because it was part of the reality against which coalition forces operated in Afghanistan and was a factor in how NZDF reacted to the allegations of civilian casualties after Operation Burnham. We should reiterate the obvious point, however, that coalition forces did cause many civilian casualties in Afghanistan⁵⁴ and the fact that such Taliban information operations were common does not mean that there were no civilian casualties on Operation Burnham.

- [43] Third, caution must be exercised when considering intelligence and similar reporting about whether a person was a civilian or an insurgent. On its own, the fact that a person was reported to have links to the Taliban is inconclusive. As we have said, Tirgiran Valley had a strong Taliban presence. As we also explained in chapter 2, it is common for people in Afghanistan to have a strong sense of loyalty to their family, village and tribal or ethnic groups. In that context, it is likely that many people living in the area would have had associations with Taliban members. That would not necessarily indicate that they were themselves Taliban members or supporters, or active insurgents. In addition, intelligence reporting came from a variety of sources and in some instances we have had little information on which to assess its reliability. As a result, while we will refer to contemporaneous intelligence reporting where relevant, we treat it with caution.
- [44] As we explained in chapter 1, the Inquiry was unable to hear evidence from the villagers represented by McLeod & Associates directly as they withdrew from the Inquiry. This was disappointing, as they were either relatives of those said to have been killed or people who allegedly suffered injuries in the operation. Despite this, the Inquiry was able, through lawyers in Kabul, to raise issues about their accounts with Fatima’s parents and with Islamuddin’s father and brother, and to obtain information from other villagers that proved useful. Interviews were also conducted with various officials and other people in Afghanistan with relevant information about the alleged civilian casualties.
- [45] To determine whether there were any civilian casualties, the Inquiry has assessed a range of material. This included the interviews just mentioned; the affidavits of three of the villagers in their 2017 judicial review proceeding; transcripts of interviews with villagers and others conducted by Mr Stephenson; satellite imagery and video footage; the ISAF Incident Assessment Team’s preliminary report and the United States AR 15-6 Report; accounts of various agencies such as the Afghan Independent Human Rights Commission (AIHRC); contemporaneous news media reports; interviews with ground force personnel; intelligence material; and hospital, health centre and university records.
- [46] Before we set out our views on the basis of this material, we should say something about some of the photographs appearing in *Hit & Run*.

What do the photographs in *Hit & Run* establish?

- [47] We had hoped to find objective evidence that would help to establish whether civilian casualties resulted from Operation Burnham. With the assistance of Mr Stephenson, we obtained the

⁵² Stephenson, above n 50, at 43.

⁵³ Stephenson, above n 50, at 44 (footnote omitted).

⁵⁴ United Nations Assistance Mission in Afghanistan, above n 51, at 21.

photographs used in *Hit & Run* of some of those said to have been killed or injured in the operation and asked two independent experts to take the metadata from them to see what, if anything, that metadata might tell us. The independent experts undertook their analysis separately, not knowing what the other had concluded. In the event, their conclusions were largely the same.

- [48] We submitted the image of Fatima at page 52 of *Hit & Run* together with three other photographs said to be of her to our independent experts for their (separate) analysis. Both said that the photographs were taken on a Samsung GT-S7562 mobile phone on 30 October 2016 and 8 December 2016. The Samsung GT-S7562 was not introduced to the market until September 2012.
- [49] Images of Islamuddin, obtained from Mr Stephenson, were also submitted to our experts for analysis. The metadata from those indicates that they were taken on a Samsung GT-S7562 mobile phone on 8 December 2016, although another date, 1 January 2011, has been added to the metadata, apparently as a result of files being edited with Nokia Image Editor 2.7.4. One expert concluded that there were contradictory indications in the metadata as to whether some of the photographs of Islamuddin were photographs of photographs. As it transpired, however, the possibility that they were photographs of photographs was not something we had to resolve, for reasons we explain when we discuss the evidence in relation to Islamuddin's death.
- [50] At page 73 of *Hit & Run*, there is a photograph which, according to its caption, shows a boy named Abdullah, identified as Fatima's brother, being treated on the day after the operation for wounds caused during the operation. The person treating him is identified in the caption (incorrectly) as Dr Abdul Rahman.⁵⁵ That and other similar photographs were supplied to Mr Stephenson by Dr Rahman together with a video showing the boy's wounds being dressed, and Mr Stephenson has made them available to the Inquiry.
- [51] The metadata from the photographs of Abdullah indicated that they were taken in 2012 on a Nokia C5-03 cell phone, a model which was not introduced to the market until December 2010. There is no metadata associated with the video (which does not appear to be the source of the still images), but it must have been taken at the same time as the photographs. Obviously, if the metadata associated with the photographs is accurate, the photographs and the video could not be a record of events on 22–24 August 2010, immediately following the operation.
- [52] We enquired of our experts whether the photographs and the video could have been taken originally on another phone and then transferred to the Nokia at a later stage. The advice we received was that transferring them in that way would not change the metadata to show the photographs to have been taken at a later date than they actually were. Rather, the metadata would travel with the images (unless deliberately stripped or modified for some reason).
- [53] We also enquired whether the still images could be photographs of photographs taken earlier on another device. We were advised that while some images in the book may be photographs of photographs (such as the image of Islamuddin on page 57), there were several features of the photographs of Abdullah that made that highly improbable. In particular, the Gain Control and the LightValue metadata figures were consistent with the images being originals. Further, this would not explain the video, which appears to have been taken at the same time.

⁵⁵ The person shown treating the boy is not Dr Rahman but a man named Mohammad Iqbal (son of Said Ahmad), who was reportedly injured during the operation (as we discuss below). He was interviewed on *Collateral Damage*.

- [54] We note in passing that there are issues with other images from *Hit & Run*. We give four examples:
- (a) Page 74 of the book has a photograph said to be of Noor Ahmad, who is described as a boy from Khak Khuday Dad, receiving hospital treatment after the raid. That photograph was taken on a Samsung GT-19082 cell phone in 2015. Mr Stephenson has acknowledged that the photograph is not relevant to Operation Burnham and should not have been included in the book.
 - (b) Page 73 of the book has a photograph of a grave, which the caption says was erected for one of the victims of Operation Burnham and is a place of prayer where people come to make wishes. The photograph was provided to Mr Stephenson by Dr Rahman, with a document saying that the gravesite was in Naik. The metadata from that photograph indicates that it was taken on a Nokia C5-03 cell phone in 2012, like the photographs of Abdullah. This grave is not in Naik (or Khak Khuday Dad), however. Rather, the geolocation data from the photograph shows that the grave is located close to Pol-e Khomri. Pol-e Khomri is 100 kilometres from Tirgiran Valley as the crow flies. A high-voltage power pylon can be seen in the background behind the grave, which further confirms that the photograph was not taken at Naik. Commercially available satellite imagery does not show any power pylons in the vicinity of Naik at that time. Current satellite images of the location indicated in the geolocation data match the topography in the photograph and show high-voltage pylons.
 - (c) The photograph at page 53 of *Hit & Run* is not, contrary to the caption, a photograph of houses as they were at the time of Operation Burnham. Rather, the house on the right of the photograph is A3, where Mohammad Iqbal and his sons, Maulawi Neimatullah and Abdul Qayoom, lived. The house on the left of the photograph was built some years later, after October 2014, as satellite imagery confirms. As we understand it, the authors accept this.
 - (d) Photographs identified as being of different houses in different villages are in fact photographs of the same house. So, for example, the photograph identified at the top of page 131 of *Hit & Run* as being of Abdul Faqir's house in Khak Khuday Dad and the photograph of Mullah Rahimullah's house in Naik at the bottom of page 132 are in fact photographs of the same house. As we understand it, the authors accept this also.
- [55] In the result, the analysis of the photographic material in the book and that supplied to us by Mr Stephenson left us with three relevant concerns. The first concern is that the photographs, particularly those provided to Mr Stephenson by Dr Rahman, raise sufficient issues concerning the accuracy of dates and locations that they have little or no corroborating value.
- [56] The second concern is that the metadata relating to the photographs and video showing Abdullah receiving treatment, and the photographs of Fatima, raise considerable doubt about the reliability of statements made by the parents of Abdullah and Fatima about what happened during Operation Burnham, as we now explain.
- [57] The parents of Abdullah and Fatima, Abdul Khaliq and Khadija, were interviewed by Mr Stephenson and Ms Paula Penfold of *Stuff* in 2017. In addition, Mr Stephenson conducted an interview with another person who had knowledge of the relevant events in 2015 and provided us with a transcript of the interview. Further, the lawyers in Kabul assisting the Inquiry obtained comments from Abdul Khaliq, Khadija and Abdullah on a number of matters.

- [58] This material shows some inconsistencies—in the varying descriptions of Abdullah’s injuries, for example—but we do not regard these as being significant in terms of assessing reliability. Rather, we see them as the type of inconsistency expected when people are asked to recall traumatic events of some years ago, in a setting that is foreign to them.
- [59] That said, some matters do raise serious questions about reliability. As we have explained, the metadata from photographs of Abdullah’s head wound being treated indicate that they were taken in 2012, not 2010, and we have been unable to find any technical explanation for this discrepancy. Abdullah indicated that the photograph from *Hit & Run* is not of him, but it is clear from a scar above his left eye and a mole on his forehead that it is. Further, Mr Stephenson conducted an interview with a villager who was present on the night of Operation Burnham and who would, given their relationship, have been expected to mention Fatima as one of those present and killed, but did not (although mentioning others). Even making allowance for the passage of time and the traumatic nature of the events in question, the omission is difficult to explain if Fatima was there and was killed.
- [60] Additionally, during their *Stuff* interview Abdul Khaliq and Khadija were shown the photograph on page 52 of *Hit & Run* and identified it as a photograph of their daughter Fatima. As already noted, we have been provided with that and other photographs of Fatima, and the metadata from them indicates that they were taken in September and December 2016, rather than at some time before 22 August 2010 when the operation occurred. Again, we have been unable to find a technical explanation for this discrepancy. When this was raised with Abdul Khaliq and Khadija, they reiterated that the photos were of their young daughter, Fatima.
- [61] The discrepancy in the metadata does not, of course, prove that a child was not killed during Operation Burnham. Rather, it simply indicates that it is unlikely that the child in the photograph was killed.
- [62] In this context, we note that other villagers were shown the photographs said to be of Fatima. They gave mixed responses. Some said they did not recognise the child; others went further and stated that the child was not Fatima. One Afghan local from outside the villages stated that it was Fatima, but only knew this because her parents had previously shown the person the same photograph.
- [63] It is also relevant to note that, in the *Stuff* interview, Abdul Khaliq claimed that his house was so severely damaged that “not even a scarf” remained. This is inconsistent with other evidence, discussed below, which indicates that A1 and A3 were the only buildings to suffer significant damage as a result of the operation.
- [64] The third and final concern is that much of the information Mr Stephenson obtained about civilian casualties during Operation Burnham came from Dr Rahman. Dr Rahman said that he had gone to Tirgiran Valley immediately after Operation Burnham to provide medical assistance. There is some support for this in a brief incident report compiled by the AIHRC on 28 August 2010,⁵⁶ which noted that a medical team had been sent to the area, and from villagers who say that Dr Rahman provided medical assistance after the operation. Despite this, there is a question as to Dr Rahman’s reliability given the information derived from the metadata of the photographs that he supplied to Mr Stephenson. We also note that contemporaneous intelligence reporting

56 This report is not publicly available but was provided to the Inquiry on request. The information in the report was based on a meeting that the Violations Monitoring and Investigation Section of the Afghan Independent Human Rights Commission (AIHRC) held with Baghlan province officials. The AIHRC report is discussed further at paragraphs [69] and [119].

indicated that Dr Rahman had links to the Taliban, although it did not confirm he was himself a Taliban member. Indeed, according to some accounts, he was ultimately killed by the Taliban.

- [65] There is an additional point raised by the photographs in *Hit & Run* which we should address for completeness. The book says that the villagers found two empty plastic drink bottles (described in the book as “strange” drink bottles) at a lookout point on the top of the ridge that indicated the location of the overwatch position, and that the bodies of Islamuddin and Abdul Qayoom were found nearby.⁵⁷ The book includes a photograph of two empty drink bottles alongside some empty shell casings, with a caption that implies that these objects were found at the overwatch position (although this is not stated expressly).⁵⁸ NZDF said in a presentation to ministers in 2018 that the book claimed this equipment was used by the NZSAS during the operation and rejected that, showing different equipment it said was in fact used by the NZSAS.⁵⁹
- [66] Having reviewed the source information provided to Mr Stephenson, it appears there has been some confusion over the significance of this photograph. The photograph does not depict the drink bottles the villagers say they found at the overwatch position. The image was taken some time after the operation to show some shell casings that Dr Rahman said were found after the operation at a high point on the ridge. The drink bottles appear to have been included in the photograph to show the relative size of the casings—not because they were said to be of any direct relevance. The bottles pictured were of a kind which appears to be commonly used in rural Afghanistan.⁶⁰ The code on the casings show they are 30mm rounds from the Apaches, as the book states elsewhere.⁶¹ They are not from ammunition used by the marksmen.
- [67] While the placement and captioning of the photograph in the book has led to some confusion, we are satisfied this can be disregarded when assessing the villagers’ description of where the bodies of Islamuddin and Abdul Qayoom were found. One of the villagers interviewed by lawyers in Kabul said that empty mineral water bottles were found near Abdul Qayoom’s body. Some of those at the overwatch position were carrying small plastic water bottles in addition to their NZDF-issue canteens. Given this, there may well have been empty mineral water bottles at or near the overwatch position. Further, as we discuss below, it appears that Abdul Qayoom was the man shot by a marksman at the overwatch position and the villagers’ description of where they found his body appears to be broadly accurate.

What does the other evidence show?

- [68] The contemporaneous media reports are conflicting. Reports in Afghan media cite the District Governor of Tala wa Barfak, Mohammad Ismail, saying that six civilians were killed (including a woman and child), a number (six in one instance, and 11 in another) were injured, four people were arrested and 20 houses were burnt.⁶² United States media reported on 23 August that eight

⁵⁷ At 56–59.

⁵⁸ At 59.

⁵⁹ OPERATION BURNHAM (Inquiry doc 09/17) at 14.

⁶⁰ For example, a similar bottle is hanging from a tree in the background of the photograph at page 52 of *Hit & Run*.

⁶¹ The same or similar casings are shown in a photograph on page 49, next to a ruler.

⁶² “Six civilians killed in Baghlan Province” Radio Azadi Online (online ed, 23 August 2010) and “Afghan official says six civilians killed in NATO strike” *Pajhwok Afghan News* (23 August 2010) (reproduced in Inquiry doc 09/21, above n 10, at 11).

civilians were killed, 12 injured and nine people arrested, again citing Mohammad Ismail.⁶³ In fact, Mohammad Ismail seems to have been the principal source of all or most of the original media reporting of the civilian casualties from Operation Burnham.⁶⁴ As we understand it, the list of dead and wounded contained in *Hit & Run* was prepared by Abdul Khaliq, Fatima's father, with the assistance of Dr Abdul Rahman. Dr Rahman took the list to Mohammad Ismail to have an official government stamp put on it. The details provided were not independently assessed.

- [69] Immediately after the operation, the supervisory team of the Violation Monitoring and Investigation Section of the AIHRC met with Baghlan province officials, who advised that six civilians, including a child, had been killed and 12 had been injured on the operation. The AIHRC recorded those killed as a two year old child named Sabera; Iqbal, son of Noor Mohammad; Abdul Qayoom, son of Iqbal; Abdul Faqir, son of Abdul Rahman; Abdul Qayoom, son of Sakhi Dad; and another unidentified male. The only two people the AIHRC names from those injured are two females—Amir Bigom, daughter of Mohammad Ibrahim, and her daughter Hafiza (13). Both appear on the list of wounded in *Hit & Run*.
- [70] The six civilians listed in *Hit & Run* as having been killed during Operation Burnham are:⁶⁵
- (a) Abdul Qayoom, son of Sakhidad;
 - (b) Abdul Faqir, son of Abdul Rahman;
 - (c) Fatima, the three year old daughter of Abdul Khaliq;
 - (d) Mohammad Iqbal, son of Noor Mohammad;
 - (e) Abdul Qayoom, son of Mohammad Iqbal; and
 - (f) Islamuddin, son of Abdul Qadir.
- [71] As can be seen, four of those named on this list are the same as those named on the AIHRC's list. The AIHRC's list appears to refer to a different child—Sabera rather than Fatima. That leaves the unidentified male on the AIHRC's list, identified in the *Hit & Run* list as Islamuddin.
- [72] Before we turn to consider the evidence in relation to those named in the book as having been killed during the operation, we make three general points.
- [73] First, it appears likely that there were people killed during Operation Burnham who are not named in the list of dead and wounded in *Hit & Run*. In particular, the people engaged by the AC-130 Spectre gunship and an Apache at 2.52am as they were climbing up the side of the ridge about a kilometre to the south of A3 do not seem to be accounted for in the list⁶⁶ (except to the extent that Abdul Qayoom, son of Mohammad Iqbal, may have been one of the four).⁶⁷ The AC-130

⁶³ "Afghans Say NATO Troops Killed 8 Civilians in Raid" New York Times (online ed, 23 August 2010) <www.nytimes.com>; "NATO accused of killing 8 civilians during raid in Afghanistan" Star Tribune (online ed, 23 August 2010) <www.startribune.com>. See also Dexter Filkins "New Case of Civilian Killings Investigated in Afghanistan" *The New York Times* (online ed, 24 August 2010) <www.nytimes.com>, which cited Mohammad Ismail as stating that two women and one child were among the dead.

⁶⁴ We note we have seen some material that indicates Mohammad Ismail may not be a reliable source.

⁶⁵ At 126.

⁶⁶ See chapter 4 at [36].

⁶⁷ See paragraphs [102]–[103].

fired 40mm and 105mm cannon rounds and the Apache fired a Hellfire missile at them, a weight of fire which was unlikely to be survivable. The AC-130 reported that four people were killed in this engagement.⁶⁸ Those killed were part of the group of eight people who gathered in the village about 500 metres south of A3, three of whom had been tracked by the drone heading north down a valley southeast of the village. The group left the village and headed south along a path at the base of the western side of the ridge. About a kilometre to the south of A3, the group started to climb up the side of the ridge, where some of them were ultimately engaged and killed. An intelligence report immediately following the operation identified the four people killed as insurgents, giving the names of three of their fathers but not their names.⁶⁹ Additionally, our imagery and geospatial analyst suggested that more people may have been killed in the engagements on the ridge above Khak Khuday Dad than are recorded in the book. It may be, however, that they are accounted for among the injured.

- [74] Second, contemporaneous documentary material supports the view that most of those named in the list in *Hit & Run* as having been killed were in fact killed during the operation. We have already referred to the summary prepared by the supervisory team of the AIHRC. In addition, we have had access to intelligence reporting that consistently identifies the following people as having been killed in Operation Burnham: Mohammad Iqbal (father of Maulawi Neimatullah) and his son Abdul Qayoom; another local named Abdul Qayoom; and Abdul Faqir. A child is also referred to as having been killed in some reporting but is not named. We will refer to this in more detail (to the extent possible) in our discussion below of the individuals listed as having been killed.
- [75] Third, there were at least two occasions during Operation Burnham where civilians could have been injured or killed as a consequence of fire from the air assets, as ISAF's Incident Assessment Team concluded.⁷⁰ One was when the Apaches fired on the apparently injured man coming down the hill. A group of people including two women and two children can be seen at the corner of the video, standing against the wall of the building neighbouring the cache house. The Apaches continued to fire on the man as he moved closer to the group. Firing eventually ceased when the Apache crews determined that there was a risk of collateral damage. It appears plausible that people within this group could have been injured or killed by flying shrapnel or pieces of rock.
- [76] The other occasion, shortly after the first, was when fire from the Apache with the incorrectly slaved weapon hit the roofs of the cache house and the neighbouring building. It is probable that there were people in at least one of these buildings, as the video footage shows women and children entering the building neighbouring the cache house about 30 minutes earlier.⁷¹ Obviously, it is possible that people in the buildings could have been injured, even mortally, by exploding munitions or flying shrapnel. This possibility was accepted by ISAF's preliminary inquiry conducted by the Incident Assessment Team and by the United States AR 15-6 investigation.⁷²

68 OP-RAHBARI-OBJ-BURNHAM-OPSUM (22 August 2010) (Inquiry doc 02/14) at 2.

69 External Release Update Obj Burnham Op 21 Aug 10 Update 2 (25 August 2010) (Inquiry doc 02/09) at 3.

70 See chapter 8 at [16] and [19].

71 As discussed in chapter 4 at [12] and referred to in the AR 15-6 Report: "Findings and Recommendations" at 5, in Inquiry doc: FOIA release, above n 14, at 10.

72 ISAF Joint Command "Incident Assessment Team confirms possibility of civilian casualties in Baghlan" (29 August 2010); "Findings and Recommendations" at 7–8, in Inquiry doc: FOIA release, above n 14, at 12–13. It should be noted that if the armaments penetrated the roofs of the two buildings, they may or may not have exploded, depending on how they landed. There are no obvious indications that they exploded, but it is possible that they did.

- [77] While these are the most obvious occasions on which civilian casualties could have occurred, there may have been others. The video footage available to us shows that fire from the Apaches landed significantly off target a number of times. The possibility that civilians were harmed as a result cannot be ruled out. For example, during one of the early engagements on the hill behind Khak Khuday Dad, rounds fired by one of the Apaches landed very close to (possibly even on) a building approximately 65 metres south of the weapons cache buildings. If people were in or around the building at the time they may have been hit by shrapnel or flying rock. However, it is not clear from the video footage available to the Inquiry whether there were civilians in the vicinity at the time.
- [78] We turn now to the individuals alleged to have been killed on the operation. We begin with Islamuddin, son of Abdul Qadir.

Islamuddin, son of Abdul Qadir

- [79] *Hit & Run* claims that Islamuddin, a young man newly graduated as a school teacher and not an insurgent, was killed not by shrapnel from aircraft fire but by three bullets that passed through his chest, leaving small entry wounds and larger exit wounds.⁷³ It goes on to say that the villagers believe he ran up towards the top of the ridge to hide or get away from the ground force because he was fearful of what might happen to him. As he did so, he was killed by one of the TF81 marksmen in the overwatch position on top of the ridge with the Ground Force Commander and the Joint Tactical Air Controller (JTAC).
- [80] There are two difficulties with this account:
- (a) First, the marksman in the overwatch group who shot and killed a man fired only two shots. The first hit and killed the man, the second hit a rock. Based on the evidence available to us, we are satisfied that these were the only rifle shots fired by TF81 personnel during the operation.⁷⁴
 - (b) Second, the two marksmen in the overwatch group went down to check on the man who had been shot. When they found him, he was dead. Both described him as being dirty and dishevelled, as if he had been sleeping rough, and put him at around 45–50 or so years of age. If that is correct, the man cannot have been Islamuddin, who would have been in his early 20s.
- [81] Islamuddin's father, Abdul Qadir,⁷⁵ and one of Islamuddin's brothers were interviewed by the lawyers in Kabul who assisted the Inquiry. Both said that Islamuddin was a student at a government university in Mazar-i-Sharif but were unable to name it or to indicate what Islamuddin was studying there. (There is a public university located in Mazar-i-Sharif, Balkh University, which was established in 1986.) They said that the family supported him financially, sending him between five and ten thousand Afghanis a month for living expenses, a considerable sum for a

⁷³ At 56–58. An elder from Naik, interviewed by Mr Stephenson, gives a different description of Islamuddin, saying he was a 16 or 17 year old student at school in Tala wa Barfak.

⁷⁴ As noted in chapter 4 at [27], slugs fired from a shotgun were used to break the lock and the hinges on the door of A3 to gain entry. Also, a member of the CRU fired a shot at a civilian near the helicopter landing zone (it missed) and was immediately reprimanded by a member of TF81 (see chapter 4 at [45](b)).

⁷⁵ He referred to himself as Ghulam Qadir, son of Khair Mohammad, but is also known as Abdul Qadir.

farming family.⁷⁶ Their account was that Islamuddin had gone to the villages to visit some of his university classmates, although they did not know who those classmates were, and was killed during the operation. They said that after the operation Islamuddin's body was returned to them for burial but were vague as to the details—how he had died, the nature of his injuries, who had washed his body and so on.

[82] As a result of further investigation, including conducting interviews with other persons with first-hand knowledge of the matters described and obtaining university records, we are satisfied that Islamuddin was a student at Balkh University, having first enrolled there in 2006. He was majoring in history and was regarded as a good student—intelligent, quiet and hardworking. He had nearly completed his degree but failed to hand in his final dissertation or monograph, which was due to be submitted at the end of January 2010. The University was advised he had died.

[83] We were told that Islamuddin had gone to Tala wa Barfak in November 2009 to undertake research work for his dissertation. According to both open source reporting and intelligence information available to us, Islamuddin was the innocent victim of an incident at a bazaar in Tala wa Barfak in late January 2010. This is recorded in the following account from the *Afghanistan Times* of 26 January 2010:⁷⁷

Elsewhere, a robber and a student were killed in the Tala Wa Barfak district of northern Baghlan province. Deputy police chief, Syed Zaman Husaini, said the robber, Mohammad Yousuf and Balkh University student Islamuddin were killed and a police officer injured during a clash. A tribal elder of the district, Juma Khan, said police should have detained the robber outside the crowded bazaar. But the policemen acted irresponsibly and the innocent student was killed as a result of their unprofessional conduct, he observed.

[84] It appears that Islamuddin was severely injured in the incident and died soon after. Intelligence reporting and police records obtained by the Inquiry confirm that the Islamuddin involved in this incident was the son of Abdul Qadir.⁷⁸

[85] This account was put to Abdul Qadir and Islamuddin's brother through the lawyers in Kabul engaged by the Inquiry. They continued to maintain that Islamuddin was killed on Operation Burnham.

[86] Because we are satisfied that Islamuddin was not killed on Operation Burnham but died as a result of an incident seven months earlier, it is unnecessary for us to resolve issues relating to the photographs that purport to be of him. We note, however, that the villagers interviewed by lawyers in Kabul engaged by the Inquiry consistently said the photograph in *Hit & Run* that purported to be of Islamuddin was of a different man, whom they named. They said that this man was present on the night of the operation and may have been injured but was not killed. The man's name does not appear on the list of dead and wounded in *Hit & Run*. One person who knew Islamuddin while he was at university did identify him as the man in the photograph. However, given the passage of time and the number of students attending the university, a mistake in this regard would be unsurprising. We accept the evidence of the villagers on this point.

⁷⁶ We were advised that it is not unusual for relatively poor farming families to provide a significant amount of financial support for a promising child to attend university. Education is highly valued in many rural communities.

⁷⁷ "Three dead in blast, crash" *Afghanistan Times* (Kabul, 26 January 2010) at 6.

⁷⁸ We also note that in an interview in 2018, Mr Stephenson asked Qari Musa whether he knew a young teacher named Islamuddin who was killed during Operation Burnham. Musa said that he knew a teacher named Islamuddin but he was killed in another operation, in a fight with police.

- [87] Obviously, the fact that Islamuddin was not killed on Operation Burnham but months earlier casts considerable doubt on the reliability of those of the villagers who said that he was killed on the operation and gave detailed descriptions of his wounds and the circumstances of his death.⁷⁹

Fatima

- [88] While some of the contemporaneous documentary material refers to the death of a child, none of it refers to a three year old named Fatima.
- (a) Some (but not all) of the contemporaneous intelligence reporting refers to the death of a girl, but she is not named and varying ages are given.
 - (b) The AIHRC summary refers to the death of a two year old child named Sabera.
 - (c) Another international agency, whose personnel spoke to villagers shortly after the operation but which we are not free to name, recorded that five civilians had been killed, including a girl.⁸⁰

So, while there is reasonably consistent reporting at the time that a girl was killed in the operation, there is no consistency about her age and only one name is given, which is not Fatima. We note that the sources of information referred to above are not first-hand; they are all based on what had been reported by others (and, in some cases, the reports may have originated from the same person or people).

- [89] Three things are worth noting at this point. First, Neimatullah told Mr Stephenson in a telephone interview in 2017 that he conducted the burial service for a seven year old girl named Fatima who was killed during Operation Burnham.⁸¹ Second, an Afghan official interviewed by the lawyers in Kabul on behalf of the Inquiry said that his understanding (based on what he had been told) was that a six year old named Fatima had been killed.⁸² Finally, we have received persuasive evidence that shortly after Operation Burnham, NZDF intelligence officers were provided with a video of the funeral of a child, along with other videos (including some apparently filmed immediately after Operation Burnham). While a number of witnesses were clear that they recalled seeing a video of a child's funeral, the descriptions they gave of exactly what it showed were not entirely consistent. We were told that the video was saved electronically on NZDF systems, along with the other videos received at the time. It was also examined closely in an effort to determine whether it was indeed a video taken after Operation Burnham or was a video taken on an earlier, unrelated occasion.
- [90] The Inquiry was provided with copies of the videos referred to—with the notable exception of that relating to the child's funeral. However, as a result of the Inquiry making specific requests to NZDF, we obtained some further video footage that was, we are satisfied, among the videos sent

⁷⁹ Although we reiterate that, as noted in paragraph [13] above, the fact that part of a person's evidence is incorrect or fabricated does not mean that all of their evidence must be rejected.

⁸⁰ Following the publication of *Hit & Run*, this agency made further inquiries and its revised list of casualties contains 19 of the 21 names given in *Hit & Run*.

⁸¹ There was some intelligence reporting at the time, to the effect that Neimatullah had been criticised for not attending the funerals; but the preponderance of the evidence is that he did attend. See, for example, the "Intelligence Summary Report" attached to Inquiry doc 02/13, above n 43, at [8].

⁸² This type of discrepancy about age is not material given the uncertainty in rural communities of a person's precise age.

to Camp Warehouse shortly after Operation Burnham.⁸³ The video footage appears to the naked eye to indicate that a child was killed during Operation Burnham. This is consistent with what witnesses described to us. However, NZDF disputes this interpretation of the video.

- [91] The video shows the body of a man being prepared for burial. It then pans to what appears to be another body, completely wrapped in preparation for burial. The body is clearly smaller than the man's body but bigger than that of a two or three year old. NZDF submitted an expert analysis of the video which assessed the wrapped body to be about the size of an average adult Afghan male. The Inquiry also engaged an independent expert who assessed the object to be approximately the size of an average eight and a half year old child, according to World Health Organization standards.⁸⁴ The discrepancy appears to be likely due to measuring the object from different points. If the object is in fact a body, as it appears to be, then it is not entirely clear where the body ends and whether there is excess fabric at one or both ends of it. Because of this, we cannot make a precise determination about the length of the probable body. However, it appears more likely that it is a child (or, possibly, a small woman) than an adult man. The video was saved in the NZPRT's computer system in early September 2010 and had a file name indicating that it may have shown casualties of Operation Burnham.
- [92] We consider that the video was probably taken immediately after Operation Burnham, based on the metadata both from it and from three other videos received by the NZPRT at the same time. Although the creation dates recorded in the metadata are not 22 August 2010, at least one of these videos was clearly filmed in Naik on the day after Operation Burnham. It shows A1 damaged and on fire with debris still smouldering on the ground around the building. It appears to have been filmed by Qari Miraj, as he turns the camera on himself for a brief portion of the footage. The video shows a creation date and time in January 2008, which is obviously inaccurate. Such errors may occur if the time on the device has not been set by the user or updated through a network connection, and instead has remained on the default factory setting. The three other videos, including the video of the small body wrapped for burial, have creation times within six hours of this video.⁸⁵ It is highly unlikely that four videos would coincidentally have creation times this close together if they were unrelated and filmed on different devices. We consider it far more likely that it indicates all four videos were filmed on the same device within several hours of each other. That conclusion is supported by expert advice obtained by the Inquiry.
- [93] In the circumstances, we cannot be confident that we have received all the video footage that witnesses told us they recalled seeing at the time. From the descriptions they gave, it is possible some witnesses were referring to other video footage not provided to the Inquiry. Despite that, after considering together (a) the video footage just discussed; (b) the evidence we heard from witnesses about the existence of video footage showing a child's funeral; and (c) the other information noted above suggesting a girl was killed during Operation Burnham, we consider that it is likely a female child (aged up to 10 years old) was killed. However, the identity of that

⁸³ The video has been identified by someone who saw it at the time.

⁸⁴ The World Health Organization's growth standards for children give a universal standard for a child's height assuming adequate nutrition. However, Afghanistan has experienced large-scale malnutrition which has affected childhood growth rates. In 2004 59.3 per cent of Afghan children were stunted (that is, their height was more than two standard deviations below the universal mean for their age). In 2013 the figure was 40.9 per cent. At age eight and a half the mean heights for boys and girls are almost the same. See "Global Database on Child Growth and Malnutrition" <www.who.int>.

⁸⁵ We note NZDF submitted that the videos were filmed on different days. However, the Inquiry received expert advice to the effect that this submission relied on an analysis of the wrong part of the metadata—namely the file modification date rather than the media creation date.

child remains unclear. We are unable to accept that the young girl portrayed in the photograph on page 52 of *Hit & Run* as Fatima was the child killed, given the metadata from the photographs of her and the fact that she appears too young to be the child in the video. There is also insufficient evidence for us to conclude that, if a child was killed, she was named Fatima, or that she was the daughter of Abdul Khaliq. Any child killed must, obviously, have been a civilian.

Abdul Qayoom, son of Sakhi Dad

- [94] *Hit & Run* claims that in addition to Islamuddin, another person was also killed by a TF81 marksman: Abdul Qayoom, son of Sakhi Dad. Abdul Qayoom is described as a poor farmer. The book says that when the helicopters arrived at Khak Khuday Dad, Abdul Qayoom headed out of the village on a path that passed below the assumed position of the overwatch group. The book says that he was about 150 metres away when he was hit by a single bullet and died.
- [95] One of the Afghan villagers who filed an affidavit in the 2017 judicial review proceedings gave a rather different account. He said that when the operation began, Abdul Qayoom left his home to flee to the mountains but was captured. He was beaten with rifle butts, severely tortured and then executed by a single shot to the chest from a hand gun. When interviewed by the lawyers in Kabul assisting the Inquiry, the villager said that Abdul Qayoom's body was "totally black", that he had been beaten, strangled and then shot. Others interviewed gave a similar account.
- [96] We do not accept that Abdul Qayoom was captured, beaten and strangled by any of the ground force, nor do we accept that he was executed in the way alleged. None of the villagers say they saw the events described. Rather, their accounts appear to be conjecture, based on the state of Abdul Qayoom's body.
- [97] While we do not agree with the description given in *Hit & Run* of the precise circumstances of Abdul Qayoom's death, we think it likely that Abdul Qayoom was the man killed by the marksman stationed with the overwatch group.⁸⁶ We say this because:
- (a) the description given by the marksmen of the dead man is consistent with him being Abdul Qayoom;
 - (b) the villagers say that Abdul Qayoom was killed by a single shot, which is consistent with him being killed by the marksman; and
 - (c) the injuries on Abdul Qayoom's body as described in the affidavit are consistent with his having fallen 20–30 metres down the side of a steep, rocky ridge after he was shot.
- [98] That leads to the question whether there is evidence that Abdul Qayoom was an insurgent. As noted, the villagers say that he was not—he was simply a poor farmer trying to escape the area.
- [99] There is some intelligence reporting indicating that Abdul Qayoom may have been an insurgent, or at least armed on the night of the operation. We also note that he was one of Abdul Razaq's nephews and therefore was part of an extended family with known links to the Taliban. He appears to have lived close to the cache house. In light of this, he may well have been one of the men seen moving weapons. If he was simply a farmer, it is unclear why he would have left his home during

⁸⁶ See chapter 4 at [24]–[25].

the operation (bearing in mind that he left his wife and four children there) and begun climbing up the ridge given the obvious hazard from the firing of the air assets.

- [100] However, while there is some evidence that suggests Abdul Qayoom may have been an insurgent, we have been unable to reach a definitive conclusion on the information available to us. There is no clear indication that Abdul Qayoom was acting with others in an organised fashion or that he was climbing towards a weapons cache or something similar. Our imagery and geospatial analyst who viewed the drone footage considered it was possible the man climbing the ridge towards the overwatch group was carrying a long arm weapon slung over his shoulder, but he could not confirm this. If he was, that might explain the bruising to the man's neck, which may have been caused by the webbing of the weapon as he fell.
- [101] There is, of course, a difference between the questions whether Abdul Qayoom was in fact actively participating in hostilities and whether he was reasonably perceived by TF81 personnel to be actively participating in hostilities. At this point, we are considering the first question. We address the second question in chapter 6.

Mohammad Iqbal, son of Noor Mohammad, and his son, Abdul Qayoom

- [102] Mohammad Iqbal, son of Noor Mohammad, was the father of Maulawi Neimatullah and of a young man named Abdul Qayoom.⁸⁷ Based on what the villagers told the authors, *Hit & Run* says neither Mohammad Iqbal nor Abdul Qayoom was an insurgent. Mohammad Iqbal did not support the activities of his son, Neimatullah, nor did Abdul Qayoom—he was simply a young farmer.⁸⁸
- [103] Mohammad Iqbal was killed as he walked along the track to the south of A3. He had an AK-47 slung over his shoulder at the time.⁸⁹ Abdul Qayoom was with him, along with Qari Miraj and one of his bodyguards. It is unclear whether Abdul Qayoom was hit by Apache fire during the engagement in which his father was killed. It seems more likely that he was one of the people killed in the final engagement further to the south. That aligns broadly with the version of events given by Qari Miraj, who said Abdul Qayoom was killed around 200 metres away from his father.⁹⁰ Miraj also said Qayoom was unarmed.
- [104] Since the air assets did not obtain clearance from the JTAC before the engagement in the valley in which Mohammad Iqbal was killed,⁹¹ it is difficult to see any basis on which NZDF might be implicated in his death or that NZDF could have carried out any meaningful investigation after the operation. Accordingly, we do not think it necessary that we reach a view about whether Mohammad Iqbal was an insurgent or a civilian. We note, however, that we are not aware of any contemporaneous intelligence reporting indicating that Mohammad Iqbal was an insurgent.

⁸⁷ This is a different Abdul Qayoom from the person discussed at [94]–[101].

⁸⁸ Hager and Stephenson, above n 1, at 62. It appears that Abdul Qayoom was in his late teens to early 20s. The book places him in this age range. The list of dead prepared by the village elders says 22. One of the villagers interviewed said 17 or 18, another said “young, about to be married”. Lack of precision about age is common in rural communities in Afghanistan.

⁸⁹ Miraj interview with Jon Stephenson, referred to in “Insurgent leaders admit they were in Afghanistan village raided during NZ SAS’s Operation Burnham”, above n 22. A long arm weapon is also clearly visible on the video footage of this engagement.

⁹⁰ Qari Miraj provided this information to Jon Stephenson in an interview in 2017. The exact timing of Abdul Qayoom’s death is unclear from the interview.

⁹¹ See chapter 4 at [26].

[105] The final engagement, in which Abdul Qayoom was most likely killed, was cleared by TF81 personnel. Qari Miraj stated that Abdul Qayoom, son of Mohammad Iqbal, was one of his men in a statement he made to the Afghan National Directorate of Security in January 2011. He went on to say that Abdul Qayoom was killed in a firefight, which must be a reference to Operation Burnham. Because the statement as a whole contains much detail that can be verified from other sources as being accurate, the statement appears to be generally reliable.

[106] However:

- (a) It is alleged that Qari Miraj's statement was obtained by the National Directorate of Security through torture, a claim which we address later in this report.⁹² Obviously there are issues about the Inquiry relying on a statement obtained as a result of torture.
- (b) When asked by Mr Stephenson in his interview in 2017 whether Abdul Qayoom was an insurgent, Qari Miraj said he was just a civilian.

Abdul Faqir, son of Abdul Rahman

[107] The remaining man identified in *Hit & Run* as having been killed in the operation is Abdul Faqir, son of Abdul Rahman. *Hit & Run* describes him as a poor farmer and says that he was fired on by one of the Apaches while "running to a rocky hiding place behind his house".⁹³ The book says he was impaled by a piece of rocket and died after about nine hours without treatment.

[108] There is some intelligence reporting indicating that Faqir, like his cousin Abdul Qayoom, may have been an insurgent, or at least armed on the night of the operation. Abdul Faqir was also part of Abdul Razaq's extended family and appears to have lived near the cache house. Mr Hager told the Inquiry that the building south of the cache buildings (approximately 65 metres away) belonged to Abdul Faqir, based on information he obtained from villagers through a journalist in Kabul in 2019. While we have been unable to verify this conclusively, the interviews conducted with villagers on the Inquiry's behalf suggest it is likely to be correct.

[109] Two men with weapons were observed in the tree line outside this building as the assault force moved past on their way to A1. Approximately 20 minutes later, the first two helicopter engagements occurred on the hill a short distance behind the same building. One person appeared to be hit by helicopter fire during these engagements. Our imagery and geospatial analyst assessed he was probably carrying a long arm weapon. Based on the descriptions given by the villagers of where his body was found, it seems likely this was Faqir. Circumstantial evidence therefore indicates that Faqir was part of the group seen with weapons acting in a manner that indicated they were insurgents. However, on the evidence available to us we cannot draw a firm conclusion to that effect.

Conclusions and findings on deaths during Operation Burnham

[110] The result of the analysis just set out is as follows:

- (a) We are satisfied that Islamuddin, son of Abdul Qadir, was a final year student at Balkh University in Mazar-i-Sharif who died as a result of an incident in Tala wa Barfak in late January 2010 and not as a result of Operation Burnham.

⁹² See chapter 11 at [32]–[40].

⁹³ At 51.

- (b) The contemporaneous and photographic material we have examined does not indicate that a three year old named Fatima was killed during Operation Burnham. Further, we have some concerns about the reliability of her family's statements. That said, we think it likely that a girl did die as a result of the operation, but we have been unable to determine her precise age or identity.
- (c) We accept that Mohammad Iqbal, son of Noor Mohammad, was killed during Operation Burnham, but do not consider it necessary to reach a concluded view as to whether he was an insurgent or a civilian. This is because TF81 did not clear the engagement in which he was killed.
- (d) We also accept that Mohammad Iqbal's son, Abdul Qayoom, was killed, most likely in an engagement that TF81 did clear. We do not express a view about whether he was an insurgent.
- (e) We accept that Abdul Qayoom, son of Sakhi Dad, and Abdul Faqir, son of Abdul Rahman, were killed in the operation. Some information indicates both may have been insurgents, or at least were carrying weapons on the night of the operation. However, we have been unable to determine that conclusively.
- (f) Based on the video evidence, up to four other men were almost certainly killed in the final engagement to the south of A3, and it is possible that several other men may have been killed in the engagements near Khak Khuday Dad. There is insufficient evidence available to identify who these individuals were or whether they were insurgents.

Were civilians injured on the operation?

- [111] As to those listed as wounded in Operation Burnham, we are satisfied that a mother and daughter listed, Amir Begum and Hafiza, were injured and taken to Baghlan Provincial Hospital in Pol-e Khomri for treatment. We have obtained the hospital admission records, which show the two being admitted on 23 August 2010. Amir Begum is recorded as having suffered an "injury in shoulder girdle due to weapons" and her daughter Hafiza a "small injury to the right side of the abdomen due to weapons". Further confirmation is found in the AIHRC report of 28 August 2010. It refers to Amir Begum and Hafiza being in hospital and suffering from a shoulder injury and an abdomen injury respectively. Amir Begum and Hafiza were the wife and daughter of Abdul Razaq, so it seems likely they were injured during the engagement when rounds hit the cache house and the neighbouring building.
- [112] In addition, we have obtained confirmation from the Comprehensive Health Centre of Tala wa Barfak that four people injured in the operation were treated at the Centre. Two were women: Khadija, daughter of Mohammad Rahim, and Zahra, daughter of Khan Mohammad. Khadija was the wife of Abdul Khaliq and mother of Fatima and Abdullah. She is included on the list of wounded in *Hit & Run*. Zahra may be the same woman referred to in the list of wounded in *Hit & Run* as Zuhra, daughter of Faiz Mohammad, who was the wife of Abdul Qadus. If we are right about the identity of these women, they were part of Abdul Razaq's extended family and lived nearby, so they may well have been part of the group of women and children seen near the cache house.
- [113] The other two people treated at the Centre were men: Din Mohammad, son of Said Ahmad; and Mohammad Din, son of Abdul Rahim. Mohammad Din is not referred to in any other material available to the Inquiry, including interviews with villagers, so we have been unable to reach any view about him. Din Mohammad appears on the list of wounded in *Hit & Run* (as "Deen

Mohammad”) along with his brother, Mohammad Iqbal (note this is a different Mohammad Iqbal to the father of Neimatullah). Intelligence reporting also indicates the two brothers were injured during the operation. According to several villagers interviewed (although contrary to Din Mohammad’s own account),⁹⁴ both brothers were staying with Abdul Razaq on the night of the operation. We consider it is likely that they, too, were injured near the cache house. There is some intelligence indicating they may have had links to the insurgency, but it is inconclusive. We have no evidence that the brothers were part of the group observed carrying weapons, so we assume they were civilians.

- [114] As we have noted, it also appears that rounds from the first two engagements landed very near the building approximately 65 metres south of the cache house, which seems likely to have belonged to Abdul Faqir. There is no suggestion in *Hit & Run* that members of Faqir’s family were injured. However, a son of Faqir is included on a list of wounded prepared by the village elders after the operation, which was provided to the Inquiry by Mr Stephenson. In addition, one of the villagers interviewed indicated Faqir’s son was hit in the head by shrapnel, although he said the injury was not serious. In light of the video evidence, Faqir’s son may well have sustained a minor injury.⁹⁵
- [115] In the result, we accept that at least six civilians were injured during Operation Burnham, and there may have been others. We face some difficulty in going beyond this. There are significant inconsistencies between the accounts given by villagers and various documentary records about injuries. In some cases people listed as injured in *Hit & Run* made no mention of being injured in the operation when interviewed. One villager explicitly stated that a relative of his was not injured despite a description of the injury appearing in *Hit & Run*. Others named in the list of injured prepared by the village elders or in the Health Centre records were not mentioned by villagers as having been injured on the operation. This, together with the passage of time and the sketchiness of records, makes it impossible to reach any conclusive view.

Property damage

- [116] As we have said, *Hit & Run* alleges houses and buildings in the villages were destroyed or extensively damaged as a result of Operation Burnham and that this was substantially motivated by a desire for revenge on the part of NZSAS personnel. Similarly, the book alleges that Operation Nova was motivated by revenge, during which further destruction of houses occurred.⁹⁶
- [117] The perspective adopted in the book is well illustrated by the following extract. After describing the alleged assault on Qari Miraj in January 2011, the book says:⁹⁷

But it would be wrong to focus on the commandos in isolation. The anger and drive for retaliation came from the top; what these men did, and failed to do, was consistent with *the leadership that organised the systematic destruction in the Tirgiran Valley*.

⁹⁴ Din Mohammad said that he was sleeping in tents in a field with his extended family when the helicopters arrived (see Hager and Stephenson, above n 1, at 48–49). His account is inconsistent with the objective evidence available to us.

⁹⁵ We also note, on the topic of civilian casualties, that Mr Stephenson interviewed an experienced CRU officer who had participated in Operation Burnham. He said that towards the end of the operation, he encountered an old man who had suffered injuries to his leg. The CRU officer used his field dressing on the man’s injured leg, before moving to the helicopter landing zone to be evacuated. The officer said the man was obviously a civilian. However, we have been unable to corroborate this account.

⁹⁶ At 79–81.

⁹⁷ At 85 (emphasis added).

The book alleges that numerous houses in Khak Khuday Dad and Naik were either deliberately set on fire or blown up by the ground force or bombed and attacked with cannons and rockets by the air assets.⁹⁸ It refers repeatedly to the desire of NZDF personnel for revenge or retaliation.⁹⁹ It says that some of the houses damaged have never been rebuilt or have been only partially re-erected.¹⁰⁰ In addition, we note that the three villagers who made affidavits in 2017 stated that their houses were damaged or destroyed during Operation Burnham, and that they and their families left the villages shortly after the operation and never returned. Key elements of their descriptions of property damage are at odds with the account in *Hit & Run*.

[118] For convenience, we deal with the allegations about damage caused on Operation Burnham first and then with the allegations about what happened on Operation Nova.

Operation Burnham

[119] *Hit & Run* claims that 12 houses were destroyed during Operation Burnham: six in Khak Khuday Dad and six in Naik.¹⁰¹ Contemporaneous reports vary widely. For example, a *Pajhwok Afghan News* report of 23 August 2010 stated that 20 residential houses were “torched” during the operation.¹⁰² By contrast, the AIHRC’s incident report said that only two houses were burnt during the operation.

[120] We note that there may be some confusion about the use of the word “house”. It became apparent during interviews with the villagers conducted by the Inquiry’s Afghan lawyers that the word “house” was often being used to describe what we would refer to as a room or apartment. For example, some villagers stated that up to five of the “houses” damaged in the operation belonged to the same individual. When this issue was raised with one of the villagers, the interpreter concluded after some discussion that by “houses” the villager meant “rooms”. For our purposes we will use the term “house” to refer to the building as a whole rather than to individual rooms within the building.

[121] The fact that there was damage to two houses in the villages that NZSAS entered and searched is not disputed.¹⁰³ In summary:¹⁰⁴

- (a) Both A1 and A3 were damaged by fires, which became apparent after TF81 personnel had entered and searched them, albeit at different stages.
- (b) The wall at the western end of A1 collapsed as a result of an explosive charge which TF81 personnel set off to achieve entry to A1.
- (c) A1 was an L shaped residence. Part of the walls and roof at the heel of the L collapsed. The evidence indicates that this resulted from the explosive destruction of the weapons discovered in the searches.
- (d) The door to A3 was damaged by the shotgun used by the assault force to gain entry.

⁹⁸ At 36, 39–41, 50, 54 and 60–62.

⁹⁹ At 18, 24, 26, 28, 40, 44, 61, 79 and 109.

¹⁰⁰ At 61.

¹⁰¹ At 130. The book treats the guest houses of Kalta and Neimatullah as separate houses. Mr Hager concedes that “destroyed” was not accurate and that a more appropriate word would be “damaged”; he stated that it was not clear if the inaccuracy was because of mistranslation or exaggeration on the part of the villagers.

¹⁰² “Afghan official says six civilians killed in NATO strike”, above n 62.

¹⁰³ This is apart from any damage inflicted by the air assets.

¹⁰⁴ The damage to A1 and A3 can be seen in the “before” and “after” images of A1 and A3 included at the end of chapter 3.

- [122] Further, at least two, and possibly three, buildings in Khak Khuday Dad village suffered some damage as a result of fire from the Apache helicopters. First, rounds from one of the helicopters appear to have impacted the roofs of the cache house and the neighbouring building. It is probable that the rounds penetrated the roofs and entered the buildings, although we cannot state this categorically. Little damage to the roofs is visible on the video footage, which tends to indicate that the rounds did not detonate on them. If the rounds did penetrate, they may have detonated inside the buildings, but we are unable to determine whether this occurred. Our military expert advised that whether or not the rounds detonated would be affected by how they landed. We can say that the video footage showed no visible evidence of explosions inside the buildings.¹⁰⁵
- [123] Second, as we have noted above, rounds from a helicopter landed in close proximity to the building located approximately 65 metres south of the cache house during the first two engagements. While it is not possible to confirm from the footage whether the building was hit, it is possible some damage was sustained. As we have said, it is likely this building belonged to Abdul Faqir. Several of the villagers interviewed said that Faqir's house was damaged by helicopter fire.
- [124] There is no visible damage to any of these three buildings in subsequent video footage or satellite imagery. This can be contrasted with imagery of A1 and A3, in which the damage is clearly visible. This tends to indicate that the damage sustained to the cache buildings, and any damage to Faqir's house, is likely to have been relatively minor.
- [125] What we have described in the preceding paragraphs is, in our view, the extent of the damage to houses in the villages resulting from Operation Burnham. We do not agree with the media reports immediately after the operation that claimed that many more houses were damaged or destroyed, nor with the similar claims made in *Hit & Run*. The video footage and the satellite imagery available to us do not support the view that there was widespread destruction in the villages. While it is not always clear exactly where the rounds landed, there were no other engagements close enough to buildings to have caused damage. An independent aerial imagery specialist engaged by the Inquiry analysed commercially available satellite images from before and after the operation and found no evidence of other damage.¹⁰⁶ We should also say that, consistent with the findings of the United States AR 15-6 Report,¹⁰⁷ we have seen nothing to indicate that the buildings hit by the fire from the Apaches were deliberately targeted (as alleged in *Hit & Run*).¹⁰⁸ We are satisfied that TF81 personnel were not aware that buildings had been hit at the time of the operation. This only became apparent subsequently, when the weapons video was available. We will discuss these aspects in more detail shortly.
- [126] Before we do so, however, we should record that we were concerned to learn that two of the three houses that TF81 entered during Operation Burnham caught fire. These were A1 and A3, the houses belonging to Abdullah Kalta and Maulawi Neimatullah respectively. In addition, A1 suffered extensive damage as a result of two explosive detonations. It was obvious that we needed to examine the background to these events to ascertain whether the fire and other damage resulted from vengeful motives, and we did so.

¹⁰⁵ The impacts are visible in still images attached to the AR 15-6 Report and are also referred to in a transcript prepared by the AR 15-6 investigating officer. See "Exhibits 16–18" in Inquiry doc: FOIA release, above n 14, at 61–63.

¹⁰⁶ David Napier *Inquiry into Operation Burnham location analysis report* (14 November 2019) at 37.

¹⁰⁷ "Findings and Recommendations" at 7, in Inquiry doc: FOIA release, above n 14, at 12. The investigating officer found, in relation to the rounds that hit the cache house and the neighbouring building, that "The AWT and ground units were unaware that bullets had impacted the buildings until the time of this investigation". As we explain in chapter 8, it appears some members of the ground force did in fact become aware that buildings had been impacted somewhat earlier, during the Incident Assessment Team's assessment (see chapter 8 at [14]).

¹⁰⁸ Mr Hager has also now acknowledged that none of the damage to houses caused by the air assets was deliberate.

- [127] We should also record that the TF81 Senior National Officer gave evidence that when he learnt that A1 and A3 had suffered fire damage during the operation he was concerned (he said he felt “terrible”) and immediately enquired into what had happened. He said that having viewed the drone footage and obtained explanations from those involved, he was satisfied that there had been no inappropriate conduct by the ground force. The Senior National Officer said that video footage he saw indicated that the fire in A1 resulted from an RPG rocket motor which exploded and was propelled onto the roof as a result of the explosive destruction of the weapons caches.¹⁰⁹ In relation to A3, he accepted that the fire was likely caused by either a flashbang or an unattended cooking fire.
- [128] We begin our consideration with the damage to A1. Some witnesses thought that the damage to the wall on the western end of A1 resulted from rocket or cannon fire from the Apache helicopters and that the person injured in the collapse was a civilian. Although neither proposition is correct in fact, for villagers, members of the Afghan Crisis Response Unit (CRU) stationed at the helicopter landing zone and others who were on the operation but were not at A1 at the time, these were understandable errors. Operation Burnham occurred within a relatively narrow valley with steep ridges on either side. Although the moon was up and reasonably full, on the valley floor it was dark and the firing from the aircraft must have been terrifying for those who had not experienced it before. As one of the air crew from the Apaches put it: “It was pretty crazy in the valley.”¹¹⁰ For those not privy to what was happening and not familiar with that type of conflict, the scene must have been one of confusion and threat. In such circumstances, some misunderstanding of what was happening seems inevitable.
- [129] We are satisfied that the west wall of A1 was not damaged by aircraft fire. Rather, the wall collapsed on top of the team leader of one of the assault groups, causing him severe injuries, after he attempted to enter the building following the detonation of the explosive entry charge. We can say this with confidence because the oral evidence we heard is confirmed by the drone footage, which captured the whole sequence of events. While TF81 intended to breach the wall to gain access to A1, there was no intention to damage it to the extent that it would collapse in the way that it did.¹¹¹
- [130] A section of the walls and roof of A1 at the eastern end of the building, in the heel of the L, was also damaged. Although the oral evidence was not consistent on this point, we are satisfied that this collapse occurred when the captured munitions were detonated and destroyed close to the wall of A1. Apart from oral evidence that the blast damaged the wall of A1, this conclusion is supported by the drone footage. Although it does not show the munitions being destroyed, the footage does show A1 about an hour after the explosive destruction occurred, and at that stage, the section of walls and roof had collapsed. This damage is also clearly visible in video footage taken later in the morning.
- [131] We explored with witnesses a suggestion that the explosive destruction of the captured munitions occurred inside A1, rather than immediately outside it, which was a possible explanation for the damage caused. We are satisfied, however, that it took place outside the building, but in close proximity to the wall of A1. Given the nature of the damage to A1, it seems to us that the level

¹⁰⁹ The video footage the Inquiry has had access to does not show what TF81’s Senior National Officer described. However, it could have been part of the AC-130 footage, which the Inquiry only received edited portions of.

¹¹⁰ “Exhibit 10” in Inquiry doc: FOIA release, above n 14, at 46 (exhibit 10).

¹¹¹ We note the OP SUMMARY (Inquiry doc 02/03) records that one of the “key lessons learnt” from the operation was that “Buildings in Baghlan are not as well constructed as the compounds in Logar” (at 2).

of charge used may have been greater than necessary, but we do not consider that this was done deliberately to cause damage to A1. There was a sensible reason to destroy the captured weaponry close to the wall of A1—it was to provide protection from the blast for the members of the assault force and any civilians or civilian buildings in the vicinity. We are satisfied with the explanation that witnesses provided.¹¹²

- [132] As to the fire at A1, *Hit & Run* alleges that it was deliberately started by a member of the assault force firing his weapon into a cotton mattress, setting it on fire.¹¹³ We explored this allegation with witnesses and are satisfied that it is incorrect. Apart from anything else, we understand the firearms used by NZSAS personnel would not set fire to a cotton mattress in the way alleged. Further, the fire in A1 does not become visible on the drone footage until about 3.58am, after the operation had ended and the ground force had left in the helicopters. Smoke is shown coming from A1 and a glow on the roof indicates that a fire is burning in the central part of the building. The fire might have been expected to be visible earlier if it was started as alleged in the book, although we acknowledge that a cotton mattress could smoulder for some time before catching fire.
- [133] That does not mean, however, that the fire was not caused by the actions of the ground forces. For example, it could have been caused by a flashbang or, more likely, by hot fragments of munitions that were scattered about after the detonation of the weapons, which caused some small fires in grass and vegetation in the surrounding area. The Senior National Officer thought that it resulted from a rocket motor falling on the roof of the building after the explosion, and we accept that is possible. The drone footage does show a glow on the roof of A1 that builds in intensity over time. In any event, we have no doubt that the fire resulted from the actions of TF81 personnel.
- [134] However, while we consider that the fire did result from the actions of TF81 personnel—most likely the explosive destruction of the weapons—we do not consider that they deliberately started it. Having heard considerable witness evidence on the point and reviewed the drone footage, we are also satisfied that TF81 personnel were not aware of the fire before leaving the area. While the fire was likely linked to the detonation of weapons, it does not appear to have grown to a detectable size until sometime after ground troops had left the vicinity.
- [135] Turning to A3, the allegation in *Hit & Run* is that TF81 personnel deliberately set fire to the room in the building containing Neimatullah’s religious books, and also set fire to the house of Neimatullah’s father about 20 metres away, which was “burned completely”.¹¹⁴
- [136] We can deal with the second aspect of this allegation immediately. There was no fire at the structure that stands near Neimatullah’s house. This is clear from the video evidence available to us.
- [137] As to the first aspect, the assault force attempted an explosive method of entry at the northern wall of Neimatullah’s house. The explosive charge was insufficient to breach the wall, so the assault force moved to the front of the building to enter by way of the front door. The hinges and lock of

¹¹² Our military advisor also suggested a further possible reason for destroying the weapons and munitions in close proximity to A1: to minimise the distance that personnel needed to carry unknown weaponry. While this was not specifically raised by witnesses in relation to the proximity of the detonation to A1, some witnesses did say that weapons and ammunitions were generally destroyed on-site rather than being transported back to base due to safety concerns associated with transporting weapons of unknown provenance.

¹¹³ At 40. Having reviewed the source material, it may be that the person who told the authors this was actually referring to A3. In any event, that does not alter our assessment. We are satisfied that neither of the fires were started in the way alleged.

¹¹⁴ At 39.

the front door were blown off with shots from a shotgun, and the assault force entered, clearing rooms with flashbangs as they went.

- [138] The NZDF has attributed the fire that occurred in A3 to an unattended cooking fire.¹¹⁵ We do not think that this was the likely cause as our understanding is that the cooking fire was contained in some form of cylindrical structure. Although it is possible that the structure was knocked over causing a fire, it seems to us more likely that the fire started as a result of the discharge of one or more flashbangs, which are likely to cause fires if there is readily combustible material nearby. This possibility was raised by TF81 immediately after the operation, as contemporaneous documents indicate,¹¹⁶ although it did not feature in subsequent reporting.
- [139] As we said in chapter 4,¹¹⁷ the Troop Commander saw the beginnings of the fire when he was preparing to leave the area of A3 to move back to A1. He advised the Ground Force Commander of it but was told he did not need to do anything about it. Given this instruction, he went with the rest of the assault force back to A1. We understand that the fire was also observed at the Tactical Operations Centre at the TF81 base camp in Kabul via the live video feed from the drone and that the question was raised whether an attempt should be made to extinguish it. No steps were taken, however.
- [140] As the fire was about the size of a small cooking fire when it started, it could probably have been extinguished reasonably easily—as the Troop Commander accepted. The explanation given for not attempting to extinguish it was that the assault force was not trained or equipped to extinguish fires and, in any event, the priority was to move the assault force back to A1. This was because:
- (a) it was thought that there was an immediate insurgent threat coming up from the south (causing some of the assault force to adopt “blocking” positions);¹¹⁸ and
 - (b) in any event, it was time for the assault force to move back to A1 in preparation for extraction by helicopter.
- [141] Given the small size of the fire when it was first detected, we do not consider that lack of training or equipment would have presented a significant barrier to extinguishing it. However, we accept that it was appropriate to prioritise withdrawing the assault force over extinguishing the fire in light of the Ground Force Commander’s genuine belief at the time that there was an imminent insurgent threat from the south. Most importantly for present purposes, we do not consider the fire was deliberately ignited or that the decision to leave without attempting to extinguish the fire was one motivated by a desire for revenge.
- [142] In summary, then, we consider that the fires at A1 and A3 both resulted from the actions of TF81 personnel, but we do not accept that they were deliberately started. That leaves the question whether the infliction of damage nonetheless breached the applicable rules of engagement or principles of International Humanitarian Law in any way, which we address in chapter 6.

¹¹⁵ See, for example, NZSAS (TF81) OPERATIONS IN BAGHLAN PROVINCE AUGUST AND SEPTEMBER 2010 (10 December 2010) (Inquiry doc 09/12) at [6]; “Speech notes for Press Conference on Operation Burnham” (27 March 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) from 316 at 319; *Unreferenced account of events*, above n 4, at 10.

¹¹⁶ Intelligence Debrief Report TF81 81 Intelligence Cell (23 August 2010) (Inquiry doc 02/04).

¹¹⁷ Chapter 4 at [33].

¹¹⁸ See chapter 4 at [31].

Operation Nova

- [143] Operation Nova took place on 3 October 2010.¹¹⁹ As we have said, *Hit & Run* alleges that it was an operation motivated by revenge¹²⁰ and that the reason for the operation was “to wreck the houses again, this time more thoroughly”.¹²¹ The allegation is that TF81 conducted the raid in order to blow the houses up, and did so. The book describes damage to A1 and cites a source who said he thought another house further away was also blown up. The book does not specify which house this was, but it seems likely to be a reference to A3. Having heard evidence from those involved in the operation, reviewed the pre- and post-operation documentation, viewed video footage and considered commercially available and classified satellite imagery, we are satisfied that these allegations have no substance in fact.
- [144] Operation Nova was directed at capturing Maulawi Neimatullah only. Accordingly, the intention was to enter only his house, A3. As matters turned out, part of the ground force assigned to perform a “blocking” role between A3 and A1 did go up to A1 and A2 and entered and searched them. Finding no one present, they left. There was no need to force entry and no damage was done to A1 or A2.
- [145] When Operation Nova took place, A1 was still damaged from Operation Burnham—it had not been repaired. The damage sustained during Operation Burnham is still visible on commercially available satellite imagery from 11 November 2010.¹²² As we noted in chapter 4, the 11 November satellite imagery does show one area of additional damage that was not present in post-Operation Burnham imagery of A1.¹²³ That is, part of the roof of the small wing at the eastern end of the building (the bottom of the “L” shape) had collapsed. The Inquiry is satisfied based on the evidence available to it that this damage did not occur on Operation Nova. As we said in chapter 4, the cause of the collapse is unclear but it is likely that the structural integrity of the roof was compromised by the damage caused during Operation Burnham.
- [146] The explanation for A1 not having been repaired before Operation Nova may be that Abdullah Kalta had, as contemporaneous intelligence reporting indicated, been living in tents near the villages and not occupying his house after Operation Burnham.¹²⁴ In any event, we are confident that A1 was not further damaged in Operation Nova.
- [147] In relation to A3, the only damage to the building from the operation was to the door when effecting entry. We have access to video footage of TF81 personnel conducting a search of A3 during the operation. It shows that repair work had been carried out to the area of the roof that was burnt out in the fire resulting from Operation Burnham. Commercially available satellite imagery dated 11 November 2010 shows A3 intact. It is improbable that A3 was destroyed on 3 October 2010 as alleged in *Hit & Run* if it was fully rebuilt by 11 November 2010. The satellite imagery shows no obvious signs of recent rebuilding activity.
- [148] It follows that the allegation that Operation Nova was a revenge operation for the purpose of wrecking A1 and A3 cannot be sustained.

¹¹⁹ See chapter 4 at [47]–[52].

¹²⁰ At 79.

¹²¹ At 80.

¹²² This is the first available imagery following Operation Nova.

¹²³ See chapter 4 at [51].

¹²⁴ See, for instance, BDA and current NZPRT analysis (26 August 2010) (Inquiry doc 02/12) and NZPRT Bamyān Supintrep 005-10 Malawi Nematullah (23 September 2010) (Inquiry doc 11/01).

Conclusion and findings on damage

[149] In the result, we are satisfied that:

- (a) The account given in *Hit & Run* about the destruction and damage to houses and buildings in the villages in Operation Burnham is exaggerated and incorrect. TF81 caused damage to A1 and A3, the houses of the two insurgent leaders, by the means used to gain entry, but these were standard operational techniques on an operation such as Operation Burnham. There were fires at both buildings as a result of the actions of TF81 personnel, but neither fire was deliberately started. In addition, cannon fire from an Apache impacted (and likely penetrated) the roofs of two houses in Khak Khuday Dad, and potentially caused minor damage to a third house.
- (b) The allegations in relation to substantial damage to A1, A2 and A3 during Operation Nova are incorrect. There was no further damage caused to A1 or A2 and the damage to A3 was confined to the damage caused to the door when gaining entry.

Was the conduct of TF81 personnel motivated by revenge?

[150] As evidence supporting the allegation that the operations were revenge raids and that there was a determination to “exact revenge” against the insurgents responsible for Lieutenant O’Donnell’s death, *Hit & Run* cites unnamed sources and a Facebook post by a “New Zealand intelligence officer working inside the US Bagram base”.¹²⁵ The Facebook post, which is dated 5 August 2010, reads:

You may run, you may hide, but that cant help you now. You took a brother and now you must suffer! Sleep tight, and pray to your Alah. He cant help you now as we are coming for you!

[151] An email chain between Government Communications Security Bureau (GCSB) personnel disclosed to the Inquiry could also be read as indicating that some of those providing support to TF81 had a desire for revenge against the insurgent group.¹²⁶ Referring to Kalta, one GCSB staff member asked another, who was in Afghanistan at the time, “is anyone going to go and snot those guys?” The staff member in Afghanistan replied: “Snot is about the right word too. There aint gonna be much of those compounds left once they’ve finished.” The second staff member went on to note that they hoped TF81 didn’t “destroy the haystack looking for the needle”.

[152] While we make no findings about whether the Facebook post and emails referred to in fact reflected a desire to exact revenge for the death of Lieutenant O’Donnell, they are disappointing in their tone. But it is important to recognise that they came from support staff, not from the troops. One of the witnesses we spoke to acknowledged he was aware of this attitude among some support staff at the time and took steps to address it, but he considered it was not representative of the attitude of the troops on the ground during the operation.

¹²⁵ At 17.

¹²⁶ Email from GCSB personnel in Afghanistan to GCSB personnel alternative email address “Re: Let’s see if this makes it through...” (19 August 2010, 00.40) (Inquiry doc 12/09).

- [153] It was also suggested to us that the assault on Qari Miraj by a TF81 member, which we discuss in chapter 11, is evidence that TF81 personnel were seeking revenge. However, the person allegedly implicated in that assault was not involved in either Operation Burnham or Operation Nova. We have seen no evidence that supports the view that the troops involved in planning and conducting those operations were influenced by a desire for revenge.
- [154] Indeed, one of the most powerful aspects of the evidence we heard from those involved was their deep sense of resentment at the allegation that these were revenge operations or were carried out in a vengeful way, to the point that some were visibly upset at the suggestion. Those involved strongly denied that the operations were aimed at obtaining revenge or that they were affected by a desire to obtain revenge in the way they carried them out. We accept this evidence. Allowing an emotion such as seeking revenge to influence decision-making and action in the course of operations such as these was not only contrary to their training and ethos; it was also likely to increase risk and result in serious errors.
- [155] Having considered the evidence and the objective material available to us, we do not agree that either Operation Burnham or Operation Nova were revenge raids or that a desire for revenge played any significant part in what happened on them.

6

Assessment of conduct during Operation Burnham

Chapter 6

- [1] In this chapter we assess whether the actions of New Zealand Defence Force (NZDF) personnel during Operation Burnham complied with International Humanitarian Law and the applicable rules of engagement.¹
- [2] We have described in chapters 4 and 5 what happened during Operation Burnham and the casualties and property damage that resulted. In this chapter we focus on the conduct of NZDF personnel during the operation and the legal implications of that conduct. In particular, the Inquiry's Terms of Reference direct us to consider 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".²
- [3] Our analysis focuses on the legality of NZDF's conduct *during* the operation. Issues relating to how NZDF handled allegations of civilian casualties subsequently are addressed in chapters 8 and 9.
- [4] This chapter is divided into two parts:
 - (a) Part I summarises the legal framework against which the conduct of NZDF personnel is to be assessed. This includes both the relevant principles of International Humanitarian Law and the rules of engagement that applied to Task Force 81 (TF81) at the time of Operation Burnham.
 - (b) Part II sets out our assessment of the conduct of TF81 personnel during the operation and whether it complied with the legal requirements set out in Part I. We consider the role of TF81 personnel in the engagements carried out and conduct of TF81 personnel that resulted in damage to property.

Part I – The legal framework

- [5] We begin by setting out the principles of International Humanitarian Law and the specific rules of engagement that are relevant to Operation Burnham. In some instances, key principles of International Humanitarian Law were effectively incorporated into the rules of engagement, and to that extent compliance with the two can be assessed together. However, the rules of engagement do not encompass the entirety of International Humanitarian Law; they are necessarily narrower in scope. As a result, there are additional relevant aspects of International Humanitarian Law not expressly recognised in the rules of engagement that must be considered. This is implicit in the rules of engagement, which required the Commanding Officer and Senior National Officer to ensure that personnel under their command were familiar with the Law of Armed Conflict (or International Humanitarian Law), particularly as it related to a non-international armed conflict such as existed in Afghanistan, in addition to the rules of engagement.³

¹ *Terms of Reference: Government Inquiry into Operation Burnham and related matters* (11 April 2018), cl 7.1.

² Clause 7.2.

³ OP WAATEA RULES OF ENGAGEMENT (ROE) As at 25 May 10_Redacted (25 May 2010) (Inquiry doc 04/04) at [4].

- [6] The Inquiry notes that NZDF personnel, and New Zealand Special Air Service (NZSAS) members in particular, received extensive training and guidance on the requirements of International Humanitarian Law and the applicable rules of engagement. This was outlined by Brigadier Lisa Ferris in her evidence at the Inquiry's public hearings⁴ and is evident from NZSAS training materials provided to the Inquiry.⁵ A legal officer was also deployed on Operation Wātea. One of the officer's tasks was to endeavour to ensure that the requirements of International Humanitarian Law and the rules of engagement were properly observed.

Applicable principles of International Humanitarian Law

- [7] We summarise below the key aspects of international law applying to the deployment of the NZSAS to Afghanistan in the period 2009–2012, during which time the matters under examination by the Inquiry took place. These international obligations bind New Zealand as a State. The Government of New Zealand is therefore responsible under international law if they are breached. Conduct that breaches these obligations may also give rise to criminal responsibility for individuals under international and domestic criminal law in some circumstances.
- [8] The summary below draws on the expert opinions provided to the Inquiry by Emeritus Professor Sir Kenneth Keith QC and Professor Dapo Akande, which were discussed at the Inquiry's Public Hearing Module 3, on 29 July 2019.⁶ It also takes account of submissions to the Inquiry on behalf of the Crown Agencies and *Hit & Run* authors Mr Nicky Hager and Mr Jon Stephenson.⁷

Relationship between International Humanitarian Law and International Human Rights Law

- [9] The application of International Humanitarian Law does not exclude the potential application of International Human Rights Law.⁸ There is broad acceptance that the protections provided by International Human Rights Law do not cease in respect of armed conflict and the two legal regimes may apply simultaneously.⁹ In fact, they are frequently complementary and mutually

4 Evidence of Brigadier Lisa Ferris, Transcript of Proceedings, Public Hearing Module 2 (22 May 2019) at 98–125; see also Brigadier Lisa Ferris "Rules of Engagement and military doctrine" (Public Hearing Module 2, 22 May 2019).

5 See, for example, Legal Brief 1 Redacted (Inquiry doc 04/02).

6 Rt Hon Sir Kenneth Keith "International Humanitarian Law and the Law of Armed Conflict" (Public Hearing Module 3, 29 July 2019); Professor Dapo Akande "The legal principles relating to predetermined and offensive use of force with particular reference to the Joint Prioritised Effects List (JPEL)" (Public Hearing Module 3, 30 July 2019).

7 Nicky Hager "Public hearing on Operation Burnham and Rules of Engagement" (Public Hearing Module 2, 23 May 2019); Paul Radich QC *Memorandum for New Zealand Defence Force regarding Rules of Engagement* Submission to Inquiry (13 June 2019); Sam Humphrey "Synopsis of Submissions of Counsel for Jon Stephenson for Public Hearing 3" (Public Hearing Module 3, 29 July 2019); Nicky Hager "Public Hearing 3 presentation" (Public Hearing Module 3, 29 July 2019); Paul Rishworth QC and Ian Auld "Crown Agencies' Presentation on Applicable International Legal Frameworks" (Public Hearing Module 3, 29 July 2019); Paul Rishworth QC and Ian Auld *Memorandum of Counsel for the Crown Agencies* Submission to Inquiry (16 August 2019). The Inquiry also received a submission from Kevin Riordan in his personal capacity: Kevin Riordan *Submission on Applicable International Law* Submission to Inquiry (24 July 2019).

8 Dieter Fleck *The Handbook of International Humanitarian Law* (3rd ed, Oxford University Press, Oxford, 2013) at 72; Nils Melzer *International Humanitarian Law: A Comprehensive Introduction* (ICRC, Geneva, 2016) at 29–30; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories (Advisory Opinion)* [2004] ICR Rep 136 at [106].

9 Fleck, above n 8, at 72; Melzer, above n 8, at 29–30; *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICR Rep 226 at [25]; *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda) (Merits)* [2005] ICR Rep 168 at [216].

reinforcing.¹⁰ For example, as discussed in chapter 10, torture is prohibited under both International Humanitarian Law and International Human Rights Law—although in slightly different terms.

- [10] As Professor Akande advised the Inquiry, the relationship between a state's obligations under International Humanitarian Law and International Human Rights Law is often resolved through the application of the *lex specialis* principle.¹¹ This can be understood to mean that a specific rule of International Humanitarian Law may inform the interpretation of a general human rights norm,¹² or it may prevail over an incompatible human rights norm¹³—or vice versa. Both the International Court of Justice and the Human Rights Committee have applied the first approach and recognised that the specific rules of International Humanitarian Law will be relevant to interpreting the content of human rights obligations in the context of armed conflict.¹⁴
- [11] The right to life is the primary human rights obligation that requires consideration in respect of Operation Burnham. It is reflected in both international treaties to which New Zealand is a party and in the New Zealand Bill of Rights Act 1990 (NZBORA).¹⁵ It can also be considered to have reached the status of customary international law.
- [12] The incidents that are the subject of the Inquiry took place in Afghanistan. This raises particular issues as to whether New Zealand's international human rights obligations applied to the conduct of NZDF at all when operating outside New Zealand.
- [13] The extraterritorial application of human rights treaties remains a particularly difficult subject in international law, as Professor Akande discussed in his opinion.¹⁶ Both the International Court of Justice¹⁷ and the Human Rights Committee¹⁸ have held that a state party must ensure the rights laid down in the International Covenant on Civil and Political Rights—including the right to

¹⁰ Fleck, above n 8, at 72–73; Melzer, above n 8, at 29–30; Terry Gill and Dieter Fleck, *The Handbook of the International Law of Military Operations* (Oxford University Press, Oxford, 2010) at [4.02].

¹¹ Professor Akande, above n 6, at [66]–[71]. *Lex specialis* (“law governing a specific subject matter”) comes from the legal maxim *lex specialis derogat lex generali*. The effect of the principle is that more specific rules take precedence over more general rules: see Malcolm Shaw *International Law* (8th ed, Cambridge University Press, Cambridge, 2017) at 48 and 94. For more discussion of the application of this principle in the context of International Humanitarian Law and International Human Rights Law see: Fleck, above n 8, at 72–73; Melzer, above n 8, at 29–30; Gill and Fleck, above n 8, at [4.02]. But see *contra* the position argued in Derek Jinks “International Human Rights Law in Time of Armed Conflict” in Andrew Clapham and Paola Gaeta (eds) *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press, Oxford, 2014) at 656–674.

¹² Fleck, above n 8, at 73; Gill and Fleck, above n 10, at [4.02](4).

¹³ Fleck, above n 8, at 72–73; Gill and Fleck, above n 10, at [4.02](5).

¹⁴ *Legality of the Threat or Use of Nuclear Weapons*, above n 9, at [25]; Human Rights Committee *General Comment No 31 [80]: Nature of the Legal Obligation Imposed on States Party to the Covenant* UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) at [11]; and Human Rights Committee *General Comment No 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life* UN Doc CCPR/C/GC/36 (30 October 2018) at [64]. The European Court of Human Rights has taken a slightly different approach but has also accepted that, in situations of armed conflict, the provisions of the European Convention should be interpreted with reference to the rules of International Humanitarian Law: see, for example, *Hassan v United Kingdom* ECHR 297950/09, 16 September 2014 at [100]–[107] and the discussion in Ian Park (ed) *The Right to Life in Armed Conflict* (Oxford University Press, Oxford, 2018) at 108–110.

¹⁵ The right to life is guaranteed under art 6 of the International Covenant on Civil and Political Rights (ICCPR) (ratified on 28 December 1978), art 6 of the Convention on the Rights of the Child (ratified on 6 April 1993), art 10 of the Convention on the Rights of Persons with Disabilities (ratified on 25 September 2008) and s 8 of the New Zealand Bill of Rights Act 1990. See also art 3 of the *Universal Declaration of Human Rights* GA Res 217A (1948).

¹⁶ Professor Akande, above n 6, at [60]–[65]. See also the discussion in: Marko Milanovic *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford University Press, New York, 2011); and Park, above n 14, at 65–101.

¹⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, above n 8, at [109]–[111].

¹⁸ Human Rights Committee *General Comment No 31*, above n 14, at [10]; and Human Rights Committee *General Comment No 36*, above n 14, at [63].

life—are protected in relation to any person under the state’s power or effective control, even outside its territory. In 2018 the New Zealand Court of Appeal indicated a similar approach might be taken with respect to the extraterritorial application of the NZBORA.¹⁹

- [14] The question of what constitutes “effective control” for the purposes of extraterritorial application was an area of contention in the submissions presented to the Inquiry. As Professor Akande advised:²⁰

62. Where a state is in control of territory that an individual is located in, the state will have the obligation to respect the right to life. Likewise, where an individual is [in] a location (e.g. a military base, a ship, a plane) over which the state has effective control, the state will have the obligation to respect the right to life of the individual.

63. However, *it has been unclear whether the state must respect the right to life under human rights treaties in circumstances where the state does not control the physical space where the individual is located.* ...

(Emphasis added.)

- [15] In this context the Inquiry heard considerable argument as to whether the capacity to wield lethal force over an individual is in itself enough to constitute “effective control”.²¹ However, in the absence of clear international authority to that effect, the Inquiry concludes that the issue remains undecided in international law at present.²²

- [16] Even when New Zealand’s international human rights obligations can be said to have applied to NZDF in Afghanistan, the precise content of those obligations in a situation of armed conflict will be shaped by the more specific rules of International Humanitarian Law—particularly those relating to the conduct of hostilities. This is particularly relevant when interpreting the protection in the International Covenant on Civil and Political Rights against the “arbitrary” deprivation of life.²³ The Inquiry adopts the guidance of the International Court of Justice that, in a situation of armed conflict, whether a deprivation of life is “arbitrary” is to be determined primarily by the rules of International Humanitarian Law designed to regulate the conduct of hostilities.²⁴ This guidance is consistent with the recent statement of the Human Rights Committee that “[u]se of lethal force consistent with international humanitarian law ... is, in general, not arbitrary.”²⁵ At the same time, the Inquiry notes that conduct that is inconsistent with International Humanitarian Law would also likely violate the Covenant, when it can be said to have applied.²⁶ Accordingly, the applicable principles of International Humanitarian Law will be of primary importance in assessing NZDF conduct during Operation Burnham.

19 *Young v Attorney-General* [2018] NZCA 307 at [40]: “there is no reason in principle why the NZBORA should not be interpreted to apply to acts that would otherwise fall within the ambit of s 3 by reason only that they occur offshore”.

20 Professor Akande, above n 6.

21 Relying particularly on: the decisions of the European Court of Human Rights in *Al Skeini v United Kingdom* (2011) 53 EHRR 18 at [136]–[137] and *Jaloud v The Netherlands* ECHR 47708/08, 20 November 2014; and the statement of the Human Rights Committee in *General Comment No 36*, above n 14, at [63]. See Professor Akande, above n 6, at [63]–[65].

22 This issue of effective control in relation to obligations arising out of detention is discussed further in chapter 10 at [54]–[60].

23 ICCPR, above n 15, art 6(1).

24 *Legality of the Threat or Use of Nuclear Weapons*, above n 9, at [25].

25 Human Rights Committee *General Comment No 36*, above n 14, at [64]. Professor Akande noted that it was possible to imagine a “difficult” case (particularly in a situation of internal armed conflict) where the use of lethal force against an individual would be lawful under International Humanitarian Law but not under International Human Rights Law, but the example he gave was very different to the facts before the Inquiry: see Evidence of Professor Akande, Transcript of Proceedings, Inquiry Public Hearing Module 3 (30 July 2019) at 184–185.

26 Human Rights Committee *General Comment No 36*, above n 14, at [64].

Core principles of International Humanitarian Law

- [17] International Humanitarian Law “comprises those rules of international law which establish minimum standards of humanity that must be respected in any situation of armed conflict”.²⁷ The rules of International Humanitarian Law are built on two essential foundations: *military necessity* and *humanity*.²⁸
- (a) Military necessity provides that “a state engaged in an armed conflict may use that degree and kind of force, not otherwise prohibited by the Law of Armed Conflict, that is required in order to achieve the legitimate purpose of the conflict”.²⁹
 - (b) Humanity “forbids the infliction of suffering, injury, or destruction not actually necessary for the accomplishment of legitimate military purposes”.³⁰
- [18] As reflected in the Inquiry’s Terms of Reference, it is generally accepted that, during the period 2009 to 2011, the conflict in Afghanistan took the form of a non-international armed conflict.³¹ New Zealand, as a member of the International Security Assistance Force (ISAF) operating to assist the Afghan Government, was a party to that conflict.³²
- [19] The central rules of International Humanitarian Law applicable to situations of non-international armed conflict are found in Common Article 3 to the 1949 Geneva Conventions, Additional Protocol II to the 1949 Geneva Conventions and customary international law.³³ Some of these rules are also recognised as peremptory norms (or *jus cogens*), from which no state may derogate.³⁴

²⁷ Melzer, above n 8, at 17.

²⁸ Melzer, above n 8, at Chapter 1.I.1.3; see also Fleck, above n 8, at [132]–[134].

²⁹ UK Department of Defence *The Joint Service Manual of the Law of Armed Conflict: JSP 383* (2004) at [2.2] (as amended by Amendment 3, September 2010). Some commentators add that military necessity limits a belligerent party to the *minimum* use of force necessary to achieve its military objective: Fleck, above n 8, at [132]; ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC, Geneva, 2009) at 77–82.

³⁰ *The Joint Service Manual of the Law of Armed Conflict*, above n 29, at [2.4].

³¹ Armed conflict may take one of two forms: international armed conflicts, which occur between two or more States; or non-international armed conflicts, which take place between states and non-governmental armed groups, or between two or more such groups. This distinction is important because the precise rules of International Humanitarian Law that apply in a particular conflict situation depend on whether or not it is an international or non-international armed conflict. The Afghan conflict can be divided into two broad phases. First, a phase of international armed conflict between the United States-led Operation Enduring Freedom coalition and the Taliban governing Afghanistan. This phase is generally identified as lasting from 7 October 2001 to 18 June 2002 – that is, from the date of the first US-led air strikes to the establishment of the Afghan Transitional Administration. Second, since 19 June 2002, a non-international armed conflict between the Afghan Government, supported by ISAF and Operation Enduring Freedom forces, and the armed opposition. See, for example, the discussion in: ICRC *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea: Commentary of 2017* (ICRC, Geneva, 2017) at [422] and [423]; Fleck, above n 8, at [209.2]; Robin Geiss and Michael Seigrist “Has the Armed Conflict in Afghanistan Affected the Rules on the Conduct of Hostilities?” (2011) 93 IRRC 11 at 13–16; Annyssa Bellal, Gilles Giacca and Stuart Casey-Maslen “International Law and Armed Non-State Actors in Afghanistan” (2011) 93 IRRC 47 at 51–53.

³² Melzer, above n 8, at 73–75.

³³ Note that the use of certain weapons is also prohibited in non-international conflicts—for example under the 2001 Certain Conventional Weapons Convention and its Protocols. However, these obligations are not addressed in this analysis, as issues relating to these obligations do not appear to arise in relation to the events before the Inquiry.

³⁴ The term *jus cogens* means “the compelling law” and is reserved for the most important rules of international law. The most well-known effect is that state-made rules of international law, such as treaties, are invalid if they conflict with *jus cogens*. This rule is found in Article 53 of the Vienna Convention in the Law of Treaties. The principle behind this rule is that peremptory norms transcend the contractual will of states. For further explanation of *jus cogens* norms see Shaw, above n 11, at 91–95.

- [20] The specific rules of International Humanitarian Law contained in these sources can be summarised by reference to four essential principles: *distinction*; *proportionality*; *precaution*; and *humane treatment*. These principles require that civilians must be protected from *direct* or *indiscriminate* attack—while at the same time acknowledging that incidental harm to civilians can be an acceptable result of a lawful attack.³⁵

Distinction

- [21] Parties to the conflict must at all times distinguish between military objectives and civilians or civilian objects.³⁶ Attacks may only be directed against military objectives.³⁷ Civilians are protected against direct attack unless, and only for such time as, they take a direct part in hostilities.³⁸ Civilian objects are likewise protected against attack unless, and only for such time as, they are military objectives.³⁹ Indiscriminate attacks against military objectives and civilians or civilian objects without distinction are prohibited.⁴⁰
- [22] Military objectives are “objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”.⁴¹ All other objects are civilian objects.⁴²
- [23] The obligation to distinguish between civilian objects and military objectives applies in respect of attacks *directed* at the object in question.⁴³ If an attack targeted an individual or a military objective but resulted in civilian casualties or collateral damage to civilian property, that would not breach the principle of distinction (although the principles of proportionality and precaution would still need to be complied with, as discussed below).

Proportionality

- [24] International Humanitarian Law does not include an absolute prohibition on attacks that may cause civilian casualties or collateral damage. However, it does prohibit:⁴⁴
- (a) the launching of an attack that may be expected to cause incidental loss of civilian life, injury to civilians, or damage to civilian objects; *if*

³⁵ Melzer, above n 8, at 17–20. See also Fleck, above n 8, at [1203]. The rules of customary International Humanitarian Law applying in situations of non-armed conflict have been identified by the ICRC in its 2005 study: Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law* (Cambridge University Press, Cambridge, 2005); *Protocol additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)* 1125 UNTS 609 (opened for signature 8 June 1977, entered into force 7 December 1978) [Additional Protocol II].

³⁶ Additional Protocol II, above n 35, art 13(2); Henckaerts and Doswald-Beck, above n 35, rules 1 and 7. See also: Fleck, above n 8, at [501], [518] and [1203]; Gill and Fleck, above n 10, at [16.02].

³⁷ Henckaerts and Doswald-Beck, above n 35, rules 1, 8 and 9. See also: Fleck, above n 8, at [502], [518] and [1203]; Gill and Fleck, above n 10, at [16.02].

³⁸ Additional Protocol II, above n 35, art 13(3); Henckaerts and Doswald-Beck, above n 35, rule 6. See also: Fleck, above n 8, at [517], [518] and [1203]; Gill and Fleck, above n 10, at [16.02](10).

³⁹ Henckaerts and Doswald-Beck, above n 35, rule 10. See also: Fleck, above n 8, at [501], [518] and [1203]; Gill and Fleck, above n 10, at [16.03].

⁴⁰ Henckaerts and Doswald-Beck, above n 35, rules 11 to 13. See also: Fleck, above n 8, at [457]–[459] and [1212]; Gill and Fleck, above n 10, at [16.04].

⁴¹ Henckaerts and Doswald-Beck, above n 35, rule 8.

⁴² Henckaerts and Doswald-Beck, above n 35, rule 9.

⁴³ Gill and Fleck, above n 10, at [16.02].

⁴⁴ Henckaerts and Doswald-Beck, above n 35, rule 14. See also: Fleck, above n 8, at [509], [518] and [1212]; Gill and Fleck, above n 10, at [16.06].

(b) that loss of life, injury or damage would be excessive in relation to the concrete and direct military advantage anticipated.

- [25] This rule applies at the time that an attack is planned,⁴⁵ but parties to the conflict must also do everything feasible to cancel or suspend an attack if it becomes apparent during the attack that incidental civilian casualties would be excessive in relation to the concrete and direct military advantage anticipated.⁴⁶ The test of whether incidental civilian casualties would be “excessive” is an objective one, to be assessed on the basis of the information available to a commander at the time.⁴⁷

Precaution

- [26] All feasible precautions must be taken to avoid and minimise incidental loss of civilian life, injury to civilians and damage to civilian objects.⁴⁸ “All feasible precautions” requires all precautions that are practicable, or practically possible, taking into account all circumstances at the time.⁴⁹
- [27] Parties to the conflict must accordingly do everything feasible to verify that targets are military objectives.⁵⁰ They must take all feasible precautions in the choice of means and methods of warfare with a view to avoiding and minimising incidental civilian casualties;⁵¹ and assess whether such anticipated casualties would be excessive in relation to the concrete and direct military advantage anticipated.⁵² They must give effective advance warning of attacks that may affect the civilian population unless circumstances do not permit such a warning.⁵³

Humane treatment

- [28] Civilians and persons not taking part in hostilities must be treated humanely and without adverse distinction.⁵⁴ Murder, torture and cruel, inhumane or degrading treatment are specifically prohibited.⁵⁵ Whenever circumstances permit, parties to the conflict must take all possible measures to search for the dead and wounded, and to dispose of the dead in a respectful manner.⁵⁶ The wounded must receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition.⁵⁷ Persons deprived of their liberty must be provided with basic necessities and assured of certain guarantees.⁵⁸

⁴⁵ Gill and Fleck, above n 10, at [16.06](3).

⁴⁶ Henckaerts and Doswald-Beck, above n 35, rule 19. See also: Fleck, above n 8, at [460] and [1212].

⁴⁷ Gill and Fleck, above n 10, at [16.06](3).

⁴⁸ Henckaerts and Doswald-Beck, above n 35, rule 15. See also: Fleck, above n 8, at [510], [518] and [1203]; Gill and Fleck, above n 10, at [16.07].

⁴⁹ Gill and Fleck, above n 10, at [17.04](7).

⁵⁰ Henckaerts and Doswald-Beck, above n 35, rule 16. See also: Fleck, above n 8, at [460 and 1212]; Gill and Fleck, above n 10 at [16.07](3).

⁵¹ Henckaerts and Doswald-Beck, above n 35, rule 17. See also: Fleck, above n 8, at [460 and 1212]; Gill and Fleck, above n 10, at [16.07](4).

⁵² Henckaerts and Doswald-Beck, above n 35, rule 18. See also: Fleck, above n 8, at [460] and [1212]; Gill and Fleck, above n 10, at [16.06](3)–(7).

⁵³ Henckaerts and Doswald-Beck, above n 35, rule 20. See also: Fleck, above n 8, at [448] and [1212].

⁵⁴ Article 3 common to the four Geneva Conventions [Common Article 3]; Additional Protocol II, above n 35, art 4; Henckaerts and Doswald-Beck, above n 35, rules 87 and 88. See also: Fleck, above n 8, at [1203].

⁵⁵ Henckaerts and Doswald-Beck, above n 35, rules 90 and 115. See also: Fleck, above n 8, at [608], [1203] and [1212].

⁵⁶ Common Article 3; Additional Protocol II, above n 35, art 8; Henckaerts and Doswald-Beck, above n 35, rules 109 and 112. See also: Fleck, above n 8, at [605] and [1212].

⁵⁷ Common Article 3; Additional Protocol II, above n 35, art 7; Henckaerts and Doswald-Beck, above n 35, rule 110. See also: Fleck, above n 8, at [605] and [1212].

⁵⁸ Common Article 3; Additional Protocol II, above n 35, art 5; Henckaerts and Doswald-Beck, above n 35, rules 118 to 128.

“Combatants”, “civilians” and “direct participation in hostilities”

[29] The effect of the principle of distinction is that there are two situations in which a person may be a lawful target of direct attack under International Humanitarian Law:⁵⁹

- (a) the person is not a civilian; or
- (b) the person is a civilian but is taking a direct part in hostilities at the time when they are the object of the attack.

[30] In situations of international armed conflict, all members of the armed forces that are a party to the conflict (other than medical and religious personnel) are “combatants”.⁶⁰ They wear uniforms and are easily distinguished from the population at large. People who are not members of the armed forces of a party to the conflict are “civilians”.⁶¹ “Combatants” enjoy “combatant privilege”—that is, they are immune from prosecution for lawful acts of war.⁶² But they remain lawful objects of direct attack.⁶³ Civilians, by contrast, are protected from attack except for such time as they take “direct participation in hostilities”.⁶⁴

[31] The situation in a non-international armed conflict is quite different, however, as Professor Akande discussed in his opinion.⁶⁵ The treaties setting out the rules of International Humanitarian Law that apply in non-international armed conflict do not use the term “combatant”, although they do refer to “civilians”. As Professor Akande noted, the operation of the principle of distinction is less clear in a non-international armed conflict setting. He said:⁶⁶

With regard to the facts, complexity arises because many non-state armed groups do not have clearly defined membership structures, and it is often the case that persons will occasionally fight on behalf of those groups but also engage in normal civilian activities (the “farmer by day and fighter by night”). Also, many such groups do not wear uniforms or have other fixed distinctive sign or indicia which make the members of the group easily distinguishable from the general civilian population.

[32] Professor Akande identified two approaches to the question of who is a “civilian” in situations of non-international armed conflict.

- (a) Under the first approach, only members of a State’s armed forces can be regarded as “combatants” in a non-international armed conflict. All persons other than members of the State’s armed forces must be treated as “civilians” and may only be attacked if and at such time as they directly participate in hostilities. This is the approach adopted by NZDF in its Law of Armed Conflict manual.⁶⁷ However, NZDF also takes the view that membership of an organised armed group that is a party to the conflict is evidence that an individual is taking

⁵⁹ Professor Akande, above n 6, at [10].

⁶⁰ Protocol additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol I) 1125 UNTS 609 (opened for signature 8 June 1977, entered into force 7 December 1978) [Additional Protocol I]; Henckaerts and Doswald-Beck, above n 35, rule 3.

⁶¹ Additional Protocol I, above n 60, art 50(1); Henckaerts and Doswald-Beck, above n 35, rule 5.

⁶² Nils Melzer “The Principle of Distinction between Civilians and Combatants” in Clapham and Gaeta, above n 11, at 305.

⁶³ Henckaerts and Doswald-Beck, above n 35, rule 1; except when *hors de combat* (Additional Protocol I, above n 60, art 41(1); Henckaerts and Doswald-Beck, above n 35, rule 47).

⁶⁴ Henckaerts and Doswald-Beck, above n 35, rule 6.

⁶⁵ Professor Akande, above n 6, at [13]–[17].

⁶⁶ At [13].

⁶⁷ NZDF *Manual of Armed Forces Law: Vol 4, Law of Armed Conflict* (7 August 2017).

a direct part in hostilities on a continuous basis—so that they have made themselves lawful targets of direct attack at any time.⁶⁸

- (b) Other commentators, including the International Committee of the Red Cross (ICRC), take a different approach. In situations of non-international armed conflict the ICRC considers that members of organised armed groups that are a party to the armed conflict are not “civilians”.⁶⁹ They are therefore not entitled to protection against direct attack.⁷⁰ But they do not enjoy “combatant privilege” and remain subject to prosecution for acts committed during the conflict, even if they comply with International Humanitarian Law.⁷¹

- [33] As Professor Akande noted, in practice, the approach adopted by NZDF and that of the ICRC lead to practically equivalent results.⁷² An individual who is a member of an organised armed group that is a party to the conflict can lawfully be attacked—either because they are not considered to be a “civilian”, or because they are a civilian “directly participating in the hostilities”.

Membership of an organised armed group

- [34] There is no clear definition of “membership” of an organised armed group in either treaty or customary International Humanitarian Law. Interpretive guidance issued by the ICRC in 2009 notes that, in contrast to membership of state armed forces, membership of organised armed groups:⁷³

... is rarely formalized through an act of integration other than taking up a certain function for the group; and it is not consistently expressed through uniforms, fixed distinctive signs, or identification cards. In view of the wide variety of cultural, political, and military contexts in which organized armed groups operate, there may be various degrees of affiliation with such groups that do not necessarily amount to “membership” within the meaning of IHL.

- [35] The ICRC guidance takes the approach that membership of an organised armed group is limited to those who fight. It considers that membership must be assessed according to function, and limits membership to those individuals who have a “continuous combat function” within the group.⁷⁴ Given this:⁷⁵

... individuals whose continuous function involves the preparation, execution or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function.

- [36] On the other hand, individuals who accompany, support or assist an organised armed group but whose functions do not involve the *direct* participation in hostilities are not “members of an organised armed group” and must be treated as civilians.⁷⁶

⁶⁸ NZDF, above n 67, at [6.5.24]–[6.5.26].

⁶⁹ ICRC *Interpretive Guidance*, above n 29, at 27–36.

⁷⁰ At recommendation VII and 71–73; Melzer in Clapham and Gaeta, above n 62, at 318–323; Fleck, above n 8, at [1203]; Gill and Fleck, above n 10, at [16.02](4).

⁷¹ Knut Dörmann “Unlawful Combatants” in Clapham and Gaeta, above n 11, at 605; Fleck, above n 8, at [1215].

⁷² Professor Akande, above n 6, at [15].

⁷³ ICRC *Interpretive Guidance*, above n 29, at 32–33.

⁷⁴ At 33–34.

⁷⁵ At 34.

⁷⁶ At 34.

- [37] The ICRC's emphasis on a continuous combat function as the criterion for assessing membership has been criticised by some commentators as being too narrow and inconsistent with the approach taken to defining the armed forces of a State party to a conflict.⁷⁷ Critics have also argued that the ICRC's approach is too complex and creates uncertainty for the soldier on the battlefield.⁷⁸ The NZDF manual on the Law of Armed Conflict, for example, looks instead at whether the individual makes a "direct contribution to the combat effectiveness" of the organised armed group.⁷⁹
- [38] Although influential, the ICRC's guidance therefore should not be taken as a statement of settled law. But it does represent the high-water mark of protection. Professor Akande therefore advised the Inquiry that an individual who meets the ICRC's "continuous combat function" criteria can be safely considered to be a lawful target of deliberate attack under International Humanitarian Law.⁸⁰
- [39] In any case, the issue does not arise on the facts of Operation Burnham. As we have said, the principle of distinction only applies where an attack is directed against the person in question. At the time of Operation Burnham, TF81 did not know the identity of the individuals against whom force was used, nor did it have any specific information about their affiliations.⁸¹ Rather, the individuals were engaged based on their behaviour during the operation.

Persons taking a direct part in hostilities

- [40] Even if an individual is not a known member of an organised armed group that is a party to the conflict, they can still be a lawful target of deliberate attack during such time as they take a "direct part in hostilities".
- [41] The concept of "direct participation in hostilities" is also not defined in either treaty or customary International Humanitarian Law, and it remains a particularly difficult area of International Humanitarian Law. The ICRC addressed this concept in its 2009 interpretive guidance.⁸² Under that guidance, direct participation is limited to specific acts that meet three cumulative criteria:⁸³
- (1) a threshold regarding the harm likely to result from the act, (2) a relationship of direct causation between the act and the expected harm, and (3) a belligerent nexus between the act and the hostilities conducted between the parties to an armed conflict.
- [42] The ICRC's guidance has been the subject of considerable debate but, even so, Professor Akande considered that it provides a useful analytical tool for making determinations as to direct participation in hostilities.⁸⁴ The Inquiry agrees with his view that it is appropriate to take a narrow interpretation of the direct participation concept.⁸⁵ We also note that while the ICRC's guidance is not binding on states, it is persuasive given the ICRC's mandate under the

⁷⁷ See the discussion in Melzer, above n 62, at 316 and the references in footnote 88.

⁷⁸ See, for example, Kenneth Watkin "Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance" (2010) 42 NYU J Intl L & Pol 641 at 662–664.

⁷⁹ NZDF, above n 67, at [6.5.25].

⁸⁰ Professor Akande, above n 6, at [23].

⁸¹ While there was some general intelligence indicating there was a Taliban presence in the area, we consider that was insufficient to establish that the particular individuals engaged during the operation were Taliban members.

⁸² ICRC *Interpretive Guidance*, above n 29.

⁸³ At 46. For a discussion of each of these criteria see pages 46–64.

⁸⁴ Professor Akande, above n 6, at [34].

⁸⁵ At [34].

Geneva Conventions.⁸⁶ We therefore take the approach that an individual who meets the ICRC criteria for “direct participation in hostilities” can safely be considered to be a lawful target under International Humanitarian Law.

[43] Accordingly, in assessing the conduct of NZDF personnel during Operation Burnham, we adopt the following test for when a civilian may be treated as “directly participating in hostilities”, based on the ICRC’s *Interpretive Guidance*:⁸⁷

- (a) The civilian must be acting or preparing to act in a manner likely to adversely affect the military operations of a party to an armed conflict (including, but not limited to, causing death or injury to military personnel). The harm must “reasonably be expected to result from [the] act in the prevailing circumstances”.⁸⁸
- (b) There must be a direct causal link between the act and the likely harm. This requirement will be met if the act “may reasonably be expected to directly—in one causal step—cause harm that reaches the required threshold.”⁸⁹
- (c) The act must be one that “can reasonably be perceived as an act designed to support one party to the conflict by directly causing the required threshold of harm to another party.”⁹⁰

[44] This test focuses on what could reasonably be perceived and expected in the circumstances. This accounts for the fact that the commanders and soldiers must make decisions based on the information available to them, which will often be incomplete. Provided their assessment is reasonable in the circumstances, they will not breach International Humanitarian Law. It must, however, be remembered that in cases of doubt International Humanitarian Law requires that an individual is treated as a civilian entitled to protection from attack.⁹¹

Use of force in self-defence

[45] The rules of International Humanitarian Law that we have been discussing govern the use of force as a matter of direct attack against people or property. Under those rules, offensive force may be used against legitimate military targets—whether or not they are engaged in hostile action at the time of the attack. At the same time, force is prohibited against civilians and civilian property. Civilians only lose their protection from direct attack at such time as they are directly participating in hostilities.

[46] In addition to those rules, the right of soldiers to use force in their own self-defence is recognised under international and domestic law.⁹² Any such force is defensive only. It is permitted only when: an attack is occurring or is imminent; the use of force is necessary (there being no feasible

⁸⁶ See generally Fleck, above n 8, at [1424]. We note there has been some criticism of the ICRC’s approach. However, the main areas of controversy do not affect the analysis of Operation Burnham, so we are not required to resolve them. See, for example, the discussion in Gill and Fleck, above n 10, at [16.02].

⁸⁷ ICRC *Interpretive Guidance*, above n 29.

⁸⁸ At 47.

⁸⁹ At 58.

⁹⁰ At 64.

⁹¹ See, for example, the ICRC’s commentary on “Situations of doubt as to the character of a person” in “Practice Relating to Rule 6. Civilians’ Loss of Protection from Attack” ICRC <ihl-databases.icrc.org>.

⁹² See generally Gill and Fleck, above n 10, at [10.03](18), [22.06]–[22.08], [22.12], [23.01] and [23.12].

alternatives); and the force used is proportionate to the level of attack being defended against.⁹³ The right applies on both the individual and the unit level, and a commander has the right to take all necessary measures to defend his or her unit against attack.⁹⁴

- [47] Where the right of self-defence applies there is no need to determine that the attacker is directly participating in hostilities or is otherwise a legitimate military target. The right to use force is triggered by the threat posed by the individual not his or her status. For example, a soldier would be entitled to defend him or herself against an attack by a civilian who is not involved in the insurgency and is motivated by non-military factors. However, the force used in defence must be necessary and proportionate to the threat the soldier is facing. No more force than is strictly necessary should be used to counter the attack.⁹⁵

Consequences of breaching International Humanitarian Law and/or International Human Rights Law

- [48] A state is responsible under international law for violations of International Humanitarian Law committed by its armed forces.⁹⁶ The New Zealand Government is therefore legally responsible under international law for any breaches of International Humanitarian Law committed by NZDF.
- [49] In addition, some breaches of International Humanitarian Law are “war crimes” incurring criminal responsibility on the part of individuals under both domestic and international law.⁹⁷ Not every breach of International Humanitarian Law constitutes a war crime—only those that are “serious” or “grave” and that are committed with the requisite *mens rea*.⁹⁸ Criminal responsibility for war crimes may attach to persons who (directly or indirectly) committed the crime,⁹⁹ as well as those in a position of command responsibility.¹⁰⁰ Central to “command responsibility” is the requirement that the commander knew, or ought to have known, that their subordinates were committing a war crime.¹⁰¹
- [50] Some breaches of International Humanitarian Law may also give rise to criminal responsibility for individuals in certain limited circumstances. Gross breaches of human rights amounting to “crimes against humanity” are recognised as crimes under both New Zealand domestic and

⁹³ At [22.08] and [23.02].

⁹⁴ At [22.06].

⁹⁵ At [23.07].

⁹⁶ Henckaerts and Doswald-Beck, above n 35, rule 149; Fleck, above n 8, at [1419](4); International Law Commission *Draft Articles on State Responsibility* (2001) UN Doc A/56/10, art 4.

⁹⁷ In situations of non-international armed conflict, both serious violations of Common Article 3 and other serious violations of International Humanitarian Law constitute “war crimes”: Henckaerts and Doswald-Beck, above n 35, rule 156. These “war crimes” are criminalised in New Zealand law under both s 11 of the International Crimes and International Criminal Court Act 2000 and s 3 of the Geneva Conventions Act 1958. For a discussion of the development of the international criminal law with respect to violations of International Humanitarian Law see Paola Gaeta “War Crimes and Other International ‘Core’ Crimes” in Clapham and Gaeta, above n 11, at 737.

⁹⁸ *Mens rea* (literally, “guilty mind”) refers to the mental element of a criminal offence—for example, intention, knowledge or recklessness.

⁹⁹ Henckaerts and Doswald-Beck, above n 35, rule 151. See, for example, Rome Statute of the International Criminal Court 1998 art 25(2) and (3).

¹⁰⁰ Henckaerts and Doswald-Beck, above n 35, rule 153. See, for example, Rome Statute, above n 99, art 28.

¹⁰¹ See the elaboration of the elements of command responsibility by the International Criminal Court in *Prosecutor v Jean-Pierre Bemba Gombo*, PTC II, Decision on the Confirmation of Charges, 15 June 2009 at [407].

international law.¹⁰² These include murder¹⁰³ and torture¹⁰⁴ when committed as part of a “widespread or systematic attack” knowingly directed against a civilian population.¹⁰⁵

Applicable rules of engagement

- [51] Rules of engagement are the internal rules adopted by a military that define the conditions, circumstances, degree and manner in which force may be used. Typically, they specify the conditions under which force, including lethal force, can be used and place limits upon its use. They generally define who or what may be targeted and under what circumstances.
- [52] In New Zealand, rules of engagement are made under the legal authority of the Royal Prerogative in the form of formal military orders. That means that they are enforceable under the Armed Forces Discipline Act 1971 and violations can be subject to prosecution under New Zealand’s military justice system. When issued, rules of engagement apply to all military members undertaking the operation for which the rules of engagement were issued. Both individual personnel and commanders who authorised their unit’s operations are bound by the rules of engagement.
- [53] Rules of engagement are formulated to reflect policy, operational and legal requirements and are issued at the highest level of military command and approved at the highest level of government. At a minimum they must be consistent with the legal requirements of International Humanitarian Law. Rules of engagement cannot authorise actions that breach International Humanitarian Law or domestic law.¹⁰⁶ But they will also take account of policy and operational considerations. Frequently they may impose *stricter* conditions on the use of force than those required by International Humanitarian Law.
- [54] In an overseas coalition setting, combined or international rules of engagement may be issued to cover all the coalition. In Afghanistan, ISAF had its own rules of engagement. As a contributing member to that coalition, New Zealand was required to adhere to ISAF’s rules of engagement to obtain approval to conduct operations within ISAF’s area of operation and control. However, like many nations that contributed to ISAF operations in Afghanistan, New Zealand also had its own rules of engagement. In the event of inconsistency between New Zealand’s rules of engagement and ISAF’s rules of engagement, NZDF personnel were bound to follow New Zealand’s rules of engagement.
- [55] The following discussion therefore focuses on the rules of engagement for the Operation Wātea deployment dated 25 May 2010, which was the version current at the time of Operation Burnham. These rules of engagement have been declassified in part and published by the Inquiry.¹⁰⁷ The Inquiry has also had access to the full, unredacted rules of engagement, and notes the redactions do not affect our analysis.

¹⁰² Rome Statute, above n 99, art 7; see also the International Criminal Court “Elements of Crime” (2013) <www.icc-cpi.int> at 5–12. “Crimes against humanity” are criminalised in New Zealand law under s 10 of the International Crimes and International Criminal Court Act 2000.

¹⁰³ Rome Statute, above n 99, art 7(1)(a).

¹⁰⁴ Art 7(1)(f).

¹⁰⁵ Art 7(1) *chapeau* and 7(2)(a).

¹⁰⁶ NZDDP-06.1 pdf 2010 Doctrine_Redacted (February 2010) (Inquiry doc 04/03) at 1–6 and [15].

¹⁰⁷ Inquiry doc 04/04, above n 3.

- [56] In interpreting and applying the rules of engagement, it is necessary to have regard to the practical context in which they operate. As Brigadier (Retired) Kevin Riordan (the Judge Advocate General and former Director of Defence Legal Services) said in evidence at Module 2 of the Inquiry’s public hearings, soldiers must make rapid decisions in complex situations and exercise important elements of judgement in applying the rules of engagement.¹⁰⁸ The Inquiry is conscious of the need to be realistic about what can be expected of soldiers in conflict situations.
- [57] Against that background, the following four rules of engagement are of particular relevance to Operation Burnham.

Rule A: Use of force in self-defence

- [58] Rule A of the rules of engagement recognised the right of TF81 to use force in self-defence. It permitted the use of force to protect individual TF81 members, the unit or “designated persons” (which included other ISAF personnel and the Crisis Response Unit (CRU)).¹⁰⁹ Rule A provided that:¹¹⁰

Use of **minimum force**, up to and including **deadly force**, is permitted for individual or unit self defence or in defence of **designated persons** against a **hostile act** or demonstration of **hostile intent**.

- [59] Relevant to Operation Burnham, the following terms are defined in the rules of engagement:¹¹¹

Deadly force means force that is intended or likely to cause death or serious injury.

Hostile act means the use of force by any person or group against one or more members of TF 81, **designated persons** or **designated property** where death or serious injury is likely to result.

Hostile intent means that there is an imminent intent to commit a **hostile act**. The existence of a hostile intent may be judged by either:

- (a) The threatening individual or unit’s capability and preparedness to inflict imminent or immediate damage; or
- (b) Information, particularly intelligence, which indicates an intention to conduct an imminent or immediate attack.

Minimum force means the minimum degree of force that is necessary, reasonable and lawful under the circumstances to achieve the objective. It includes the full range of force, up to and including **deadly force**.

Self defence means the use of reasonable force to protect any member of TF 81 or any other **designated person** against a **hostile act** or **hostile intent**.

¹⁰⁸ Judge Advocate General Kevin Riordan, Transcript of proceedings, Public Hearing Module 2 (22 May 2019) at 59–96; see also Judge Advocate General Kevin Riordan “Rules of Engagement and military doctrine” (Public Hearing Module 2, 22 May 2019).

¹⁰⁹ See the definition of “designated persons” in Inquiry doc 04/04, above n 3.

¹¹⁰ At [3A] (bold in original).

¹¹¹ At [2] (bold in original).

- [60] The effect of the rule, taking account of the definitions of “minimum force” and “self-defence”, was that TF81 could use *only such force as was necessary* to protect individual members, the unit or designated persons against an act of force or imminent intent to commit an act of force that was likely to result in serious injury or death. This is consistent with the principles applying to self-defence under international law, which require the use of force to be necessary and proportionate.¹¹² While proportionality was not expressly referred to in rule A, similar considerations are likely to be relevant in determining whether the level of force was “reasonable”.

Rule C: Use of force to achieve the mission

- [61] Rule C of the rules of engagement provided:¹¹³

Use of **minimum force**, up to and including **deadly force**, to achieve the mission is permitted.

- [62] The use of the term “minimum force” (defined in paragraph [59] above) meant, in the context of this rule, that the level of force used had to be necessary, reasonable and lawful to achieve the mission. In this respect, rule C imposed greater restrictions on TF81 than International Humanitarian Law required. The use of minimum force is not a general requirement under International Humanitarian Law, although the level of force used may be relevant in assessing compliance with the principles of proportionality and precaution.
- [63] On its face, rule C has a potentially broad application. By way of illustration, the “mission” for Operation Burnham was to conduct a helicopter assault force operation to detain Abdullah Kalta and Maulawi Neimatullah.¹¹⁴ To achieve that mission, use of force might be necessary, for example, to facilitate entry to the objective buildings, to capture and detain the targets, or to ensure troops could be safely extracted. However, any such use of force would, under the definition of “minimum force”, need to be both reasonable and lawful. The “lawful” aspect of the definition recognises that any use of force to achieve the mission had to comply with International Humanitarian Law. As we described earlier, the principle of distinction under International Humanitarian Law provides that civilians are protected against direct attack unless, and only for such time as, they take a direct part in hostilities. Accordingly, rule C could not permit the use of force against a civilian unless they were directly participating in hostilities—even if their conduct might threaten mission accomplishment in some other way.
- [64] Rule C of the rules of engagement also appears to be the primary rule that would have applied in relation to the use of force against property. The principle of distinction is relevant in this context as well, as it requires that attacks only be directed against military objectives. While the wording of rule C differed from the definition of “military objective” under International Humanitarian Law, it appears generally consistent with the requirements of International Humanitarian Law. If the property in question did not make an effective contribution to military action, or damage to it would not offer any military advantage, it is difficult to see how the use of force against it could be “necessary ... to achieve the mission”.

¹¹² See the discussion in paragraphs [45]–[47].

¹¹³ At [3C] (bold in original).

¹¹⁴ The orders for the operation state that the mission is to “conduct HAF DDO on Obj Burnham and Obj Nova”: OP RAHBARI ORDERS (Inquiry doc 09/39) at 34. A “HAF” refers to a helicopter assault force operation, and “DDO” refers to a deliberate detention operation.

Rule H: Attacks on individuals directly participating in hostilities

[65] Rule H of the rules of engagement provided:¹¹⁵

Attack on individuals, forces or groups directly participating in hostilities in Afghanistan against the legitimate Afghan government, including [redacted] is permitted.

[66] The rule further required:

- (a) authorisation at a certain level for planned attacks;¹¹⁶ and
- (b) positive confirmation that a target was directly participating in hostilities.

[67] As we discuss further in chapter 8, rule H was the primary rule relied on in planning and conducting attacks against targets on the Joint Prioritised Effects List (JPEL). It also permitted attacks against people who were not JPEL targets but who, during an operation, were identified as directly participating in hostilities.¹¹⁷

[68] Rule H reflects the principle of distinction under International Humanitarian Law, expressly adopting the term “direct participation in hostilities” that is used in that context. Given our conclusion that rule C could only permit the use of force against an individual if they were directly participating in hostilities, the practical effect of rules C and H was very similar—at least insofar as rule C relates to the use of force against individuals (as opposed to property).

[69] In practice, it appears that NZDF’s interpretation of “directly participating in hostilities” at the relevant time was similar to the test in rule A (self-defence). The term is not defined in rule H. However, in her presentation at the Inquiry’s public hearing on module 3, Brigadier Ferris stated:¹¹⁸

... in Afghanistan at the time relevant to this Inquiry, New Zealand considered that a civilian could lose protection by [directly participating in hostilities] through:

- (a) demonstrating hostile intent or engaging in a specific hostile act; or
- (b) being a member of an Organised Armed Group (OAG) that was collectively and continuously taking part in hostilities against the Government of Afghanistan.

[70] In relation to people subjected to force during Operation Burnham, the first category is most relevant. As noted above, the identity of these people was not known during the operation, so they could not be identified as known members of a specific organised armed group. The criteria for determining membership are discussed in chapter 7 in relation to the predetermined and offensive use of lethal force.

¹¹⁵ Inquiry doc 04/04, above n 3, at [3H].

¹¹⁶ The specific level of authorisation required is redacted from the public version of the rules of engagement.

¹¹⁷ This is clear from the fact that the rule provides for a specific level of authorisation in the case of pre-planned attacks only. Given this, it must have been anticipated that the rule might also be used in attacks that were not pre-planned.

¹¹⁸ Brigadier Lisa Ferris “Presentation of the New Zealand Defence Force” (Inquiry Public Hearing Module 3, 30 July 2019) at [28].

- [71] The terms “hostile act” and “hostile intent” are defined in the rules of engagement, although they are not used in rule H. Brigadier Ferris noted that rule A of the rules of engagement (self-defence)—which did use these terms—was usually relied on to justify the use of force against people identified as directly participating in hostilities during the course of an operation.¹¹⁹ It appears, then, that NZDF personnel likely understood the concepts of “direct participation in hostilities” and “hostile act”/“hostile intent” as being similar, if not identical, in scope. We note that the presentation used to train TF81 personnel on the rules of engagement and International Humanitarian Law support this conclusion.¹²⁰

Rule I: Actions that could result in incidental casualties and collateral damage

- [72] Rule I of the rules of engagement sets out when force could be used that might have the *incidental* effect of harming civilians or civilian property, even though they are not the target. It provided:¹²¹

Actions which could result in **incidental casualties** and **collateral damage** are permitted if the action is essential for mission accomplishment and the expected **incidental casualties** and **collateral damage** are proportionate to the concrete and direct military advantage anticipated.

- [73] “Incidental casualties” and “collateral damage” were defined in the rules of engagement as follows:¹²²

Collateral damage means the unintended destruction of property, which occurs incidental to the authorised and legitimate use of force.

Incidental casualties means the unintended death or injury of civilians, which occurs incidental to the authorised and legitimate use of force.

- [74] We make three points about this rule:

- (a) First, it required that the casualties or damage be “proportionate to the concrete and direct military advantage anticipated”. This is consistent with the International Humanitarian Law principle of proportionality.
- (b) Second, it required the action in question to be “essential for mission accomplishment”. As discussed in relation to rule C above, in the case of force directed against an individual this would not in itself have been sufficient under International Humanitarian Law. The principle of distinction would also require that for an individual to be a legitimate target they must be directly participating in hostilities.
- (c) Third, the definitions of collateral damage and incidental casualties only cover casualties or damage that are incidental to the *authorised and legitimate* use of force. Therefore, any actions involving the *illegitimate* use of force that resulted in civilian casualties or damage to civilian property would not be permitted. This would include force directed against a civilian who was not directly participating in hostilities.

¹¹⁹ At [45].

¹²⁰ Inquiry doc 04/02, above n 5, at 35–36.

¹²¹ Inquiry doc 04/04, above n 3, at [31] (bold in original).

¹²² At [2] (bold in original). We note that, while given a more specific meaning in the rules of engagement, the term “collateral damage” is often used as an umbrella term for both civilian casualties and damage to civilian property.

- [75] Despite the positive way in which the rule is framed, we see it operating (like the proportionality principle) as a limit on the use of force where collateral damage might be expected to result. The relevant use of force would still need to be permitted by a separate rule or principle of International Humanitarian Law (for instance, on the basis that it was directed against a military objective or a person directly participating in hostilities).

Relationship between rules C and H and the ICRC's test for direct participation in hostilities

- [76] We consider that in the context of Operation Burnham, the test for direct participation in hostilities set out by the ICRC (discussed at [43]) can be used to assess compliance with both rules C and H of the rules of engagement and the principle of distinction under International Humanitarian Law, insofar as they relate to the determination of whether an individual was a lawful target of attack. The rules of engagement must be interpreted consistently with the principles of International Humanitarian Law; they cannot be more permissive. As we have said, this meant rule C could only be used to justify the use of force against individuals who were directly participating in hostilities. Rule H explicitly incorporated the concept of direct participation in hostilities.
- [77] Rule C did impose an additional “minimum force” requirement, which we do not consider was required under International Humanitarian Law.¹²³ However, rule H did not include such a requirement. Taking account of the effect of the principle of distinction, we consider rule H would also have been available to TF81 in the same situations as rule C where the use of force against individuals was concerned. For this reason, it is unnecessary to apply a minimum force requirement when assessing compliance with the rules of engagement in relation to attacks on individuals who were directly participating in hostilities (the use of force in self-defence is a different matter, as discussed below).
- [78] We acknowledge that the ICRC guidance was relatively new at the time of Operation Burnham, so TF81 personnel may not have adopted the same test when applying their rules of engagement. Indeed, as we have said, it appears that at the relevant time TF81 personnel understood the test for “direct participation in hostilities” would be met where there was a “hostile act” or “hostile intent” (similarly to rule A). The key differences between that approach and the test set out above are that the definition of “hostile act”:
- (a) Only applied to acts *against* members of TF81 or designated persons/property likely to cause *serious injury or death*. This is a higher threshold to meet than limb (a) of the test for direct participation in hostilities in paragraph [43] above (which only requires the act to be likely to adversely affect TF81’s military operations).
 - (b) Did not explicitly require that the act be designed to support one party to the conflict (as is required by paragraph [41](c)). In this sense, it permitted a potentially broader range of people to be subject to attack.

¹²³ As we discuss in chapter 7 (at [23]–[25]), there is significant disagreement over whether force used against people who are directly participating in hostilities must be limited to the minimum degree necessary (which might, for example, require them to be captured rather than killed where possible). We proceed on the basis that there is no such a requirement under the current law.

- [79] The main area of contention in relation to Operation Burnham relates to paragraph (a) of the test for direct participation in hostilities—that is, whether individuals were acting or preparing to act in a manner likely to adversely affect the operation. This threshold would be satisfied wherever the definition of “hostile act” or “hostile intent” applied.¹²⁴
- [80] In relation to paragraph (c) of the test, we take the approach that if the definitions of “hostile act” or “hostile intent” were met but there was no basis for determining that the relevant act was designed to support a party to the conflict, force could only be used in accordance with rule A of the rules of engagement (self-defence). As noted above, rule A imposed a “minimum force” requirement, which would apply in such a situation. Given that TF81 generally relied on rule A rather than rule H when using force against individuals identified as hostile during operations, this approach should not represent a significant departure from how the rules of engagement were applied in most cases.
- [81] This approach is necessary to give effect to the plain wording of “direct participation in hostilities”. As the ICRC guidance notes, “armed violence which is not designed to harm a party to an armed conflict, or which is not designed to do so in support of another party, cannot amount to any form of “participation” in hostilities taking place between these parties”.¹²⁵
- [82] It also reflects the different purposes of the self-defence rule and the direct participation in hostilities test. The self-defence rule serves the limited purpose of permitting soldiers to defend themselves and their units against imminent attack. On the other hand, the direct participation in hostilities test dictates when a civilian loses the protection against attack to which they are normally otherwise entitled. A civilian who directly participates in hostilities can be subject to attack in a broader range of circumstances; it is sufficient if their conduct is likely to adversely affect military operations. The requirement that the civilian’s actions be designed to support a party to the conflict is a key factor that justifies this loss of protection from attack.

Summary of the principles to be applied

- [83] Drawing on the discussion above, in the context of Operation Burnham we consider compliance with the applicable rules of engagement and the principles of International Humanitarian Law can be assessed against the following criteria.

Use of force against individuals

- [84] For the use of force against individuals to be lawful, the individual had to be either a) directly participating in hostilities; or b) acting in a manner that justified the use of force by TF81 in self-defence.

A. Direct participation in hostilities

- [85] Having regard to the circumstances at the time, did the relevant TF81 personnel:

¹²⁴ Professor Akande, above n 6, at [32]. The definition of “hostile act” was, in fact, narrower in terms of the type of harm required than the ICRC’s test for direct participation in hostilities.

¹²⁵ ICRC *Interpretive Guidance*, above n 29, at 59.

- (a) reasonably perceive that the individual(s) were acting or about to act in a manner designed to support the insurgency by causing harm to the military operations of TF81 or coalition partners? (**Direct participation in hostilities**)
- (b) properly determine that any incidental civilian casualties or damage to civilian property that could reasonably be expected were proportionate to the concrete and direct military advantage anticipated? (**Proportionality**)
- (c) take all feasible precautions to avoid and minimise incidental civilian casualties and damage to civilian property? (**Precaution**)

B. Self-defence (rule A)

[86] Having regard to the circumstances at the time, did the relevant TF81 personnel:

- (a) reasonably determine that:
 - (i) the individual(s) were using, or had an imminent intent to use, force against members of TF81, the unit or designated persons; and
 - (ii) serious injury or death was likely to result? (**Hostile act / hostile intent**)
- (b) use the minimum degree of force that was necessary, reasonable and lawful under the circumstances? (**Minimum force/necessity**)
- (c) use a level of force that was proportionate to the level of attack being defended against? (**Proportionality**)

Use of force against property

[87] Having regard to the circumstances at the time, did the relevant TF81 personnel:

- (a) reasonably determine that:
 - (i) the property was making an effective contribution to military action; and
 - (ii) the partial or total destruction, capture or neutralisation of the property would offer TF81 a definite military advantage? (**Military objective**)
- (b) use the minimum degree of force that was necessary, reasonable and lawful under the circumstances to achieve the objective?¹²⁶ (**Minimum force**)
- (c) determine that any incidental civilian casualties or damage to civilian property that could reasonably be expected were proportionate to the concrete and direct military advantage anticipated? (**Proportionality**)
- (d) take all feasible precautions to avoid and minimise incidental civilian casualties and damage to civilian property? (**Precaution**)

¹²⁶ Required by rule C of the rules of engagement. This is not a general requirement under International Humanitarian Law.

Actions following the use of force

[88] Having regard to the circumstances at the time, did the relevant TF81 personnel:

- (a) take all possible measures to search for the dead and wounded?
- (b) provide medical care to the fullest extent practicable?

Part II: Our assessment of conduct during Operation Burnham

Approach

[89] In this section we consider 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”.¹²⁷ As this emphasises, it is NZDF’s assessment *at the time of the relevant engagements* that matters.¹²⁸ In considering the propriety of that assessment, we must guard against allowing our consideration of the “on the ground” decision-making to be influenced by the outcome of the engagements (in other words, we must guard against “outcome bias”).¹²⁹

Engagement by the marksman at the overwatch position

[90] We begin with the engagement by the marksman at the overwatch position because it was the only one ordered (as opposed to cleared) by the Ground Force Commander and carried out by TF81 personnel. Any breaches of International Humanitarian Law or the rules of engagement in relation to this engagement would therefore be clearly attributable to NZDF.

[91] As discussed in chapter 5, the man killed in this engagement is likely to have been Abdul Qayoom, son of Sakhi Dad.¹³⁰ We have seen some information that indicates he may have been an insurgent, or at least armed on the night of the operation, although the information is limited. As far as we know, Abdul Qayoom was not on the JPEL and TF81 was unaware of his identity at the time. Accordingly, the question is whether, based on his conduct at the time, the engagement was consistent with the rules of engagement and International Humanitarian Law.

[92] Following the engagements of men carrying weapons from the cache house, the Joint Tactical Air Controller (JTAC) received information that the insurgents may have been aware of the location of the ground forces. Shortly after this, one of the air assets told him that a “mover” was coming up the ridge from the north towards the overwatch position. In addition, the Ground Force Commander said in his evidence that he received information from the TF81 base in Kabul, where TF81 personnel were watching the drone footage, that an “insurgent” was coming up the ridge towards the overwatch position.¹³¹ The Ground Force Commander knew that an armed

¹²⁷ *Terms of Reference*, above n 1, cl 7.2.

¹²⁸ The relevant engagements are those carried out, ordered or cleared by NZDF personnel.

¹²⁹ “Outcome bias” has been defined as “the tendency to evaluate decisions in light of their outcome”: see Tomer Broude and Inbar Levy *Outcome Bias and Expertise in Investigations under International Humanitarian Law* (Melbourne Legal Studies Research Paper Series No 862, 26 November 2019) at 7.

¹³⁰ Chapter 5 at [67] and [97].

¹³¹ The drone was following the man’s progress.

group had been engaged further down the ridge and understood this person had broken away from that group. This understanding is supported by several summaries of the operation produced immediately after it, which record that the man had broken away from the group engaged by the AH-64 Apaches.¹³²

- [93] A supporting air asset followed the man's progress up the ridge and indicated his position to ground forces from time to time. The man was difficult to see due to the light conditions. One of the marksmen was able to view the figure advancing through his night vision sight, but only fleetingly every 50 metres or so. He could not determine whether the man was armed. The marksman was in regular dialogue with the Ground Force Commander. At 1.21am, when the advancing figure was within 50 metres of the overwatch position, the Ground Force Commander ordered the marksman to shoot the man. The marksman fired two shots. Both marksmen proceeded to search for the man and found him dead, having rolled 20–30 metres downhill.
- [94] The Ground Force Commander gave the order because he was concerned that the man was about to move into "dead ground" where he would not be visible to the marksmen, and could outflank the command group, thereby compromising their helicopter extraction site.¹³³
- [95] In considering the Ground Force Commander's assessment, both the general circumstances of the operation and the particular circumstances of the engagement must be taken into account. Beginning with the general circumstances, as we described in chapter 3, in his orders for the operation the Ground Force Commander undertook a risk assessment.¹³⁴ In that context, he referred to intelligence which indicated that the two objectives of the operation, Kalta and Neimatullah, were confident, that Kalta led 14–20 fighters and that Taliban fighters were visible in the area, walking about armed. The risk assessment also identified the possibility that insurgent reinforcements might come from the surrounding area. As soon as the helicopters arrived in the area, this risk assessment appeared to materialise, as the Apaches advised the Ground Force Commander that men with weapons were seen moving from Khak Khuday Dad up the side of the ridge, in twos or threes. Two men with weapons were also seen in close proximity to the assault force as it moved towards A1. As the pre-operation intelligence had indicated, then, there appeared to be a significant armed Taliban presence in the area.
- [96] Turning to the particular circumstances of the engagement, given the timing (shortly after the engagements near the cache building), the man's general direction of travel (climbing along and up towards the top of the ridge), and the advice received from Camp Warehouse (that the man was an "insurgent") and from the air assets (that the man was a "mover"), it was a reasonable conclusion that the man had come from the same general area where men had been seen with weapons. Like the armed men, he appeared to be moving towards high ground. The advice to the Ground Force Commander from personnel at Camp Warehouse that the man was an insurgent tended to indicate that they had observed him splitting off from the armed group, as did the advice from the air assets that he was a "mover".¹³⁵ By the time of the engagement, the man had been under observation by the air assets for over 20 minutes. The Ground Force Commander

¹³² Summary of Incident (Inquiry doc 02/10); 4x contacts during obj BURNHAM (Inquiry doc 02/08) at [3]; OP-RAHBARI-OBJ-BURNHAM-OPSUM (22 August 2010) (Inquiry doc 02/14) at [5].

¹³³ Inquiry doc 02/08, above n 132, at [3].

¹³⁴ Chapter 3 at [47].

¹³⁵ In fact, the air assets only began tracking the man when he was part way up the ridge. Given this, it is not possible to discern from the footage whether the man was part of that group. However, that assessment would not have been clear to the Ground Force Commander based on the communications he received. We accept that he was justified in thinking that the man had come from the group that the Apaches had previously fired on.

had been unable during that period to confirm whether or not the man was armed. The man's close proximity to the overwatch position meant there was an immediate potential threat to the command group if he was armed or had access to a weapon or weapons cache and became aware of their presence.¹³⁶ The Commander had to make a decision quickly or the marksmen may have lost sight of the man in the "dead ground" and been unable to take defensive action.

- [97] On the other hand, the man was alone and the Ground Force Commander was unable to confirm whether or not he was armed (either from the air assets or the marksman who was monitoring the man).¹³⁷ It is unlikely the man would have been aware of the location of the overwatch position or the command group, and the drone footage showed no obvious signs that he was aware of their presence. His direction of travel may have been coincidental and he may simply have been fleeing the village (although the route he was following was odd if his objective was simply to leave the area).
- [98] Although there are arguments either way and reaching a view is not straightforward, we consider that the Ground Force Commander's decision was justified in the circumstances as he understood them to be. The Ground Force Commander was operating in a challenging environment, based on information coming to him from a variety of sources. The risk he perceived was that the man would locate himself on high ground between the command group and the place where they were to be picked up by their helicopter. If the man had a weapon, or had access to a weapons cache, he would have been a threat to the group's ability to leave. That consideration, together with the apparent consistency of the man's behaviour with what the air assets had perceived shortly before (that is, men with weapons climbing the ridge behind the cache house) and the advice from Camp Warehouse and from the air assets, meant that the man could reasonably be perceived directly participating in hostilities and as threat to the safety of the command group, which needed to be addressed. In the particular circumstances, we consider that the Ground Force Commander did not have other viable alternatives.¹³⁸

Clearance of air asset engagements

- [99] The Inquiry's focus is on the conduct of (and assessments made by) NZDF during the operation, not on the actions of the United States air assets (which are outside our jurisdiction).¹³⁹ The actions of the air assets were the subject of United States Army AR 15-6 investigation and were found to comply with applicable rules of engagement and tactical directive.¹⁴⁰
- [100] As we have described in earlier chapters, the air assets were subject to their own rules of engagement and were not under the command or control of the TF81 Ground Force Commander. They were, however, there to support TF81's mission and sought to act in accordance with the Ground Force Commander's intent. To ensure that occurred, and to ensure friendly forces were not endangered by fire, they generally sought clearance from the JTAC to engage before firing.

¹³⁶ Although the man would not have had night vision goggles, the moon was almost full.

¹³⁷ As noted in chapter 4, our imagery and geospatial analyst was also unable to reach a conclusive view based on the video footage. He said it was possible the man was carrying a weapon slung over his shoulder, although, as also noted in chapter 4, the marksmen did not find a weapon when they checked on the man: see chapter 4 at [25] and footnote 28.

¹³⁸ It was suggested to us that the Ground Force Commander had alternatives such as calling for further monitoring of the man by the air assets, doing something in an effort to warn him off or at least questioning the air crews to get a better picture of what he was doing. In the circumstances as they were at the time, we do not agree that these were viable alternatives.

¹³⁹ *Terms of Reference*, above n 1, cls 7.1–7.2 and cl 9.

¹⁴⁰ Headquarters United States Forces—Afghanistan "Findings and Recommendations" *AR 15-6 Investigation—Tigiran Village* (30 September 2010) (Inquiry doc: United States Government FOIA release).

- [101] The primary concern of the JTAC and the Ground Force Commander when the air assets sought clearance to engage was to ensure ground forces were not put at risk. But they also considered, to the extent possible based on the information they had, whether the proposed engagement was consistent with the applicable rules of engagement¹⁴¹ and with International Humanitarian Law. While the rules of engagement applying to the air assets and the New Zealand rules of engagement may have differed, it was still necessary to comply with the principles of International Humanitarian Law. If clearance was sought for an engagement that the JTAC or Ground Force Commander suspected would not comply with International Humanitarian Law (for example, if the targets were civilians who were not directly participating in hostilities), the Inquiry considers they had a responsibility either to refuse clearance for that engagement, to seek further clarification, or to specify conditions on the clearance to ensure compliance. Although the operation was an ISAF one, it was New Zealand-led. NZDF personnel therefore bore some responsibility for ensuring, to the extent within their control, that any use of force in support of the operation was lawful and appropriate. We recognise they could not control the actions of other forces, but any requests they made would, presumably, have been persuasive.
- [102] As we have discussed, the Ground Force Commander and the JTAC were bound to comply by the principles of distinction, proportionality and precaution when clearing the air assets to engage. In considering those principles and making the necessary assessments, they had to rely on the information available to them, much of which came, of necessity, from the air assets (which were, in any event, bound by their own rules of engagement).

Engagements near Khak Khuday Dad

- [103] The Inquiry has concluded that the clearances of the engagements near Khak Khuday Dad, in which air assets targeted the men seen removing weapons from the cache house, were consistent with the rules of engagement and International Humanitarian Law.
- [104] As we discussed in some detail in chapter 5, the men seen removing weapons from the cache house were acting in a manner inconsistent with them being innocent civilians, irrespective of whether they were accustomed to ISAF operations. The air assets informed the Ground Force Commander and JTAC that these individuals had weapons and were moving to high ground. An apparently tactical response of this type was consistent with the intelligence TF81 had received before the operation, to the effect that Taliban fighters in the area were confident, walked around fully armed and had access to rocket-propelled grenades (RPGs) and PK machine guns.¹⁴² Further, the men were within firing range of TF81 personnel.
- [105] In those circumstances, it was reasonable for the Ground Force Commander to conclude either that the men had hostile intent and TF81 and/or CRU or other ISAF personnel were at risk of serious harm, or that the men were directly participating in hostilities. His clearance of the first engagement was conditional on weapons being confirmed and the individuals being clear of friendly forces and any collateral damage issues. Our understanding is that the Ground Force Commander saw these conditions as applying to the series of engagements that ensued near Khak

¹⁴¹ Our understanding is that the ISAF rules of engagement were largely relied on in this context, as they applied to both TF81 and the supporting air assets contributed by ISAF. The air assets would also have been subject to their own national rules of engagement (that is, United States rules of engagement). While the ISAF rules of engagement remain classified, the Inquiry has had access to them and can confirm that any differences between the ISAF and New Zealand rules of engagement would not affect the outcome of our analysis in relation to the clearance of the air asset engagements.

¹⁴² Inquiry doc 09/39, above n 114, at 31–32.

Khuday Dad. Each subsequent engagement in the area was also cleared by the JTAC once he was satisfied that ground troops would not be placed at risk. The JTAC gave clearance based on information he was continuing to receive from the air assets indicating that the targets were part of the same group that had been seen with weapons at the cache house (in respect of whom clearance to engage had previously been given).

- [106] The final engagement in Khak Khuday Dad presents the most difficulty. In it, the Apache helicopters targeted a man moving towards the building neighbouring the cache house, apparently injured and unarmed. There was a group of people including women and children sheltering behind the building on the side nearest to the man.
- [107] As we have said, it is outside our terms of reference to determine whether the air assets acted lawfully in conducting that engagement; what is important for our purposes is the knowledge and actions of NZDF personnel. The JTAC provided clearance for this engagement.¹⁴³ However, before doing so he was told that the man had a weapon. We consider he was entitled to rely on that information from the air assets. He had no reason to doubt it was correct, particularly given this was part of a series of engagements targeting armed men in the same area, and no other realistic means of confirming whether the man was armed. Further, there was some urgency to the situation. The man, if armed, would have presented an imminent threat to ground troops.
- [108] We are also satisfied, based on the evidence of communications between the air assets and the JTAC and our interviews with the JTAC and Ground Force Commander, that they were unaware the man was apparently injured. Furthermore, although the air assets did tell the JTAC (after he had provided clearance and the engagement was underway) that there was a group of five people next to a building approximately 200 metres from the ground patrol, we are satisfied that the JTAC did not appreciate the true nature of the situation. As we said in chapter 4, when interviewed by the Inquiry the JTAC had no recollection of being told about the huddled group.¹⁴⁴ In any event, he was not told that the group and the building they were huddled next to were in close proximity to the target. In light of the limited information available to the JTAC, we consider he had a sufficient basis for clearing the engagement and could not have been expected to intervene after the engagement had begun.

Engagements south of A3

- [109] The air assets were involved in two engagements south of A3. The first of those engagements was not cleared by the Ground Force Commander or the JTAC, and they were unaware of the engagement until shortly after it had occurred. As such, there is no issue about the conduct of NZDF personnel in relation to that engagement, and we do not need to consider it. The Ground Force Commander did, however, grant clearance for the second of the southern engagements, which was also the final engagement of the operation. As is apparent from the video footage available to us, that engagement targeted members of a group moving east up a ridge, more than a kilometre south of A3. In the engagement, four men were killed.

¹⁴³ This is recorded in a transcript of communications between the JTAC and the air assets in the AR 15-6 Report: “Exhibit 18” in Inquiry doc: FOIA release, above n 140, at 63.

¹⁴⁴ See chapter 4 at [18].

[110] Before providing our assessment of this engagement, it is important to make three points:

- (a) First, we reiterate the point made earlier that it is the Ground Force Commander's understanding of the position at the time he cleared the engagement that matters, and that understanding is most likely to be reflected in the contemporaneous material. Given the nature of operations such as Operation Burnham, a commander is likely to be making decisions based on information that is incomplete and sometimes confusing.
- (b) Second, the basis for the Ground Force Commander's clearance of the engagement was that the men were directly participating in hostilities: that is, that they were acting or preparing to act in a manner likely to adversely affect the operation.
- (c) Third, the context within which the engagement occurred is noteworthy. Several witnesses told us that, before the operation, they were aware of intelligence indicating that there was an insurgent training camp somewhere to the south of Naik and expected that reinforcements might come from that area. While troops were at A3, the drone began tracking a group of three people who were moving at speed up a valley southeast of A3 towards ground troops (although still some distance away). This was reported to the troops at A3, some of whom moved to the south of A3 as a blocking force to provide protection for the rest of the assault group. The Ground Force Commander said in evidence that the ground force set up the block because he was concerned that people were coming from the south, apparently armed, and were a threat to the ground troops, being in relatively close proximity to them.

[111] Around the same time as ground troops finished clearing A3, at approximately 2.10am, the three people moving up the valley reached the village about 500 metres south of A3. They stopped in the village for five minutes or so, where they met up with others to form a larger group. The group (now totalling eight people) then headed south out of the village and continued south along the valley floor. By about 2.25am, shortly before ground troops left A3, the group was about a kilometre south of A3. At that point the group began climbing up a hillside towards the east.

[112] It does not appear that ground forces at A3 were informed the group had stopped in the village or (later) that they had started moving south. Witnesses interviewed by the Inquiry who were positioned at A3 remained under the mistaken impression that possible insurgents were moving towards their position. This impression was shared by the Ground Force Commander at the time. A note that he prepared immediately after the operation described this engagement as follows:¹⁴⁵

... 8 MAMs [military age males] seen moving by foot N towards FF [friendly forces] along bottom of valley at speed. Suspected pos Villagers approaching due to fire. Stopped short then began to climb above FF on ridge to E [East]. FF withdrawn AC-130 stated pers manoeuvring in tactical manner. Delayed engagement until better able to confirm intent.

Tgt split into smaller parties and continued to climb. NE direction of route confirmed to take pers above FF A1 and overwatch of HLZ [helicopter landing zone]. Progress meant suspected INS would arrive in position prior to exfil. INS shown TTP [tactics, techniques and procedures] of using cache. Made decision to engage. Integrated engagement by AC-130 and AWT [air weapons team] on tgt. Did not engage all aircraft requested another engagement to eliminate movers, request denied due to threat neutralised.

¹⁴⁵ Inquiry doc 02/08, above n 132, at [4]–[5].

- [113] This account indicates that the Ground Force Commander thought the group was further north than it in fact was, and was climbing towards the northeast.¹⁴⁶ It appears this was communicated to troops at A1 at the time, some of whom told the Inquiry they were sent up behind A1 to monitor the high ground towards the east for approaching insurgents. An operation summary prepared shortly after the operation indicates the same error. It records that as the assault force was preparing to leave A3, people began to infiltrate from the south.¹⁴⁷ It says:

A blocking position was established to interdict the pers infiltrating from the south but they manoeuvred around the high ground and were engaged by AC-130.

- [114] Unlike in previous engagements near Khak Khuday Dad, the air assets did not positively identify the targets as insurgents, nor, on the material available to us, did they actively seek clearance to engage in the period immediately before the engagement. The JTAC initially requested that the air assets continue to monitor the group and advise if they were positively identified with weapons. The air assets were not able to confirm that the group had weapons or were moving towards a cache. Then, as the group was nearing the top of the ridgeline and the ground forces were about to make their way back towards their pick-up points for extraction, the JTAC told the air assets that the Ground Force Commander had cleared them to engage the group. Before they engaged, the air assets asked the JTAC if the targets had been “declared hostile”. Only when the JTAC confirmed that they had been did the air assets begin the engagement.
- [115] It will be apparent that the “clearance” of this engagement was of a different nature to the earlier engagements. Usually, the air assets sought clearance to engage targets they had determined to be hostile and the Ground Force Commander granted that clearance (or declined to grant it), sometimes conditionally, based on advice from the air assets and any other available information. In this instance, the Ground Force Commander assessed the situation, determined that the targets were hostile and cleared the air assets to engage on his own initiative. In a technical sense, however, he was still “clearing” the engagement, as he did not have authority over the air assets and could not require them to engage. We therefore use the term “clearance” in the discussion below.
- [116] Both the Ground Force Commander and the JTAC gave evidence that the engagement was cleared on the basis that the men posed a threat to the safe extraction of ground forces by helicopter, rather than because they posed an imminent threat to troops on the ground. This was against the background that at the outset of the operation the second CH-64 Chinook had been told to abort its landing initially, given the apparent insurgent activity in Khak Khuday Dad. Although the Ground Force Commander told us that his decision to clear the engagement was not based primarily on the group’s direction of travel but rather on the fact that the group was climbing towards high ground and the air corridor for the helicopters, he also said that his understanding of their direction of travel was relevant to his assessment. From his perspective, the fact that he understood that members of the group had broken off and were climbing to the north was important for two reasons. First, it meant that the men were moving towards the area of conflict, rather than away from it as might be expected if they were civilians. Second, the fact that the men were climbing presented a threat because, militarily, gaining elevation above an opposing force can make the position of the opposing force untenable.

¹⁴⁶ The Ground Force Commander seems to have realised his mistake within a day or two. A Summary of Incident provided to the ISAF Incident Assessment Team, which appears likely to have been drafted by the Ground Force Commander, records that the group was “massing on hill South East from compound A3”: Inquiry doc 02/10, above n 132.

¹⁴⁷ OP SUMMARY (Inquiry doc 02/03).

- [117] The targets of the final engagement were not known to be armed. Rather, the Ground Force Commander and the JTAC explained the reasons for the engagement by reference to the intelligence reporting indicating that insurgents in the area had access to heavy machine guns,¹⁴⁸ intelligence which appeared to be confirmed by what was seen to occur in Khak Khuday Dad as the first Chinook arrived. Previous experience in Afghanistan was that weapons capable of bringing down helicopters (such as RPGs and heavy machine guns) were sometimes kept on high ground ready for use against helicopters. The Ground Force Commander had been personally involved in an operation some years earlier in which a helicopter with troops on board was shot down in similar terrain, with significant loss of life. He was concerned that the group could be moving towards weapon emplacements and would pose a threat to the extraction of ground forces by helicopter, given the helicopters' likely evacuation route. By this stage, ground troops were preparing for pick up and there was some pressure to leave quickly before dawn (at which stage the helicopters—their only method of transport—would have to depart).
- [118] By way of summary, the Ground Force Commander based his decision to clear the engagement on the following information:
- (a) pre-operation intelligence indicating that (i) there was a significant insurgent presence in the villages; (ii) the insurgents had access to anti-aircraft weaponry; and (iii) insurgent reinforcements might well come up from the south;
 - (b) the air assets' observation of men removing weapons from the cache house then moving to high ground early in the operation, which supported the accuracy of the intelligence;
 - (c) his previous experience of a helicopter being shot down by insurgents in similar terrain;
 - (d) the fact that (consistently with the intelligence) a group of people, who were described to him as being military age males, had come up from the south towards the area of conflict on a path on the valley floor, had then made a sudden change of direction from their path along the valley floor by turning to move up to high ground and were, as the Ground Force Commander understood it (albeit incorrectly), climbing to the northeast towards the area of conflict; and
 - (e) the lack of any obvious innocent explanation for the behaviour of the men, who were described to him by the air assets as "moving tactically" and who were also (as he understood it) accessing a tactical position (that is, high ground, from which there was a risk that the evacuating helicopters could be engaged).
- [119] In addition, the JTAC said he recalled the Apaches carried out "shows of force" some time before the group was engaged. This involved flying low over the individuals at speed as a form of warning. The group hid when the helicopters flew overhead but then continued to move in what the JTAC described as a purposeful way, initially to the south then towards high ground, splitting into smaller groups as they climbed in a similar fashion to the men engaged above the cache house. The Ground Force Commander said he could not now recall whether the JTAC advised him of the shows of force and the men's reactions, but thinks it almost certain that he would have. Obviously, the fact that people take cover when two armed helicopters "buzz" them is not necessarily a sign that they are insurgents. However, the JTAC said that the men broke cover when the helicopters finished buzzing them and continued to climb the side of the ridge, which

¹⁴⁸ This reporting was summarised in the orders for the operation: Inquiry doc 09/39, above n 114, at 31–33.

is uncharacteristic of civilians. Moreover, as they did so, they dispersed. Both the Ground Force Commander and the JTAC said that dispersal in this type of situation is a well-known military tactic and was a tactic commonly used by insurgents in Afghanistan.

- [120] The Inquiry has viewed video footage of this engagement. It is clear from the footage that, consistent with the JTAC's evidence, the group split into pairs as they climbed the hill and hid when helicopters flew overhead. The men do not appear to show any specific signs of approaching a weapons cache or machine gun emplacement and the pairs travelled in slightly different directions, although that is consistent with use of the dispersal technique.
- [121] The JTAC may have had a better appreciation than the Ground Force Commander of exactly where the climbing men were located. His evidence indicated that he understood that the men were some distance away from ground troops to the south. Although the exact location of the final engagement may not have been clear to him, the JTAC was aware that the targets had gathered in the village south of A3 and had travelled further south for a time (rather than north) before climbing the ridge. In addition, the JTAC's communications with the air assets indicate that he knew the group was moving east (as opposed to north or northeast, towards ground troops).
- [122] We understand that part of the JTAC's role was to keep the Ground Force Commander informed of people's movements and any associated concerns, and to advise him on decisions regarding clearance of air asset engagements. Apparently, they had some discussion before the Ground Force Commander gave his clearance of the final engagement, although it is not now possible to reconstruct that. We also note that once the engagement began, the rounds would have been visible from the overwatch position, impacting across the valley, which would have indicated that the engagement was to the south of A3.¹⁴⁹ However, we are satisfied anything the Ground Force Commander might have seen then did not change his appreciation of the position. This is understandable given all that was happening at that stage of the operation and the Ground Force Commander's concern to ensure the safe extraction of the troops from what appeared to be a dangerous environment as soon as possible.
- [123] The engagement continued for about seven minutes and culminated in the use of a hellfire missile. The AC-130 estimated that four people were killed.¹⁵⁰ Following this, one further "mover" was identified but the JTAC asked the air assets not to engage the person as they no longer presented a threat.¹⁵¹
- [124] If we were to assess this engagement based on all the information now available to the Inquiry (in particular, the video and audio evidence to which we have had access), there is a significant question as to whether the Ground Force Commander could properly have cleared it. The men were climbing a ridge about a kilometre to the south of A3, so they were well away from the villages and the ground forces. There was no obvious indication that they were armed. While there was some intelligence about the targets of the operation having access to weapons that could threaten helicopters, it was relatively general. The Inquiry has had access to the relevant reporting and there is nothing in it to indicate that machine guns were being stored in that particular location, or even on hills around Tirgiran Valley more generally. On the other hand, we accept that the men's movements were puzzling. There is no obvious reason why, if they were innocent civilians, they

¹⁴⁹ We heard evidence that the general location of the engagement was apparent from the overwatch position once the firing began.

¹⁵⁰ Inquiry doc 02/14, above n 132, at 2.

¹⁵¹ Inquiry doc 02/08, above n 132, at [4]: "... aircraft requested another engagement to eliminate movers, request denied due to threat neutralised."

would have come up from the south and suddenly started climbing a ridge at night in the middle of an operation with air assets overhead in the dispersed way they were climbing. Moreover, in this scenario, it would have been relevant to consider whether there was some other action that the Ground Force Commander could have requested, such as continued monitoring (the group had already been monitored by air assets for almost an hour).

- [125] However, as we have said, what is relevant is what the Ground Force Commander reasonably understood the position to be at the time he gave clearance, not what is now known based on evidence not available to him at the time. His contemporaneous understanding is recorded in the note quoted at paragraph [112], as he confirmed to us. The Ground Force Commander said that the purpose of documenting things at the time was to ensure an accurate, contemporaneous explanation of events as they were then understood, given the possibility of later confusion resulting from the number of operations TF81 was involved in and the passage of time.
- [126] On the basis of the Ground Force Commander's contemporaneous understanding, we consider that the engagement was justified in terms of International Humanitarian Law and rules of engagement. It was reasonable for the Ground Force Commander to conclude that the men were directly participating in hostilities because the information available to him indicated that they were preparing to take action that threatened the success of the operation. If the men had been acting as he set out in his note, they could legitimately have been seen as presenting an imminent threat to the operation, particularly against the background of (a) the pre-operation intelligence that there were armed Taliban in the area, that they had weapons capable of bringing down helicopters and that reinforcements might appear, and (b) what was seen to occur during the operation, which was consistent with the intelligence. Although the men appeared unarmed as they travelled, they were understood to be moving towards an area of conflict and to high ground and there was an obvious risk that they would access a weapons cache once in the vicinity of the villages. The group's movements (as the Ground Force Commander understood them) were unlikely for civilians but were consistent with insurgents trying to achieve a tactical advantage. We are confident that in clearing the engagement the Ground Force Commander and the JTAC genuinely thought the men presented a threat to the ground force which was about to evacuate and were seeking to protect it. In short, we accept that the considerations identified at paragraphs [118] and [119] justified the granting of clearance.
- [127] Finally, we note that post-operation intelligence indicated that the men killed in this engagement were insurgents, albeit that the intelligence was by no means conclusive.¹⁵² This does not affect our analysis of the justification for this engagement, however, which must be based on the information available to the Ground Force Commander/JTAC at the time.
- [128] We repeat for the avoidance of doubt that our observations about this engagement are limited to the actions of New Zealand personnel. They should not be taken as suggesting that the United States air crew acted improperly in conducting the engagement. As we have explained, the air assets did not engage until the targets had been declared hostile. They would not have had access to all the sources of information available to the Ground Force Commander (such as intelligence received before the operation and information coming in from ground troops and personnel at Camp Warehouse). They informed the Ground Force Commander of what they were observing and acted on his assessment of hostile intent, which was legitimately reached, based on the totality of the information available to him at the time.

¹⁵² Chapter 5 at [73].

Property damage

- [129] We have described the damage caused to buildings during Operation Burnham in chapter 5.¹⁵³ We also concluded there that none of the damage to property resulting from the operation was deliberate or motivated by revenge. We now consider the role of TF81 personnel in causing or contributing to that damage, and whether they acted lawfully.

Damage to buildings as a result of air asset engagements

- [130] The Inquiry found no cause for concern about the actions of TF81 personnel in relation to the damage caused by air asset engagements. TF81 had no knowledge of the factors that contributed to that damage—that is, the proximity of two of the engagements in Khak Khuday Dad to buildings and the misaligned weapon on one of the Apache helicopters. The command group could not see where the rounds were landing from their location, and were unaware of any damage until after the operation. The Ground Force Commander had cleared the engagements on the basis that there were no collateral damage concerns. At no point during the engagements were the JTAC or Commander given reason to question that. In that situation they were entitled to rely on the air assets to make the necessary assessments.
- [131] We emphasise that this should not be taken as a criticism of the air assets. The AR 15-6 investigation inquired into their actions. It determined that the air crew were also unaware of the damage at the time and had acted consistently with their rules of engagement.¹⁵⁴

Damage caused during entry to A1 and A3

- [132] We also conclude that the damage caused by TF81 personnel when entering the objective buildings was permitted under the rules of engagement and International Humanitarian Law.
- [133] Both A1 and A3 were legitimate military objectives. There was intelligence indicating that the buildings were used by insurgents—the accuracy of which was supported by the discovery of weapons and ammunition upon entry. The buildings were, therefore, making an effective contribution to military action. Their capture or neutralisation would also offer a definite military advantage to TF81. Securing entry to the buildings was a key aspect of the mission and was necessary to determine whether the targets were present. It would also serve as a warning to insurgents that the buildings were not safe locations to meet or store weapons, which would have the effect (at least temporarily) of disrupting insurgent operations in the area. This was borne out in practice: as noted in chapter 4, Neimatullah and Kalta fled to Pakistan shortly after Operation Nova.¹⁵⁵
- [134] We are satisfied that TF81 took appropriate precautions prior to entering the buildings. Call outs were used to alert any occupants to the intended entry and provide an opportunity for civilians to leave safely.
- [135] As we explained in chapter 4, explosive entry was used rather than entering through a door as it was generally safer for troops—if insurgents were present in the building they could well

¹⁵³ Chapter 5 at [116]–[149].

¹⁵⁴ “Findings and Recommendations” at 5–6, in Inquiry doc: FOIA release, above n 143, at 10–11.

¹⁵⁵ Chapter 4 at [52].

be waiting behind the door to shoot if entry was attempted. We accept that was appropriate. However, we questioned witnesses on whether the level of explosive charge at A1 was excessive, given it led to the collapse of a wall. While in retrospect a lesser degree of charge may have been adequate, we are satisfied this could not have been known to TF81 personnel at the time given the difficulty in determining how a particular wall was constructed (for example, its thickness). On balance, we consider the level of force used was the minimum necessary in the circumstances as they were known to TF81 personnel.

Failure to extinguish the fire at A3

[136] As we discussed in chapter 4,¹⁵⁶ the Troop Commander saw the beginnings of the fire when he was preparing to leave the area of A3 to move back to A1. He advised the Ground Force Commander of it but was told he did not need to do anything about it. This resulted, in part, from the Ground Force Commander's understanding about insurgent reinforcements coming from the south. We concluded that while a different decision could, in hindsight, have been made without undue risk to assault force personnel, the decision not to extinguish the fire was appropriate in the circumstances as the Ground Force Commander understood them to be at the time and was not motivated by a desire for revenge.

[137] We have already said that, in our view, TF81 personnel acted lawfully in using force to safely enter and clear the objective buildings. The fire in A3 was an incidental result of that (most likely caused by one of the flashbangs used to clear the building). The remaining question is whether there was an obligation on TF81 to attempt to extinguish the fire.

[138] Under International Humanitarian Law there is no obligation to minimise damage to military objectives (which we are satisfied A3 was). Further, while the rules of engagement did impose a "minimum force" requirement, provided that was met at the time of using the force, there was no additional requirement to minimise any resulting damage. On balance, we accept the decision not to extinguish the fire was lawful in the circumstances.

Detonation of weapons at A1

[139] As we have explained in chapter 5,¹⁵⁷ we consider the fire in A1 likely resulted from the detonation of weapons and ammunition outside (but in close proximity to) the building. It is clear that the destruction of the cache was justified: the weapons and ammunition were contributing to military action and their destruction would offer a concrete military advantage by diminishing the capacity of the insurgency to carry out attacks in future. Civilian casualties and damage to civilian property were unlikely, as A1 (a military objective) was used to shield the surrounding area from the impact.

[140] The remaining question is whether the level of force used was the "minimum necessary" as required by rule C. The degree of damage to A1—including the collapse of sections of the wall and roof where the explosion occurred—suggests the level of charge may have been greater than necessary. We questioned witnesses about this. Some indicated the explosion was larger than expected, although we heard mixed views on that. Taking everything into account, we are

¹⁵⁶ Chapter 4 at [33]. See also chapter 5 at [138]–[141].

¹⁵⁷ Chapter 5 at [126]–[134].

satisfied that the assessment made at the time about the level of charge required was a reasonable one in the circumstances. That is, it would not have been clear to those placing the charge that a lesser degree of force would have sufficed.

- [141] The explosion needed to be large enough to ensure that the weapons would be rendered useless. While the degree of damage to the building was significant, this was likely a result of the very close proximity of the detonation to the southern wall, as opposed to the explosion itself being excessive to achieve the objective. We are also satisfied that detonating the weapons close to the building was necessary to shield TF81 personnel and any villagers in the area from the explosion.

Failure to conduct battle damage assessment or render assistance before departing the site of the operation

- [142] The obligations to search for the dead and wounded to the extent possible and to provide assistance apply in respect of both civilians and combatants (or civilians directly participating in hostilities). TF81 had a medic with them during the operation, and the orders anticipated the medic would provide assistance in the event of civilian casualties.¹⁵⁸ In the event, the medic did not treat any non-TF81 individuals during the operation, because ground troops did not locate any of the apparent insurgents who were wounded in engagements and did not become aware of any possible civilian casualties until after the operation. The key question for the Inquiry is whether, in the circumstances, they ought to have searched for the dead and wounded.
- [143] TF81 was aware during the operation that individuals targeted in engagements (who they believed to be insurgents) were likely to have been killed or wounded. One of these was killed by a TF81 marksman. On that occasion, TF81 personnel did search for the man, but he was dead when they found him. International Humanitarian Law recognises a general duty to dispose of the dead in a respectful manner.¹⁵⁹ We accept, however, that this could not practically be done while the operation was in progress, especially in the context of a night operation where troops had to depart by dawn.
- [144] The other engagements were all conducted by air assets. No attempt was made by TF81 in the course of the operation to search for the dead and wounded as a result of those engagements. The reason for this was twofold: first, it would have placed troops at unnecessary risk; and second, in the case of the engagements south of A3, it would have been impossible in the timeframe given the remote location in which they occurred. We accept that there was no realistic way for TF81 to search for the dead and wounded from the southern engagements. The first of these engagements was arguably within a reachable distance (700 metres south of A3, in the valley), but by the time ground troops would have been in a position to depart from A3 to conduct a search, they had reports of people massing in the south. This would have made passing through the area a risky prospect. The second southern engagement occurred late in the operation, not long before troops were due to depart, over a kilometre south of ground troops and high up on a ridge. There was no time for ground troops to travel to the area before their extraction, even if they could have done so safely.

¹⁵⁸ Inquiry doc 09/39, above n 114, at 54; Accompanies OP RAHBARI ORDERS (Inquiry doc 09/38) at 41.

¹⁵⁹ Henckaerts and Doswald-Beck, above n 35, rule 115.

- [145] The engagements near Khak Khuday Dad present more difficulty. Ground troops had to pass near the area to get back to the helicopter landing zone for extraction. Accordingly, it has been suggested that it would not have been a significant detour to conduct a quick scan for any casualties in the area near the village. However, TF81 understood that there were armed insurgents in the area, so there was an obvious risk trying to conduct a search in or near Khak Khuday Dad. Moreover, TF81 personnel were not aware of the exact locations of the engagements, how near to the village they occurred, nor that civilian casualties were a possibility. Finding bodies on the hillside in the dark would likely have been unrealistic in the short time before extraction. In those circumstances, we consider the decision not to search the village was lawful.
- [146] We also note that some battle damage assessment was conducted by way of the drone, which continued to operate in the area until around 7am.



Predetermined and offensive use of lethal force

Chapter 7

- [1] As we noted in chapter 3, once Task Force 81 (TF81) had identified those responsible for Lieutenant Tim O'Donnell's death in the 3 August 2010 attack, successful applications were made to the International Security Assistance Force (ISAF) to have several of the leaders placed on the Joint Prioritised Effects List (JPEL). As we also discussed in chapter 3, Operation Burnham was described as a "deliberate detention" or "kill/capture" operation that was directed at capturing two of those on the JPEL, Abdullah Kalta and Maulawi Neimatullah.
- [2] In this chapter we address aspects of the Inquiry's Terms of Reference relating to the predetermined and offensive use of lethal force—often referred to as targeted killings. The Terms of Reference direct us to consider the following questions:¹
- (a) Did the rules of engagement permit the predetermined and offensive use of lethal force? If so, was this understood by the New Zealand Defence Force (NZDF) and responsible ministers?
 - (b) Did NZDF's interpretation and application of the rules of engagement in this respect change over time?
- [3] As we understand it, these issues arise from the allegations in *Hit & Run* that in the two years following Operation Burnham, Abdullah Kalta and two other targets who TF81 believed to have been involved in the 3 August 2010 attack were deliberately killed in operations involving TF81.² As we explained in chapter 1, only the operation in respect of Abdullah Kalta requires consideration. NZDF was not involved in the other two operations identified. In this chapter we consider whether TF81's rules of engagement permitted targeted killings and whether ministers understood that, and address the death of Abdullah Kalta in an ISAF operation in 2012.

The Joint Prioritised Effects List

- [4] We begin by explaining the role of the JPEL and its relevance to this aspect of our Terms of Reference, given that they do not mention it. We refer to the JPEL because it was, in effect, the mechanism through which the predetermined and offensive use of lethal force (as well as other forms of targeting, such as detention operations) was coordinated by ISAF. While individual nations' rules of engagement might permit targeted killings in certain circumstances, in practice a JPEL listing was required to obtain approval for such an operation and the necessary resources from ISAF. This allowed ISAF to ensure its resources were used most effectively, against legitimate targets of high priority.
- [5] The JPEL was, as the name suggests, "a **list** by which the **joint** coalition forces [in Afghanistan] recorded and **prioritised** various **effects** that were sought in relation to specific targets, mostly individuals".³ The effects identified for a particular individual could range from ongoing surveillance through to capture or kill.

¹ *Terms of Reference: Government Inquiry into Operation Burnham and related matters* (11 April 2018), cl 7.9 and 7.10.

² Nicky Hager and Jon Stephenson *Hit & Run: The New Zealand SAS in Afghanistan and the meaning of honour* (Potton & Burton, Nelson, 2017) at 91–92.

³ Brigadier Lisa Ferris "Presentation of the New Zealand Defence Force" (Public Hearing Module 3, 30 July 2019) at [2]. Bold in original.

- [6] Brigadier Lisa Ferris, Director of Defence Legal Services, summarised the process by which the JPEL was composed in her presentation to the Inquiry.⁴ Broadly speaking, the process involved three stages:
- (a) Individual ISAF member states, including New Zealand, identified people for potential inclusion on the JPEL. This involved a targeting process through which suspected insurgents, and the desired “effect” to be achieved against them, were identified. As part of that process, targets were vetted from an intelligence perspective and validated to ensure compliance with International Humanitarian Law and rules of engagement. NZDF legal officers were involved in that process. Intelligence reporting relied on had to meet standards of reliability and credibility prescribed by ISAF.
 - (b) Individual member states then nominated the identified targets for inclusion on the JPEL.⁵ Nominations were considered within ISAF. Decisions on inclusion and prioritisation were made through a coordination process administered by boards, which included subject matter experts at the operational level of the coalition, such as intelligence and operational staff and legal advisers.
 - (c) If a nomination was approved, the individual was placed on the JPEL as a target and assigned a priority. The JPEL was regularly reviewed and updated reporting was required to justify the person’s continued inclusion on the list.⁶
- [7] The result of an individual being listed on the JPEL as a lethal target was that they were treated as directly participating in hostilities for the duration of the listing and could be attacked by ISAF forces.⁷ Before such an attack could be launched, however, the target needed to be positively identified as the individual on the JPEL (using visual or certain other specified means) to a level of “reasonable certainty”.⁸ Positive identification had to be maintained until the time of the engagement. ISAF approval still generally needed to be obtained before such an attack, and any participation by New Zealand forces had to comply with the New Zealand rules of engagement.⁹ If a lethal JPEL target was captured or indicated a clear wish to surrender, he or she could no longer be killed.¹⁰ A lethal JPEL listing also did not permit the killing of individuals who were with the target.¹¹ (Where other individuals were near the target, that would need to be assessed in accordance with the principles of distinction, proportionality and precaution as discussed in chapter 6.)

⁴ Brigadier Ferris, above n 3, from [46].

⁵ The Inquiry notes it is apparent from other evidence that while a target would be developed by an ISAF task force contributed by an individual member state (like TF81), the nominations were made through the ISAF chain of command rather than in a national capacity. So, for example, the target pack for Abdullah Kalta listed TF81 as the “lead agency” but the nominating agency was Regional Command East: RTAF 2307 ABDUL KALTA (12 August 2010) (Inquiry doc 07/18) at 1.

⁶ See, for example, email from CRIB.S2 to BFC.OIC and SWAN – JFNZ.J2 “JPEL Update” (7 May 2012, 9.37pm) (Inquiry doc 07/07). This email referred to the need to update JPEL listings that were about to expire and noted the ability to do so would depend on the frequency of reporting on each individual. It also stated “[t]he Divisional Targeting board is placing submitted JPELs under even greater scrutiny than ever before”.

⁷ NZROE and JPEL (Inquiry doc 07/17) at 9.

⁸ Inquiry doc 07/17, above n 7, at 10. See also Inspector-General of Intelligence and Security *Inquiry into possible New Zealand intelligence and security agencies’ engagement with the CIA detention and interrogation programme 2001–2009* (31 July 2019) at [54], which refers to the use of both visual and positive voice identification.

⁹ Inquiry doc 07/17, above n 7, at 9.

¹⁰ At 11.

¹¹ At 9.

- [8] The JPEL was therefore a mechanism through which ISAF task forces could draw on the resources of ISAF as a whole to identify individuals who were members of the insurgency and to carry out operations against them. The Inquiry accepts NZDF's point that the JPEL was not a "kill list"¹² because not all individuals placed on the JPEL were identified as targets to be killed. Capture was generally the intended and desired outcome, even in what were described as "kill/capture" operations. Operations against JPEL targets were conducted in accordance with the restrictions in both the ISAF and the relevant member force's rules of engagement—including any restrictions as to the use of "minimum force". As NZDF acknowledges, however, a lethal JPEL designation did authorise the use of ISAF resources to conduct an operation up to and including the use of lethal force against the targeted individual.
- [9] We acknowledge that the public have understandably shown concern about the use of the JPEL, as is reflected in *Hit & Run*.¹³ The reality is, however, that the JPEL itself could not permit the use of predetermined and offensive use of lethal force. The use of such force had to be lawful (in terms of International Humanitarian Law and other relevant law) and consistent with the relevant national and ISAF rules of engagement. The JPEL effectively added a layer of protection or assurance, by helping to ensure that targeted killings were only conducted against high priority targets in respect of whom there was a substantial body of reliable intelligence showing that they were active members of the insurgency.
- [10] Further, it is important to recall in this context Professor Dapo Akande's point (highlighted in chapter 6) that unlike conventional warfare where the soldiers on the opposing sides wear uniforms and are readily identifiable, those participating in an insurgency are often indistinguishable from the local civilian population.¹⁴ Accordingly, identifying those who are active participants in an insurgency requires the use of a mechanism such as the JPEL. Obviously, such a mechanism must be supported by robust and reliable intelligence-gathering and monitoring processes, as we discuss further below.

The law relating to targeted killings

- [11] The Inquiry is not required to determine whether targeted killings are morally or legally justified in a general sense. Our Terms of Reference focus on the effect of the rules of engagement and the knowledge of responsible ministers about the possibility of such killings. However, it is useful to briefly summarise the applicable legal framework by way of context.
- [12] "Targeted killings" are not specifically defined in any treaty or other rule of international law. Professor Akande adopted the following working definition in his advice:¹⁵

... a predetermined and offensive use of lethal force against an individual who was identified in advance of the operation and specifically selected as being liable to have such force used against him or her.

¹² Brigadier Ferris, above n 3, at [1].

¹³ Hager and Stephenson, above n 2, at 24–25 and 90–91. See also Nicky Hager "Public Hearing 3 Presentation" (Public Hearing Module 3, 30 July 2019) at [1.2] and [3.38]–[3.39].

¹⁴ See chapter 6 at [31].

¹⁵ Professor Dapo Akande "The legal principles relating to the predetermined and offensive use of force with particular reference to the Joint Prioritised Effects List (JPEL)" (Public Hearing Module 3, 30 July 2019) at [2]. See also *Report of the Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions* UN Doc A/HRC/14/24/Add 6 (28 May 2010) at [9].

- [13] That is generally consistent with the definitions adopted in Oxford's *The Handbook of the International Law of Military Operations*¹⁶ and NZDF's manual on the Law of Armed Conflict.¹⁷
- [14] The legal, moral and philosophical justification for targeted killings has been the subject of considerable academic and political debate. Much of the debate has centred on targeted killings in the context of the United States' use of drones as part of the post-9/11 "war on terror"¹⁸ and the programme of targeted killings conducted by Israel's Government.¹⁹ The legality of the latter programme was considered by Israel's High Court of Justice in the 2006 *Targeted Killings* case,²⁰ which found that such killings were neither "always legal" nor "always illegal" in that context.²¹
- [15] As already discussed in chapter 6, International Humanitarian Law permits the use of lethal force against an individual during the conduct of hostilities, subject to the principles of distinction, precaution and proportionality.²² If the use of lethal force against an individual is consistent with those principles, that force is lawful under International Humanitarian Law. And, adopting the approach of the International Court of Justice, where there is no violation of International Humanitarian Law, there will generally be no violation of International Human Rights Law.²³
- [16] Applying those principles, *The Handbook of the International Law of Military Operations* concludes that the targeted killing of an individual during the conduct of hostilities is lawful only where:²⁴
- (a) The targeted individual is a person who is a lawful target of direct attack; and
 - (b) The operation is:
 - (i) planned and conducted so as to avoid erroneous targeting, as well as to avoid and minimise incidental civilian harm;
 - (ii) not expected to cause incidental civilian harm that would be excessive in relation to the concrete and direct military advantage anticipated;

16 Terry Gill and Dieter Fleck *The Handbook of the International Law of Military Operations* (Oxford University Press, Oxford, 2010) at [17.01]: "the term "targeted killing" refers to military operations involving the use of lethal force with the aim of killing individually selected persons who are not in the physical custody of those targeting them."

17 Although the definition in NZDF's manual focuses on the use of weapons systems to conduct targeted killings. See NZDF *Manual of Armed Forces Law: Vol 4, Law of Armed Conflict* NZDF (7 August 2017) at [8.8.20]: "[t]argeted killing means the employment of weapons systems, such as remotely piloted aerial vehicles (RPV), to deliver guided missiles enabling attack on particular individuals who might otherwise be inaccessible as targets."

18 See, for example: Claire Finkelstein, Jens David Ohlin and Andrew Altman (eds) *Targeted Killings in an Asymmetrical World* (Oxford University Press, Oxford, 2012); Travers McLeod *Rule of Law in War – International Law and the United States Counterinsurgency in Iraq and Afghanistan* (Oxford University Press, Oxford, 2015); Marjorie Cohn (ed) *Drones and Targeted Killing: Legal, Moral and Geopolitical Issues* (Olive Branch Press, Northampton, 2014).

19 Roland Otto *Targeted Killings and International Law: With Special Regard to Human Rights Law* (Springer, Berlin/Heidelberg, 2011).

20 *The Public Committee Against Torture in Israel v The Government of Israel* (2006) HCJ 769/02. This case has been the subject of considerable academic analysis: see, for example, the articles in (2007) 5 J of Intl Crim L at 301ff.

21 At [60] per Barak P.

22 Gill and Fleck, above n 16, at [3.03](7).

23 *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICR Rep 226 at [25]. See the discussion in chapter 6 at [16].

24 Gill and Fleck, above n 16, at [17.04]. See also: Nils Melzer *Targeted Killing in International Law* (Oxford University Press, Oxford, 2008) at 418–419; Doc A/HRC/14/24/Add.6, above n 15, at [30]; *Report of the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism* UN Doc A/68/389 (18 September 2013) at [24]; *The Public Committee Against Torture in Israel v The Government of Israel* above n 20, at [40] per Barak P.

- (iii) suspended when the targeted person surrenders or otherwise falls *hors de combat*; and
- (iv) not otherwise conducted by prohibited means or methods of warfare.

[17] As explained in chapter 6, insurgent fighters who are members of organised armed groups that are party to the conflict are lawful targets of direct attack under International Humanitarian Law. The accurate identification and verification of individuals to be placed on the JPEL was essential. *The Handbook of the International Law of Military Operations* states that:²⁵

It is ... of utmost importance that, in practice, no targeted killing be carried out before all feasible precautions have been taken to rule out erroneous or arbitrary targeting.

That is, all feasible precautions must be taken to ensure that individuals placed on the JPEL are lawful targets of attack *and* to verify the identity of the proposed target before an operation against them begins.

[18] “Feasible precautions” are those precautions that are practicable or practically possible taking into account all relevant circumstances, including both humanitarian and military considerations.²⁶ What is “feasible” to identify and verify a target will depend on the circumstances of the case and is ultimately “a matter of common sense and good faith”.²⁷ The information relied upon must be sufficient to enable the attacking force to satisfy itself that the proposed target does not benefit from civilian protection.²⁸ As Professor Akande notes, this will generally require an assessment of the most recent intelligence regarding the individual in question.²⁹

[19] No international case law or other authoritative statement defines the level or quality of intelligence required to verify a target. The UN Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions recommends that state armed forces should:³⁰

... use all reasonably available sources (including technological ones such as intelligence and surveillance) to obtain reliable information to verify that the target is lawful ...

And:³¹

Targeted killings should never be based solely on “suspicious” conduct or unverified – or unverifiable – information. Intelligence gathering and sharing arrangements must include procedures for reliably vetting targets, and adequately verifying information.

[20] Consistent with this, the NZDF’s manual on the Law of Armed Conflict provides that:³²

²⁵ Gill and Fleck, above n 16, at [17.04]. See also Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law* (Cambridge University Press, Cambridge, 2005), rule 16.

²⁶ Gill and Fleck, above n 16, at [17.04](7).

²⁷ At [16.07](2).

²⁸ At [17.04](8), citing: Protocol additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol I) 1125 UNTS 609 (opened for signature 8 June 1977, entered into force 7 December 1978), art 50(1); and International Committee of the Red Cross *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC, Geneva, 2009) recommendation VIII.

²⁹ Professor Akande, above n 15, at [12].

³⁰ UN Doc A/HRC/14/24/Add 6, above n 15, at [93].

³¹ At [93]. See also Gill and Fleck, above n 16, at [17.04](8): “In no case does the paradigm of hostilities permit the targeting of selected individuals based on mere suspicion that they may be a legitimate target.”

³² NZDF *Manual of Armed Forces Law*, above n 17, at [4.5.2].

Commanders have a legal duty to take practicable steps to gather information and intelligence about the targets they are about to attack and the likely incidental consequences of the means and methods of combat they intend to employ. Wilful blindness to facts that argue against an attack does not provide an excuse for the resulting death and destruction.

- [21] The Inquiry has had access to material about the JPEL process, both in relation to specific targets and more generally. Much of that material is contained in ISAF documents and remains classified. It will be apparent, however, that the JPEL process contained a number of in-built safeguards:
- (a) An application was subject to internal checks within TF81 before it could be submitted to ISAF. It was then subject to scrutiny by several distinct processes within ISAF. This was a meaningful process. JPEL nominations were declined relatively often, indicating they were not simply “rubber stamped”.³³
 - (b) The process to have a target placed on the JPEL required significant recent and reliable intelligence about the target’s active involvement in the insurgency. The target pack for Abdullah Kalta, which has been released through the Inquiry’s classification review process, provides an example of the number and frequency of intelligence reports that supported JPEL listings.³⁴
 - (c) JPEL listings had to be regularly reviewed based on updated intelligence and could be renewed if justified.
- [22] Once a target was listed on the JPEL, additional requirements had to be met before ISAF would approve an operation involving the predetermined use of lethal force against them. There were strict requirements for positively identifying the target and assessing potential collateral damage. Although the precise nature of these requirements cannot be disclosed, the Inquiry is satisfied they were adequate to ensure the right people were targeted and to minimise the risk of any incidental casualties.

Obligation to capture rather than kill if possible?

- [23] In addition to the above requirements, *The Handbook of the International Law of Military Operations* states that targeted killings may not be carried out where the threat posed by the targeted person could be neutralised through capture or other non-lethal means without additional risk to the operating forces or the civilian population.³⁵
- [24] As Professor Akande discussed in his opinion,³⁶ this position draws on Recommendation IX of the 2009 International Committee of the Red Cross (ICRC) guidance on *Direct Participation in Hostilities*, which concluded that:³⁷

The kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.

³³ See, for example Inquiry doc 07/07, above n 6.

³⁴ Inquiry doc 07/18, above n 5.

³⁵ Gill and Fleck, above n 16, at [17.04](27)–(29). See also: UN Doc A/HRC/14/24/Add 6, above n 15, at [76]–[77]; *The Public Committee Against Torture in Israel v The Government of Israel*, above n 20, at [40].

³⁶ Professor Akande, above n 15, at [46]–[55].

³⁷ ICRC *Interpretive Guidance*, above n 28, at 82.

- [25] As Professor Akande noted, however, this remains one of the most controversial conclusions contained in the ICRC guidance.³⁸ It has been criticised as creating a new “capture rather than kill” standard—which some commentators view as undermining the presumption that lethal force may be used in the first instance against legitimate military targets.³⁹ Professor Akande accordingly expressed considerable caution about any suggestion that targeted killings may only be carried out where the threat posed by the individual could not be disabled by other means.⁴⁰ The Inquiry considers there is an insufficient basis for applying such a test under the current law.

Law enforcement operations

- [26] The Inquiry heard differing views as to whether the same rules apply in situations during an armed conflict that fall outside what could be considered the “conduct of hostilities”. Mr Nicky Hager, in particular, relied on the work of former ICRC Legal Adviser, Nils Melzer, to draw a distinction between the “conduct of hostilities” and “security” or “law enforcement” operations conducted by NZDF.⁴¹
- [27] Even within the context of a situation of armed conflict, armed forces may carry out tasks involving the use of force that do not form part of active hostilities. These are often described as “law enforcement” tasks, and typically include activities such as manning checkpoints or conducting cordon and search operations. Nils Melzer takes the approach that, under the rules of International Humanitarian Law itself, lethal force may only be used against an individual in such circumstances where it would otherwise be permissible under the general law enforcement paradigm recognised by International Human Rights Law.⁴² That is, where it is both *necessary* and *proportionate* to address a threat to human life.⁴³
- [28] Nils Melzer’s work has been very influential. However, as Professor Akande advised, the factual distinction between what amounts to the “conduct of hostilities” and what amounts to “law enforcement” has not been clearly and objectively articulated.⁴⁴ In *The Handbook of the International Law of Military Operations* Nils Melzer offered the following definition of the “conduct of hostilities”:⁴⁵

In sum ... the conduct of hostilities is best understood as comprising all activities that are specifically designed to support one party to an armed conflict against another, either by directly inflicting death, injury or destruction, or by adversely affecting its military operations.

However, application of that definition is by no means straightforward in practice.⁴⁶

³⁸ Professor Akande, above n 15, at [47]. See also Andrew Carswell, “Converting Treaties into Tactics on Military Operations” (2014) 96 IRRC 919 at 938–939.

³⁹ See, for example, the criticism in: W Hays Parks “Part IX of the ICRC ‘Direct Participation in Hostilities’ Study: No Mandate, No Expertise and Legally Incorrect” (2012) NYU J Intl L & Pol 770; Michael Schmitt “The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis” (2010) 1 Harvard Natl Sec J 5; A P V Rogers “Direct Participation in Hostilities: Some Personal Reflections” (2009) 48 Mil L and L of War R 143.

⁴⁰ Professor Akande, above n 15, at [46]–[55].

⁴¹ Hager, above n 13, at [2.1]–[2.7]. See also: Melzer, above n 24.

⁴² Melzer, above n 24, at 175. See also: Gill and Fleck, above n 16, at [3.04] and [17.03]; Dr Penelope Ridings “International Legal Issues Relating to Detention” Public Hearing Module 2 (23 May 2019) at [3].

⁴³ Melzer, above n 24, at 225–239. See also: Gill and Fleck, above n 16, at [3.02](7).

⁴⁴ Professor Akande, above n 15, at [73].

⁴⁵ Gill and Fleck, above n 16, at [3.03](5).

⁴⁶ See, for example, the differing views expressed in the ICRC *Report of Expert Meeting on the Use of Force in Armed Conflicts: The Interplay between the Conduct of Hostilities and the Law Enforcement Paradigms* (ICRC, Geneva, 2013).

- [29] Nils Melzer has acknowledged that the “conduct of hostilities” and “law enforcement” are not mutually exclusive and may intersect—particularly in a situation of non-international armed conflict.⁴⁷ As discussed in chapter 6, individuals other than members of a state’s armed forces who are directly participating in hostilities are not entitled to “combatant privilege”. They therefore remain subject to prosecution under domestic criminal law for acts that have been committed during the armed conflict, even if those complied with International Humanitarian Law. Such individuals are therefore at the same time *both* a lawful military target *and* a law enforcement suspect. The use of force against them may therefore be considered to fall under *both* the “conduct of hostilities” and the “law enforcement” paradigms.⁴⁸
- [30] The Inquiry further notes in this context that the ICRC convened an expert group in 2013 to discuss the distinction between the “conduct of hostilities” and “law enforcement” in armed conflict.⁴⁹ The group discussed a number of case studies, including the example of the targeted killing of an isolated “sleeping fighter”. This is a member of an organised armed group that is a party to the armed conflict who is sleeping at home with his family, in an area that is not an active combat zone at the time.
- [31] Members of the ICRC expert group were divided as to whether a targeted killing operation in those circumstances formed part of the conduct of hostilities. But by a small margin, a majority of experts considered that the situation was sufficiently connected to the armed conflict to form part of the “conduct of hostilities”.⁵⁰ The “sleeping fighter” could therefore be lawfully attacked provided that the International Humanitarian Law principles of proportionality and precaution were fulfilled.⁵¹ Central to that analysis was the fact that the fighter was not a civilian and therefore was a legitimate target of attack under International Humanitarian Law.⁵² Neither the fact that the fighter was asleep nor that he was outside the active combat zone at the time of the operation changed that view.⁵³
- [32] For the purposes of the present analysis, the Inquiry is satisfied that targeted killings of individuals on the JPEL did form part of the conduct of hostilities. As we have said, those individuals had been determined to be legitimate targets of attack under International Humanitarian Law. That remained the case even if the same individuals could also have been prosecuted by Afghan authorities under domestic criminal law.

The New Zealand rules of engagement

- [33] Turning to the New Zealand rules of engagement, rule H is of primary relevance.⁵⁴ This rule was amended in December 2009 to allow a broader range of individuals to be targeted. Before the amendment, the rules of engagement only permitted attacks against identified members of specified insurgent groups. The amendment to rule H allowed TF81 to attack individuals,

⁴⁷ Melzer, above n 24, at 277.

⁴⁸ Melzer, above n 24. See also Gill and Fleck, above n 16, at [3.05].

⁴⁹ ICRC *Report of Expert Meeting on the Use of Force in Armed Conflicts*, above n 46.

⁵⁰ At 19. The contrary view is discussed at 20–22.

⁵¹ ICRC *Report of Expert Meeting on the Use of Force in Armed Conflicts*, above n 46.

⁵² At 19–20.

⁵³ At 22.

⁵⁴ Rule H concerned attacks on individuals directly participating in hostilities: See OP WAATEA RULES OF ENGAGEMENT (ROE) As at 25 May 10_Redacted (25 May 2010) (Inquiry doc 04/04) at [3H] and discussion in chapter 6 from [65].

forces or groups directly participating in hostilities against the Afghan government.⁵⁵ The term “directly participating in hostilities” reflected the wording of Additional Protocols I and II of the Geneva Conventions.

[34] The reasons for the December 2009 changes to the rules of engagement were set out in a briefing document to the Minister of Defence from the then Chief of Defence Force, Lieutenant General Jerry Mateparae. They were:⁵⁶

- (a) To make the New Zealand rules of engagement consistent with the ISAF rules of engagement, to avoid interoperability difficulties with other coalition forces.
- (b) To better enable TF81 to conduct direct action tasks against insurgent networks in support of ISAF and the Afghan government.
- (c) To give TF81 the flexibility to plan attacks on individuals and groups which, by use of force, resisted ISAF lawfully extending the authority of the Afghan government. These were not limited to the groups mentioned in the original version of rule H. Some people whom intelligence indicated needed to be attacked to preserve the security situation could not be attacked under the existing rules of engagement.
- (d) To allow the same ISAF staffing process and authorisation levels to apply to TF81 operations as applied to other ISAF Special Forces.

[35] The briefing also stated that removing the reference to specific insurgent groups would not narrow the rules of engagement, because members of those groups could be placed on the JPEL once they satisfied the criteria for prosecution by deadly force based on available intelligence. The new rules of engagement would allow such targets to be prosecuted once confirmation of direct participation in hostilities was established.

[36] In a written submission after the Inquiry’s second public hearing, NZDF further explained the reasons for the December 2009 rules of engagement amendment.⁵⁷ As noted above, part of the reason lay in the difficulty that the insurgency was not limited to persons who were identifiably members of the groups originally specified in the rules of engagement. If the targets were members of the specified groups, then capture and kill operations would be proper under the rules of engagement. But intelligence used to identify such people was often unable to establish whether they belonged to the specified groups. It was therefore necessary to amend the rules of engagement since the original wording:⁵⁸

... affected the ability of NZ forces to plan and conduct direct action missions against insurgent elements in cases where the intended target could not be identified as belonging to the force or forces specified in the text of the rule. It was considered that this impeded the ability of TF 81 to undertake part of its mission, ‘to defeat the insurgency in Afghanistan’. It was also difficult to reconcile with the broad scope of the need to be prepared to conduct direct actions tasks against insurgent networks in support of ISAF and the Government of Afghanistan.

⁵⁵ ROE Approval 14 Dec 2009 (7 December 2009) (Inquiry doc 04/05).

⁵⁶ Inquiry doc 04/05, above n 55.

⁵⁷ NZDF *Memorandum for the New Zealand Defence Force regarding Rules of Engagement* Submission to the Inquiry (13 June 2019).

⁵⁸ NZDF *Memorandum for the New Zealand Defence Force regarding Rules of Engagement*, above n 57, at [26].

- [37] The Inquiry also heard from the then Minister of Defence, Hon Dr Wayne Mapp, who had approved the rules of engagement.⁵⁹ He described the approval process in detail, including his discussions with NZDF. Without setting out the detailed content of Dr Mapp's evidence, the Inquiry is satisfied that he took an active supervisory interest in the whole process and took his responsibilities seriously.
- [38] The main points Dr Mapp emphasised to the Inquiry were:
- (a) He thought the rules of engagement should make a distinction between al-Qaida and the Taliban. The fundamental reason for the intervention in Afghanistan was to defeat al-Qaida, which had been proscribed by the United Nations as a terrorist organisation. By 2009 al-Qaida was no longer the global threat it had been, and the Taliban posed a more serious threat to reconstruction efforts and the promotion of public order by the Afghan Government. However, ISAF was not at war with the Taliban as a group, which represented a certain segment of the Afghan population and would need to be dealt with constructively.
 - (b) He was concerned to ensure that the rules of engagement were drafted so that they covered those directly taking hostile action against the Afghan Government, ISAF or NZDF but excluded those who were only members of the Taliban.
 - (c) In practical terms the New Zealand Special Air Service (NZSAS) would be primarily protecting Kabul from Taliban attacks.
 - (d) In more than 90 per cent of missions the NZSAS did not fire their weapons. Instead, the Taliban insurgents were arrested by the Afghan Crisis Response Unit and dealt with through the Afghan justice system.
 - (e) Changes to the rules of engagement needed to be made because the existing rules were too restrictive.
- [39] In respect of the rules of engagement amendment in December 2009, the Minister said:⁶⁰
- I ultimately concluded, after the briefings and considering both the legal and operational situation, that I should approve the amendment to the ROE. I set out my reasons on the NZDF Cover Sheet, dated 14 December 2009. I inserted a handwritten comment saying:
- “I have now been fully briefed on the change, including a discussion on the concept of operations. As a result, I am satisfied that the new ROE meets two criteria:
- (i) it complies with New Zealand legal requirements
 - (ii) it meets the operational requirements of Op Wātea and NATO/ISAF.”
- [40] At the public hearing the former Minister was questioned on this point and made it clear he had a detailed understanding of the changes and the reasons for them.⁶¹

⁵⁹ Evidence of Hon Dr Wayne Mapp, Transcript of Proceedings, Inquiry Public Hearing Module 2 (23 May 2019) at 43–67. See also Hon Dr Wayne Mapp “Second Statement of Evidence of Dr Wayne Daniel Mapp QSO” (Public Hearing Module 2, 23 May 2019).

⁶⁰ Hon Dr Mapp, above n 59, at [34], and Evidence of Hon Dr Mapp, above n 59, at 48.

⁶¹ Evidence of Hon Dr Mapp, above n 59, at 64–65.

I was aware that we could take direct action, that's why I got the briefing. That's why I talked to the people. I mean, to some extent that was always permitted even in the first draft ... But they have to have an intention to conduct an imminent or immediate attack. That's the governing test. So, on that basis I thought, yes, that is appropriate ... because the alternative would be allowing them to attack you ... We knew that there were people moving through that area [Bamyan] that were intending to attack ...

Our assessment

- [41] We consider the amended version of the rules of engagement, approved by the Minister of Defence and the Prime Minister, did authorise “predetermined and offensive use of lethal force against specified individuals other than in the course of direct battle.” Such operations would have been possible before the change, but in respect of a more limited class of people. We note in particular that the amended rule H:
- (a) permitted “attacks” on individuals who were directly participating in hostilities, in contrast to other rules which only permitted the use of force in defence of people or property or to achieve the mission;⁶²
 - (b) did not contain a “minimum force” requirement, in contrast to other rules;⁶³ and
 - (c) required a certain authorisation level for “planned attacks”.
- [42] On its plain wording, then, the amended rule contemplated that planned attacks could be carried out, and that TF81 would not be limited to the use of minimum force in conducting them. Of course, before carrying out a planned attack, TF81 personnel would have to be satisfied that it complied with International Humanitarian Law in light of the circumstances at the time.
- [43] It is also clear that NZDF and responsible ministers were aware that rule H permitted targeted killings. NZDF requested the change to the rules of engagement. In its briefing to the Minister of Defence, it stated that removing the reference to specific insurgent groups would not narrow the rules of engagement, because members of those groups could be placed on the JPEL once they satisfied the criteria for prosecution by *deadly force* based on available intelligence.⁶⁴ The new rules of engagement would allow such targets to be prosecuted once confirmation of direct participation in hostilities was achieved. Thus, the briefing specifically linked rule H to the use of the JPEL and the fact that targets on the JPEL may be subject to deadly force. The briefing also referred to the need for TF81 to be able to conduct planned “direct action” tasks against the insurgent network.⁶⁵
- [44] Dr Mapp confirmed in his public evidence that he was aware the amended rules of engagement would permit kill or capture operations.⁶⁶ While the Inquiry has heard no direct evidence on the point, we consider this must also have been clear to the Prime Minister when he approved the

⁶² Inquiry doc 04/04, above n 54, rules A, B and C.

⁶³ Rules A, B and C.

⁶⁴ Inquiry doc 04/05, above n 55, at [9].

⁶⁵ At [1]–[3].

⁶⁶ Evidence of Hon Dr Mapp, above n 59, at 63–64.

amendment.⁶⁷ As such, we are satisfied that NZDF's ability to nominate targets for the JPEL and to participate in targeted killing operations was understood and mandated by the responsible ministers.

- [45] Our Terms of Reference do not require us to examine whether the predetermined and offensive use of lethal force by NZDF was consistent with International Humanitarian Law. However, it will be apparent from our summary of the legal framework above that the Inquiry considers targeted killings can be consistent with International Humanitarian Law where the target is a member of an organised armed group. For people to be placed on the JPEL, there had to be a significant body of reliable intelligence about them to that effect.
- [46] As noted in chapter 6, there is some disagreement over the criteria for determining such membership—in particular, whether the individual must have a combat function or whether making some other contribution to the combat effectiveness of the group is sufficient. We do not intend to analyse in detail the legal approach taken by NZDF in that respect, as it is outside our Terms of Reference. In any event, the JPEL targets nominated by TF81 with whom we are concerned did in fact have combat functions.

The death of Abdullah Kalta

- [47] The case of Abdullah Kalta's eventual death in an ISAF operation in November 2012 illustrates how the JPEL process worked in practice and how it interacted with the applicable rules of engagement. However, it is important to note that the operation was not ultimately authorised on the basis of Kalta's JPEL listing. Additionally, New Zealand personnel neither authorised nor conducted the operation. Even so, NZSAS personnel did contribute significantly to it by providing intelligence to the ISAF decision-makers.⁶⁸
- [48] As discussed in chapter 4, after Operation Nova in October 2010 Kalta and Maulawi Neimatullah went to Pakistan. In August 2011 NZSAS personnel in Afghanistan met with members of a partner unit that had conducted an air strike targeting another Tala wa Barfak insurgent, Qari Musa, in May 2011.⁶⁹ The purpose of this meeting was to share information on JPEL targets to "disrupt insurgent groups in Baghlan".⁷⁰ It is apparent that the possibility of conducting targeted killings of other Tala wa Barfak-based insurgents who were on the JPEL was being explored at this point.
- [49] Kalta returned to Tala wa Barfak at some time in early-to-mid 2012. His return coincided with a significant increase in improvised explosive device attacks by the Tala wa Barfak Taliban on Afghan National Security Forces and New Zealand Provincial Reconstruction Team (NZPRT) personnel. NZDF intelligence staff assessed that Kalta was responsible for this increase in activity. Throughout 2012 Kalta remained on the JPEL and was a key figure in the command and control of the Tala wa Barfak insurgent group. NZSAS personnel based in Afghanistan assessed that he was involved in planning and obtaining materiel for two attacks against the NZPRT, which led to the deaths of New Zealand soldiers in August 2012.⁷¹

⁶⁷ As discussed in paragraph [54], it is apparent that by at least 2012 the Prime Minister was broadly aware of the JPEL process and NZDF's involvement in targeted killings.

⁶⁸ The NZSAS deployment to Afghanistan at this time had changed from TF81 and was a planning team referred to as TF954, which worked within the ISAF structure to ensure that threats to the NZPRT were addressed.

⁶⁹ TF954 5Ws for CDF Approval (Inquiry doc 10/28).

⁷⁰ Inquiry doc 10/28, above n 69, at 2.

⁷¹ ISAF SOF L1 Kinetic Strike 21 Nov 12 (21 November 2012) (Inquiry doc 10/23).

- [50] Intelligence reporting in November 2012 indicated that Kalta was preparing to conduct an attack against ISAF or Afghan government targets in the near future.⁷² On 20 November Kalta and other insurgents were reported as being in the village of Karimak in northeast Bamyan, armed with AK-47s and at least one PKM light machine gun.⁷³ This was near the location of the 3 August 2010 attack that killed Lieutenant O'Donnell. The following day, 21 November 2012, intelligence indicated that Kalta and his group were positioned approximately 200 metres from the site of the 3 August attack and were lying in wait to ambush vehicles travelling along the main road below them.⁷⁴ NZSAS personnel in Afghanistan collected and collated this intelligence and provided it to decision-makers in ISAF Headquarters.⁷⁵ At the same time, ISAF aircraft identified a group of armed individuals at the location.
- [51] To authorise a strike on the basis of Kalta's JPEL listing, the authorising commander⁷⁶ had to be satisfied to a high degree of certainty that the individual being targeted was the individual on the JPEL. Although there was substantial intelligence that Kalta was in the vicinity and planning to conduct an attack, it could not be confirmed to the required degree of certainty that he was either in the group seen on the surveillance, or that he was an identifiable individual within that group. As a result, a kinetic strike against him could not be authorised based on his JPEL listing.
- [52] NZSAS personnel were actively trying to gather intelligence that would provide the necessary degree of certainty when the authorising commander concluded that there were sufficient grounds to conduct a strike on the alternative basis that the group under surveillance was directly participating in hostilities. This decision was based on the intelligence received from the NZSAS, the location where the men were, their behaviour and the presence of weapons. The aircraft fired a Hellfire missile and over 200 30mm cannon rounds in two passes over the area, killing four of the men, including Kalta.⁷⁷ Although there was significant intelligence provided by NZDF, the air strike itself was an ISAF operation.
- [53] The fact that the strike against Kalta was not able to be authorised on the basis of his JPEL listing demonstrates the strict identification requirements that had to be met before targeted killings could be conducted.
- [54] Comments to the media from the then Prime Minister John Key following the operation against Kalta indicated that he was aware of the JPEL process and how targeted killings were authorised (even though that particular strike was not ultimately conducted on that basis).⁷⁸

You have to make sure you know exactly it's the right person in the right location, that they're on the list of people etc etc.

The main issue here is trying to make the environment safe. So if we have known insurgents who've carried out attacks that have killed people and are planning other attacks – and my understanding was this was an example of that where there was planning for further attacks to take place – then, we are in a war zone and ultimately we need to make sure that our men and women are as best protected as we can.

⁷² TF954 ISAF SOF Intrep (Inquiry doc 10/31) at [6].

⁷³ Inquiry doc 10/31, above n 72, at [12].

⁷⁴ TF954 ISAF SOF Intrep (Inquiry doc 10/25).

⁷⁵ Morning Report "Defence Force speaks out about Abdullah Kalta death" *Radio New Zealand* (27 November 2012) <www.rnz.co.nz>.

⁷⁶ In this instance a senior ISAF officer.

⁷⁷ Inquiry doc 10/23, above n 71.

⁷⁸ "Terrorist responsible for NZ deaths killed" *Stuff* (26 November 2012) <www.stuff.co.nz>.

That means using intelligence, and if required, making sure that those who would undertake those attacks aren't in a position to do so.

- [55] In contrast to Operation Burnham, NZDF publicly acknowledged its role in this strike soon after it occurred. The then Chief of Defence Force, Lt Gen Rhys Jones, was interviewed on *Radio New Zealand's* Morning Report.⁷⁹ He spoke about the degree of NZSAS involvement, the reasons for the operation and the decision to conduct a kinetic strike rather than attempting to capture Kalta.

Conclusion and findings

- [56] In the result, the Inquiry is satisfied that the rules of engagement did authorise the predetermined and offensive use of lethal force, and that this was understood by NZDF and responsible ministers (the Minister of Defence and the Prime Minister). NZDF personnel deployed in Afghanistan were involved in the JPEL process. While we are not required to make findings about the legality of targeted killings, we observe that, on the information available to us, we have seen no cause for concern about the JPEL process itself as it operated within the coalition or how it was applied in relation to the events before the Inquiry.

⁷⁹ Morning Report, above n 75.



A cover-up? An account of what happened

Chapter 8

- [1] In this and the following chapter we address the allegations made in *Hit & Run* that the New Zealand Defence Force (NZDF) “covered up” what happened on Operation Burnham, particularly in respect of the possibility that there were civilian casualties.¹ These allegations are reflected in the Inquiry’s Terms of Reference. Clause 6 directs the Inquiry to (among other things):

6.2. Examine the treatment by NZDF of reports of civilian casualties following Operation Burnham.

Clause 7 requires the Inquiry to inquire into and report on (among other things):

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.

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

- [2] We will address these issues by first giving an account in this chapter of what happened, by reference to four critical periods:

- (a) The period from immediately after the operation (that is, 23 August 2010) through to the end of December 2010.
- (b) April–December 2011, after a Television New Zealand news story about Operation Burnham.
- (c) June–July 2014, when the Māori Television programme *Native Affairs* ran a report by Mr Jon Stephenson titled *Collateral Damage* which dealt with Operation Burnham.
- (d) The period after the release of *Hit & Run* (21 March 2017) until the establishment of the Inquiry on 12 April 2018.

For ease of reference, there is a timeline at the conclusion of the chapter. In chapter 9, we set out our assessment of what happened.

- [3] Before we begin, we note that the International Security Assistance Force (ISAF) had a Standard Operating Procedure (SOP) for handling allegations of civilian casualties. It provided for the setting up of an Incident Assessment Team to conduct a preliminary investigation of such allegations. Following its preliminary investigation, the team would recommend whether or not there should be a further, more formal investigation.² As ISAF made clear, its investigative process did not replace national investigations where circumstances warranted them.

¹ Nicky Hager and Jon Stephenson *Hit & Run: The New Zealand SAS in Afghanistan and the meaning of honour* (Potton & Burton, Nelson, 2017), chapters 7 and 8. Although Mr Hager disputed this, we read the book as alleging a conspiracy by senior NZDF personnel that extended to the upper echelons of government to hide the truth about civilian casualties on Operation Burnham: see *Hit & Run*, for example at 6, 100, 105, 108, 110, 120, and 121.

² Evidence of Colonel Rian McKinstry, Transcript of Proceedings, Public Hearing Module 4 (17 September 2019) at 206–207.

- [4] As will become apparent, an Incident Assessment Team was set up when the allegations of civilian casualties emerged in relation to Operation Burnham. It produced a three-page report, referred to in its title as an “executive summary”.³ We will generally refer to it as the Incident Assessment Team Executive Summary or the executive summary, although readers should bear in mind that NZDF witnesses and documents refer to it as the “IAT report”.

Period 1: 23 August – 31 December 2010

- [5] By way of background, the Senior National Officer for Task Force 81 (TF81) when Operation Burnham occurred on 22 August 2010 was Rian McKinstry, then a Lieutenant Colonel (now Colonel McKinstry). His deployment ended at midnight on 6 September 2010, when Chris Parsons, also then a Lieutenant Colonel (now Brigadier Parsons), took over as Senior National Officer. Lt Col Parsons arrived in Afghanistan on 1 September 2010 to begin the hand-over process. For ease of reference, we will refer to these and other NZDF personnel by the ranks they held at the time of the relevant events, except when referring to their evidence in public hearings, when we will refer to them by their current rank or title.
- [6] Colonel McKinstry gave evidence at the Inquiry’s public hearing in September 2019. He said that he was in the Operations Room at TF81’s base camp in Kabul during Operation Burnham and watched a live video feed from a drone stationed above the villages throughout the operation. Colonel McKinstry said that once the TF81 personnel arrived back at their base camp, they separated into their operational groups to conduct a “hotwash” or debriefing. Following that, the commanders of the groups came together for a fuller debrief, in which he participated. He said that civilian casualties were not discussed then as none of the ground forces were aware of the possibility of such casualties.
- [7] This is reflected in the Operation Summary compiled by the Operations Officer in the Operations Room.⁴ Relevantly, the Operation Summary contained the following entries:
- (a) Beside the heading “CIVILIANS INVOLVED” is the entry “ALL CIVILIANS WERE PROTECTED THROUGHOUT.”
 - (b) Beside the heading “REMARKS” are the entries “NO CIVCAS” (that is, no civilian casualties) and “ALL WOMEN AND CHILDREN WERE PROTECTED THROUGHOUT”.

This position is also reflected in a media release issued by ISAF following the operation on 23 August 2010.⁵ The release stated that 12 insurgents were killed and weapons were seized and concluded by saying that no civilians were injured or killed in the operation. It did not identify the participating forces, presumably for security reasons.

- [8] There were further developments on 22 and 23 August 2010. First, it appears that Lt Col Parsons briefed the Prime Minister on the outcome of the operation, at the request of the Chief of Defence

³ ISAF Incident Assessment Team Executive Summary, 26 August 2010: CIVCAS Allegation during TF-81 Level II Deliberate Detention Op in Tigiran Village, Talawe Berfak District, Baghlan Province, RC North (26 August 2010). This document is classified, apart from one paragraph that we have received permission to quote.

⁴ OP-RAHBARI-OBJ-BURNHAM-OPSUM (22 August 2010) (Inquiry doc 02/14) at 2–3.

⁵ ISAF “Numerous insurgents killed and weapons recovered” (23 August 2010) *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 10.

Force.⁶ Lt Col McKinstry subsequently spoke by telephone to the Military Secretary to the Minister of Defence, Group Captain Edward Poot.⁷ Lt Col Parsons forwarded a copy of ISAF's draft 23 August media release⁸ to Gp Capt Poot.⁹

- [9] Second, Lt Col McKinstry sent an email to the Director of Special Operations, Colonel (later Major General) Peter Kelly, who was based at NZDF Headquarters in Wellington, saying that insurgents had reported that 20 civilians had been killed in the operation and 20 houses had been burnt.¹⁰ The email also noted that intelligence reporting and review of the drone footage would help clarify the position. Lt Col McKinstry attached an update on the operation, which indicated that early intelligence reporting was that a number of insurgents and a small number of civilians (most likely family members) had been killed or injured.¹¹ The reporting noted that the two objectives (targets) of the operation, Maulawi Neimatullah and Abdullah Kalta, were not accounted for (they were described as "missing").
- [10] Third, *The New York Times* ran a short article about possible civilian casualties on Operation Burnham.¹² It reported allegations of eight civilians killed, 12 injured and nine taken prisoner. The Ministry of Foreign Affairs and Trade sent a copy of the article to Colonel Kelly, who forwarded it to Lt Col McKinstry and Lt Col Parsons (among others).¹³ A further article in *The New York Times* on 25 August noted ISAF's Incident Assessment Team's investigation.¹⁴ This article was also circulated to NZDF personnel.¹⁵ It seems that the Minister of Defence, Hon Dr Wayne Mapp, was aware of these articles and concerned about their potential wide distribution.¹⁶
- [11] On 24 August 2010, Lt Col McKinstry received a second update on the operation.¹⁷ That update recorded the possibility of civilian casualties but noted that the reporting came from uncorroborated human sources. On 25 August Lt Col McKinstry forwarded this update to Colonel Kelly.¹⁸ In his covering email, he referred to the preliminary investigation being carried out by ISAF's Incident Assessment Team, and to the involvement of various TF81 personnel in that process. His email ended as follows:¹⁹

6 Email from Lt Col Parsons to Gp Capt Poot "Re: Brief to PM" (22 August 2010, 19.18) (Inquiry doc 13/02).

7 Email from Gp Capt Poot to Lt Col Parsons "Brief to PM" (23 August 2010, 07.08) (Inquiry doc 13/02).

8 The draft media release does not include the final sentence that appears in the 23 August 2010 media release, ie "No civilians were injured or killed during the operation".

9 Email from Lt Col Parsons to Gp Capt Poot and Col Kelly "ISAF News Release" (22 August 2010, 20.59) (Inquiry doc 13/03).

10 Email from Lt Col McKinstry to Col Kelly (SWAN – HQNZDF.DSO) "External Release OBJ Burnham Update" (23 August 2010, 10.20pm) (Inquiry doc 08/03).

11 Update Obj Burnham Op 21 Aug 10 (23 August 2010) (Inquiry doc 02/05).

12 "Afghans say NATO troops killed 8 civilians in raid" *The New York Times* (online ed, 23 August 2010) <www.nytimes.com>.

13 Email from [redacted] MFAT to Col Kelly "[No subject]" (24 August 2010, 4.30pm) *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 14, 16 and 26.

14 Dexter Filkins "Raid that killed Afghan civilians prompts inquiry" *The New York Times* (New York, 25 August 2010); Dexter Filkins "New Case of Civilian Deaths Investigated in Afghanistan" *The New York Times* (online ed, 25 August 2010) <www.nytimes.com>.

15 Email from [redacted] to [redacted] and others "FW: Baghlan Raid Inquiry" (26 August 2010, 1.18pm) *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 58.

16 Email from Col Kelly to Lt Col McKinstry "RE: External Release Update Obj Burnham Op 21 Aug 10 Update 3" (25 August 2010, 9.22pm) (Inquiry doc 02/11).

17 Email from Intelligence Officer to Lt Col McKinstry "Update Obj Burnham Op 21 Aug 10 Update 2" (24 August 2010, 7.17pm) (Inquiry doc 02/09).

18 Email from Lt Col McKinstry to Col Kelly "External Release Update Obj Burnham Op 21 Aug 10 Update 2" (25 August 2010, 5.33am) (Inquiry doc 02/09).

19 At 1–2.

Bottom line at this stage is that there may or may not have been some CIVCAS. This is to be determined by the investigation team in order to inform command action in the matter. The intelligence coming off the OBJ is still very raw and this investigation is welcomed in order to help to clarify ISAF and TF81 actions. I am confident our actions and tactics on the objective were sound and in accordance with ROE, LOAC and the Comd ISAF Tactical Directive. It will be saddening if there has been unnecessary CIVCAS as a result but the reason for looking into this matter is sound.

- [12] On 25 August 2010, the Chief of Defence Force, Lieutenant General (now Sir) Jerry Mateparae, provided a briefing note to the Minister of Defence saying that allegations of civilian casualties had been made following Operation Burnham, and that ISAF Headquarters had initiated an investigation into the operation.²⁰ The briefing noted that the investigation was being led by a Brigadier, who had interviewed TF81's Senior National Officer (Lt Col McKinstry) and the Ground Force Commander and reviewed video footage from the AH-64 Apaches and AC-130 Spectre gunship. The briefing then set out the other steps that the Brigadier proposed to undertake.²¹ The Chief of Defence Force recommended that the Minister discuss the note with the Minister of Foreign Affairs and the Prime Minister.
- [13] On 26 August 2010, Lt Col McKinstry sent Colonel Kelly the next update in relation to the operation.²² By this stage, the intelligence reporting was beginning to firm up. The assessment conveyed in this third update was that Neimatullah and Kalta were still alive; that only one civilian might have been injured; and that all others killed or injured were insurgents. The update also noted reports that the insurgents were planning retaliatory attacks against the New Zealand Provincial Reconstruction Team (NZPRT) and Afghan police personnel.
- [14] Colonel McKinstry's oral evidence was that he first became aware of the possibility of rounds from a coalition helicopter impacting a building (and so posing a threat to civilians) when he had the opportunity to view video footage from the Apaches and the AC-130 on 26 August 2010.²³ Later that day, he sent an email to Colonel Kelly and Lt Col Parsons to report on what the video revealed.²⁴ In the email Lt Col McKinstry said:

All in all for TF81 this is good news. It has to date verified that our actions were correct and in accordance with the threat presented. This will likely be looked at by IJC [ISAF Joint Command] from two fronts. Actions by the ground force, (no problems I can see) and actions by the Airborne force, (poss CIVCAS caused in potential accidental impact of rounds onto house identified in slide 1). There is no indication at this stage on the evidence presented to the [Incident Assessment Team] that there was anything other than the correct application of force to a clear and present [insurgent] threat, and that any CIVCAS caused by the [Air Weapons Team] would be collateral and unintended. This point is still to be verified.

...

²⁰ Op Watea HQISAF Civilian Casualty Investigation into Operation Burnham (25 August 2010) (Inquiry doc 09/29).

²¹ According to the briefing note, the Brigadier planned to travel to Baghlan to speak to the German Commander of Regional Command North and the Governor of Baghlan province and, security permitting, he planned to travel to the Tala wa Barfak region to meet with the local Sub Governor of the district.

²² Email from Lt Col McKinstry (WAATEA.SNO) to Col Kelly (HQNZDF.DSO) "External Release Update Obj Burnham Op 21 Aug 10 Update 3" (26 August 2010, 04.42) (Inquiry doc 02/11).

²³ Evidence of Colonel McKinstry, above n 2, at 179.

²⁴ Email from Lt Col McKinstry to Col Kelly and Lt Col Parsons "External Release Update Obj Burnham Op 21 Aug 10 Update 4" (26 August 2010, 11.27pm) (Inquiry doc 02/13) at 2.

I have to say that today has felt for the [Officer Commanding] and I like a large weight has been lifted. We have both been personally feeling the weight of potential CIVCAS by TF81 and now having reviewed the tapes, we are both reassured that TF81 actions throughout the operation were of the highest calibre. This is not to say that a CIVCAS has not occurred however if verified it will be as a result of collateral activities from the AH64 weapon problems rather than incorrect application of force. This called for a quiet Whisky and I can tell you it never tasted so good. I will sleep well tonight.

- [15] We pause in the narrative to comment that the evident relief expressed in this email at the conclusion that TF81 personnel were not directly responsible for civilian deaths is reflected in other contemporaneous material available to us (such as personal diaries). We have no doubt that senior New Zealand Special Air Service (NZSAS) officers in Afghanistan were genuinely concerned when the allegations of civilian deaths emerged and were anxious to learn whether TF81 personnel had been directly implicated in them.
- [16] Returning to the narrative, on 27 August 2010 ISAF's Incident Assessment Team provided ISAF with its "Executive Summary" dated 26 August 2010, which set out the results of its investigation into the allegations of civilian casualties on Operation Burnham.²⁵ As noted, the Incident Assessment Team was headed by a high-ranking United States officer, Brigadier General Zadalis, and comprised ISAF and Afghan personnel. The members viewed the unedited video tapes from the AC-130 and the edited weapons video tapes from the Apaches. They also interviewed several TF81 personnel, engaged with local government officials about the allegations, and followed up a claim that there were two injured women in hospital. The team concluded that the ground forces' actions had not caused any civilian casualties, but that there was a likelihood of civilian casualties from a gunsight malfunction on one of the helicopters. The malfunction caused rounds to impact two buildings (the cache house and the adjoining building). A group of people came out of the adjoining building immediately after the rounds struck. In the executive summary, the Incident Assessment Team did not, however, recommend any further investigation as it did not consider that any further evidence would be found.
- [17] On 29 August 2010, ISAF issued a media release that indicated its Incident Assessment Team had conducted a "full assessment" of Operation Burnham.²⁶ It said the team had determined that several rounds from coalition helicopters fell short, missing the intended target and striking two buildings, and that this may have resulted in civilian casualties; that insurgents were using one of the buildings as a base of operations but it was not an intended target; and identified the cause of the short rounds as a gunsight malfunction. Brigadier General Zadalis expressed his regret for any possible civilian loss of life or injury.
- [18] Lt Col McKinstry sent an email back to Colonel Kelly on 30 August 2010,²⁷ to which he attached the post-operation report for Operation Burnham²⁸ and the latest summary of the intelligence.²⁹ In the email, he said that he did not think "we will get much more fidelity on the BDA [Battle Damage Assessment]". Lt Col McKinstry said that the Incident Assessment Team had produced

25 As noted earlier, the ISAF Incident Assessment Team Executive Summary is classified although the Inquiry has permission to quote one paragraph from it. The summary that follows refers to publicly available material.

26 29 August Joint assessment team confirms possibility of civilian casualties in Baghlan (29 August 2010) (Inquiry doc 08/08).

27 Email from Lt Col McKinstry (WAATEA.SNO) to Col Kelly "External Release Issue External to the Sitrep" (30 August 2010, 6.59am) (Inquiry doc 08/07).

28 Summary of Incident (Inquiry doc 02/10).

29 Inquiry doc 02/13, above n 24, from 3.

a report, which found that there was no case for TF81 to answer in relation to civilian casualties and that, if there were any civilian casualties, they were likely the result of a weapon on one of the Apaches not firing true. In addition, he said:³⁰

This type of CIVCAS claim is not new and is [an] INS strategy to undermine ISAF operations. RC-N [Regional Command – North] are holding a Shura with District Governor on this tomorrow with IJC [ISAF Joint Command] representation as well to try and get further to the bottom of this.

Lt Col McKinstry also said that he had asked ISAF Joint Command for the completed report and would forward it when it was received.

- [19] On 30 August 2010, Brigadier General Zadalis provided ISAF with an addendum³¹ to the Incident Assessment Team Executive Summary. Apparently, on further review of the weapons video, another possible occasion was identified where civilian casualties could have occurred. This related to what was described as a “huddled group” with a possible female in it near the engagement area.³² This group was gathered in close proximity to the wall of a building at a time when the helicopters were firing on a man in the immediate vicinity, who appeared to be moving towards either it or the adjacent building.³³ Brigadier General Zadalis recommended a comprehensive investigation to review the Incident Assessment Team’s findings. The purpose of the investigation was to investigate the facts and circumstances surrounding Operation Burnham in relation to civilian casualties including determining whether the Apache weapons video was intentionally or wrongfully altered or deleted.³⁴
- [20] Also on 30 August 2010, ISAF issued a further media release.³⁵ This media release, which was reported in *Pajhwok Afghan News* on 30 August,³⁶ said that the Commander of ISAF Joint Command had ordered an investigation into the allegations of civilian casualties in Baghlan province during an operation on 22 August. The release said in part:

The investigation was ordered based on information contained in the joint initial assessment team’s report of the operation.

³⁰ Email from Lt Col McKinstry (WAATEA.SNO) to Col Kelly, Inquiry doc 08/07, above n 27.

³¹ The “IAT executive summary addendum memo from [redacted] dated 30 August 2010” is included in the list of exhibits to Headquarters United States Forces—Afghanistan *AR 15-6 Investigation Tigran Village* (30 September 2010) (Inquiry doc: United States Government FOIA release) at 20.

³² This “huddled group” is referred to in the publicly released AR 15-6 Report Findings and Recommendations and Exhibit 18, Inquiry doc: FOIA release, above n 31, at 6 and 63.

³³ This was part of the same incident described above at paragraph [16].

³⁴ “Appointment Order” (17 September 2010), in Inquiry doc: FOIA release, above n 31, at 3.

³⁵ ISAF “Investigation ordered into Baghlan civilian casualty claims” (29 August 2010) *Inquiry Bundle for Public Hearing Module 4 – Part I* (Public Hearing Module 4, 16 September 2019) at 70. Although this release is dated 29 August, it seems in fact to have been published on 30 August 2010. We will use the latter date to avoid confusion with ISAF’s earlier media release of 29 August. The Inquiry received advice from NATO via the Ministry of Foreign Affairs and Trade on 16 July 2019 that ISAF had no power to order a further investigation, and the investigation which was subsequently carried out was a United States investigation, the findings and conclusions of which were “highly unlikely” to have been brought to the attention of ISAF formally. However, we consider it significant that the media release was issued by ISAF: it stated that the Commander of ISAF Joint Command had ordered a further investigation based on the Incident Assessment Team’s findings; although carried out under United States Army Regulations, the investigator’s report is addressed to the Commander USFOR-A and ISAF (ie, to General Petraeus); and General Petraeus directed that the report’s findings and recommendations be sent to ISAF Joint Command, which was presumably done.

³⁶ *Pajhwok Afghan News* “ISAF to probe allegations of civilian casualties” (30 August 2010), attached to email from [redacted] DPMC to Defence Intelligence Officer “First take: 1 Sep” (2 September 2010, 8.31am) *Inquiry Bundle for Public Hearing Module 4 – Resumed* (Public Hearing Module 4, 15 October 2019) at 62.

The assessment team determined that several rounds from coalition helicopters fell short, missing the intended target and instead striking two buildings, which may have resulted in civilian casualties. Insurgents were using the building as a base of operations; however, it was not the intended target.

The release concluded by saying that the results of the investigation would be provided on completion.

- [21] It is not clear to the Inquiry exactly when NZDF became aware that ISAF Joint Command had ordered this further investigation in light of the Incident Assessment Team's investigation. NZDF did not provide us a copy of ISAF's 30 August media release. When we asked for a copy, NZDF informed us that it did not hold one.³⁷ However, NZDF did have a copy of the 30 August media story about the further investigation,³⁸ and ISAF's two media releases of 29 and 30 August were referred to in an email from Colonel Kelly to Lt Col Parsons dated 24 September 2010.³⁹
- [22] On 31 August, Colonel Kelly provided a briefing for the Chief of Defence Force.⁴⁰ It recorded that the Incident Assessment Team had produced a report which found that TF81 had no case to answer and if there were any civilian casualties they would have been caused by a misaligned weapon on one of the Apaches.⁴¹ It also noted that the two claimed females in hospital had been found to be fighting age males with probable links to insurgents.⁴² The briefing also said that claims of civilian casualties were often made as part of an insurgent strategy to undermine ISAF operations.
- [23] On the same day, after he had seen the ISAF media release of 29 August, Colonel Kelly emailed Lt Col McKinsty noting that the release recorded comments by the leader of the assessment team, Brigadier General Zadalis.⁴³ Colonel Kelly wrote:

Given that he is speaking publicly, can we now expect a copy of the assessment or at least a copy of the findings so we can report back to the PM, MFA and MINDEF, they are quite [exercised] by this and are very keen to hear the official outcome.

Colonel Kelly followed up by email on 2 September, saying that he was taking a week's leave but if the Incident Assessment Team's report came in, it should be processed and provided to ministers urgently.⁴⁴

³⁷ NZDF confirmed to the Inquiry in a letter dated 9 July 2019 that it does not appear to hold a copy of ISAF's media release of 30 August 2010, which we find surprising; however, it does hold an email attaching the *Pajhwok Afghan News* article which uses most of the statements in the ISAF release.

³⁸ "ISAF to probe allegations of civilian casualties", above n 36.

³⁹ Email from Col Kelly (HQNZDF.DSO) to Lt Col Parsons (WAATEA.SNO) "MINISTERS CONCERN" (24 September 2010, 09:37) (Inquiry doc 13/04). See chapter 9 at footnote 72.

⁴⁰ 2010-08-31 CDF Ops Brief (31 August 2010) (Inquiry doc 13/22).

⁴¹ At 8.

⁴² Other NZDF briefings state it was the Incident Assessment Team that visited the hospital where the alleged casualties were taken: "Annex A: DOT POINT BRIEF FOR VCDF: TALKING POINTS FOR MEETING WITH PM ON 22 MARCH" (22 March 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 261; CRU AND NZSAS OPERATIONS IN BAGHLAN PROVINCE AUGUST AND SEPTEMBER 2010 (13 December 2010) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 266.

⁴³ Email from Col Kelly (HQNZDF.DSO) to Lt Col McKinsty (WAATEA.SNO) and others "CIVCAS REPORTING BY INTERNATIONAL MEDIA" (31 August 2010, 13:05) (Inquiry doc 09/04).

⁴⁴ Email from Col Kelly (HQNZDF.DSO) to Lt Col McKinsty (WAATEA.SNO) "RE: External Release: [redacted]" (2 September 2010, 8:17am) (Inquiry doc 09/15).

- [24] The Minister of Defence's office asked NZDF about ISAF's assessment on 31 August 2010.⁴⁵ NZDF indicated that the ISAF process was one over which it had little control⁴⁶ and said that when it received the official report from theatre, a note for the Minister would be drafted and the Senior National Officer (Lt Col McKinstry) would forward the report to Headquarters NZDF/Joint Forces New Zealand.⁴⁷
- [25] On 2 September 2010, the Department of the Prime Minister and Cabinet (DPMC) sent a compilation of news reports about casualties in Afghanistan to a Defence Intelligence Officer.⁴⁸ That compilation was emailed to Colonel Kelly, who forwarded it to Lt Col McKinstry, Lt Col Parsons and Lieutenant Colonel Karl Cummins (the Deputy Director of Special Operations).⁴⁹ The compilation included stories about civilian casualties during the ISAF operation in the Tirgiran Valley. Importantly, the first two stories in the compilation were based on ISAF's media releases of 29 and 30 August 2010 about the operation, the first of these announcing the outcome of the Incident Assessment Team's preliminary investigation (that civilian casualties were possible), and the second announcing that ISAF had ordered a further investigation based on the information obtained by the Incident Assessment Team.
- [26] On 3 September 2010, an internal email was circulated within ISAF Special Forces Operations Headquarters providing "[a]n official update on the CIVCAS allegations against TF81."⁵⁰ The update said that the Commander of ISAF Joint Command had been briefed on the findings of the Incident Assessment Team and had confirmed that TF81 had "no case to answer"; however, the air support aspect of the operation was part of an ongoing investigation. The update said that ISAF Special Operations Forces would take no further action. One of the recipients of this email was the TF81 liaison officer attached to ISAF Special Operations Forces Headquarters. The liaison officer forwarded the email to Lt Col McKinstry (among others).⁵¹
- [27] Lt Col McKinstry then attached the update email to a reporting email of 6 September 2010 to Colonel Kelly.⁵² In that email Lt Col McKinstry briefly summarised the update email (TF81 had "no case to answer" but "there may still be some fallout for the aviation elements"), and said that TF81 was looking to get a copy of the Incident Assessment Team's report "when and if it is released". At midnight on 6 September, Lt Col McKinstry handed over command of TF81 to Lt Col Parsons and then left Afghanistan on 7 September 2010.

45 Email from Gp Capt Poot to Col Thompson "Media Article" (31 August 2010, 9.15am) *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 72.

46 Email from Col Thompson to Col Hitchings "FW: Media Article" (30 August 2010, 21.19) *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 72.

47 Email from Col Kelly to Gp Capt Poot and others "Media Article" (30 August 2010, 21.22) *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 77.

48 Email from [redacted] DPMC to Defence Intelligence Officer, above n 36.

49 Email from Defence Intelligence Officer to Col Kelly and [redacted] "FW: First take: 1 Sep" (2 September 2010, 9.20am) *Inquiry Bundle for Public Hearing Module 4 – Resumed* (Public Hearing Module 4, 15 October 2019) at 61; and email from Col Kelly to Lt Col McKinstry and others "FW: First take: 1 Sep" (1 September 2010, 22.14) *Inquiry Bundle for Public Hearing Module 4 – Resumed* (Public Hearing Module 4, 15 October 2019) at 61.

50 Email from ISAF SOF HQ CJ3 DIR IS to ISAF SOF HQ CG COM SOF IS "FW: CIVCAS INVESTIGATION ON TF81" (3 September 2010, 2.29pm) (Inquiry doc 09/14).

51 Email from ISAF SOF HQ CJ3 TF 81 LNO IS to ISAF SOF TF 81 OC IS and Lt Col McKinstry (ISAF SOF TF 81 SNO IS) "FW: CIVCAS INVESTIGATION ON TF81" (3 September 2010, 16.53) (Inquiry doc 09/14).

52 Email from Lt Col McKinstry (WAATEA.SNO) to Col Kelly and others "External Release Issues External to the Sitrep" (6 September 2010, 01.32) (Inquiry doc 09/13).

- [28] The Chief of Defence Force and a number of other senior NZDF personnel were briefed on Operation Wātea at NZDF Headquarters in Wellington on 7 September 2010.⁵³ Operation Burnham was covered during the briefing. The briefing slides record, under the heading “KEY ACTIVITIES/DATES”:

TF81 portion of OP BURNHAM Initial Assessment Team (IAT) report Complete.

Later, the briefing slides said:

- ISAF Initial Assessment Team (IAT) report still in progress.
 - ISAF LEGAD assigned to IAT has advised that COM IJC [ie, Commander ISAF Joint Command] has been briefed by IAT and agrees that TF 81 have ‘no case to answer’.
 - COMISAF [ie, Commander ISAF] has been briefed on progress of report,
 - Investigation into RW CAS [ie, Rotary Wing casualties] is ongoing.

- [29] Then, on 8 September 2010, comes a critical development. In an email sent on 7 September at 11.42pm (Afghanistan time) but received on 8 September at 7.12am (New Zealand time), Lt Col Parsons advised Colonel Kelly that he had “sighted the Accident Investigation Team’s (AIT) conclusion into the claims of civ cas in BAGLAN”.⁵⁴ On 7 September, he had gone to ISAF Joint Command Headquarters to introduce himself and to seek a copy of the Incident Assessment Team’s report. In his evidence to the Inquiry, Brigadier Parsons said that if someone was with him, it would have been New Zealand’s ISAF Liaison Officer.⁵⁵ There was, he said, a lot going on in the ISAF Joint Command operations room.⁵⁶ He was introduced to an officer he had not met before and whose name he cannot now remember, although he thought he might have been American⁵⁷ and from the ISAF Joint Command legal team.⁵⁸

- [30] Lt Col Parsons said that after a brief chat, he asked this officer if he could see the Incident Assessment Team report. The officer said that it had not yet been cleared for release to New Zealand. However, he retrieved a document, pointed to the first paragraph on the final page, and said that it was what Lt Col Parsons wanted to know. Lt Col Parsons read the four-line paragraph over the officer’s shoulder.⁵⁹ The paragraph said:⁶⁰

⁵³ DIRECTORATE SPECIAL OPERATIONS CDF BRIEF OP WATEA (7 September 2010) (Inquiry doc 08/13) at 4 and 7.

⁵⁴ Email from Lt Col Parsons (WAATEA.SNO) to Lt Col Cummins (SWAN – HQNZDF.DDSO) and Col Kelly (SWAN – HQNZDF.DSO) “RE: External Release: Info/Updates” (8 September 2010, 7.12am) (Inquiry doc 09/15). We will refer to this email as the 8 September email.

⁵⁵ Evidence of Brigadier Chris Parsons, Transcript of Proceedings, Public Hearing Module 4 (17 September 2019) at 281–282. The Inquiry spoke to the New Zealand ISAF Liaison Officer who had no recollection of whether he attended any such meeting.

⁵⁶ At 266.

⁵⁷ At 284.

⁵⁸ At 266–267.

⁵⁹ At 267.

⁶⁰ *Incident Assessment Team Executive Summary*, above n 3, at 3. NATO granted permission for the Inquiry to quote this paragraph of the Incident Assessment Team Executive Summary but the remainder of the document remains classified.

An accurate CIVCAS review of Op [Burnham] requires separating [TF81] operations from the AWT [Air Weapons Team] and AC-130 engagements. The ground engagement appears to have been conducted IAW [in accordance with] all ROE, the Tactical Directive, and according to the pre-planned CONOP. The AF reported no CIVCAS and the IAT [Incident Assessment Team] was unable to find any part of their operation where CIVCAS could have occurred.

[31] In his email of 8 September 2010 to Colonel Kelly, Lt Col Parsons wrote:⁶¹

IJC [ISAF Joint Command] wasn't willing to release the report to us, so I can not fwd a copy. However, **it categorically clears both gnd and air c/s of any allegations**. It states that having reviewed the evidence there is no way that civ cas could have occurred. We already knew we were without fault, but the AWT [Air Weapons Team] have now also been cleared which is good news.

[32] In fact, the Incident Assessment Team Executive Summary did not categorically clear the air assets of any allegations; nor did it say that there was no way that civilian casualties could have occurred. To the contrary, as ISAF's media releases stated, it explicitly acknowledged the possibility of civilian casualties from a misaligned weapon on one of the Apache helicopters.

[33] In his evidence to the Inquiry, Brigadier Parsons explained his misunderstanding of what was said in the paragraph from the Incident Assessment Team report by indicating that he understood the acronym "AF" in the third sentence of the paragraph to mean "Air Force", whereas in fact, as he now realises, it meant "ground assault force".⁶² He also said (under cross-examination) that he had realised he might have sent his email too quickly, so he believed that he would have mentioned that he had only seen one paragraph of the report to Colonel Kelly (or perhaps to his deputy, Lt Col Cummins) in one of his regular telephone calls to New Zealand.⁶³ We discuss this in more detail in chapter 9.⁶⁴ For the moment, we simply note that the Chief of Defence Force was briefed on the basis of the information in Lt Col Parsons' email, and he in turn briefed Dr Mapp (orally), presumably also on that basis.⁶⁵

[34] On 14 September 2010, the Chief of Defence Force requested a "before and after" assessment of the insurgent network targeted in Operation Burnham.⁶⁶ The following day, Colonel Kelly provided a "dot point" briefing for him on the operation, which said that the operation was successful, with a number of insurgents killed or wounded including the two targets (although the latter could not be corroborated).⁶⁷ The "before and after" assessment was provided several days later.⁶⁸ The assessment consisted of two Link Charts, which indicated that those killed on the operation were believed to be insurgents.⁶⁹

61 Inquiry doc 09/15, above n 54. Bold in original.

62 Evidence of Brigadier Parsons, above n 55, from 269 and at 303.

63 At 295–296.

64 See chapter 9 at [40]–[43].

65 Evidence of Hon Dr Wayne Mapp, Transcript of Proceedings, Public Hearing Module 4 (18 October 2019) at 1019.

66 Email from HQNZDF.AD1DDIS to Lt Col Parsons (WAATEA.SNO) and others "CDF RFI: OP BURNHAM BDA" (14 September 2010, 3.53am) (Inquiry doc 08/09).

67 DOT POINT BRIEF FOR CDF (15 September 2010) (Inquiry doc 08/14) at 2.

68 Email from WAATEA.S2 to Col Kelly (SWAN – HQNZ.DSO) and others "External release RE: CDF RFI: OP BURNHAM BDA" (17 September 2010, 06.41) (Inquiry doc 08/09).

69 Untitled Link Chart (17 September 2010) (Inquiry doc 08/10).

- [35] On 23 September 2010, in an email responding to an inquiry from the Minister's office, Colonel Kelly attached ISAF's 29 August media release and said:⁷⁰

This was the last I saw from ISAF on this. I am not aware of any other releases since.

It does note that the helicopter gun was slightly off, but we now know that no casualties were caused as a result.

I am not sure how ISAF put the record straight further to what they have said here, where they state that casualties may have occurred, we now [know] none did. No nation has been identified and it is a matter for ISAF and their ongoing [Information Operations]/media plan to manage. Not sure what role we have in influencing that.

- [36] As will by now be plain, there are two relevant errors in this email:

- (a) The first is the statement that ISAF considered that there were no civilian casualties. While ISAF had expressed that view in its first media release of 23 August immediately after the operation, it took a different view in its subsequent media releases of 29 and 30 August, and at no point departed from the view expressed in them. This incorrect information appears to be based on Lt Col Parsons' 8 September email.
- (b) The second is that it does not refer to ISAF's media release of 30 August 2010, which announced the further investigation based on the Incident Assessment Team's findings. Although Colonel Kelly said in evidence before us that he was not aware of any media releases from ISAF after the 29 August 2010 media statement,⁷¹ he did refer to both the 29 and 30 August 2010 media releases in an email of 24 September 2010 to Lt Col Parsons.⁷² Further, he had been provided with a copy of the news story dated 30 August 2010 about ISAF's announcement in the compilation of media stories provided to NZDF by DPMC, which both Colonel Kelly and Lt Col Parsons received on 2 September 2010.⁷³

- [37] As well as referring to both the 29 and 30 August 2010 media releases, Colonel Kelly's email of 24 September 2010 to Lt Col Parsons referred to Lt Col Parsons' advice that the Incident Assessment Team had cleared all coalition forces, both air and ground, and found no evidence of civilian casualties.⁷⁴ He advised that the Minister wanted to know how ISAF would "close this loop" in terms of its process and whether the findings would be reported to the media. Colonel Kelly asked for some words to "reassure the Minister" and suggested a signed letter from ISAF Joint Command would be useful.

- [38] In a 29 September 2010 email, Lt Col Parsons informed Colonel Kelly that the Incident Assessment Team's findings had not yet been released to the media, and might not be released.⁷⁵ He said New Zealand had not been linked to the incident and the Minister "should be absolutely satisfied that all NZ actions are completely defensible and undertaken with the highest standards

⁷⁰ Email from Col Kelly to Gp Capt Poot "Media article" (23 September 2010, 4.09pm) *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 117.

⁷¹ Evidence of Major General (Retired) Peter Kelly, Transcript of Proceedings, Public Hearing Module 4 (17 September 2019) at 322–325.

⁷² Inquiry doc 13/04, above n 39. See chapter 9 at footnote 72.

⁷³ See paragraph [25].

⁷⁴ Inquiry doc 13/04, above n 39.

⁷⁵ Email from Lt Col Parsons (WAATEA.SNO) to Col Kelly (SWAN – HQNZDF.DSO) and @CO "RE: VISIT TO BAF DETENTION CENTRE" (29 September 2010, 6.50am) (Inquiry doc 13/26).

of discipline” and in accordance with the rules of engagement. He also noted the Governor had not produced any proof in relation to the civilian casualty allegations against the Air Weapons Team, despite being pressed to do so by the Incident Assessment Team.

- [39] We discuss these aspects further in chapter 9.
- [40] We should mention at this point that the further investigation ordered by ISAF on 30 August 2010 appears to be the investigation carried out by a United States officer at ISAF Joint Command in Afghanistan under United States Army Regulation 15-6 (AR 15-6 investigation). This investigation was instituted by letter dated 17 September 2010⁷⁶ and reported in writing on 30 September 2010 (AR 15-6 Report). The report was addressed to “Commander, United States Forces-Afghanistan (USFOR-A) and International Security Assistance Force (ISAF)”, namely General Petraeus, who directed that the report’s findings and recommendations be provided to ISAF.⁷⁷ A redacted version of the AR 15-6 Report was made publicly available by United States authorities in June 2019.⁷⁸
- [41] The Investigating Officer conducted interviews with the US Airborne Mission Commander, all the air crews and a video editor; the officer also viewed the edited weapons video from the Apaches and the unedited video from the AC-130 (which covered the full length of the operation).
- [42] In relation to civilian casualties, the AR 15-6 Report concluded:⁷⁹

This investigation concurs with the IAT observation that based on [Weapons Systems Video] evidence it is possible that CIVCAS occurred because at the time of the [Air Weapons Team] engagement, women and children appear to have been present ... However, there is no evidence in the video that confirms there were civilian casualties. The only piece of information that can be confirmed is that rounds impacted the roofs of buildings where it is possible that civilians were located. Based on the evidence that I reviewed, I concur with the [Incident Assessment Team] findings that civilian casualties are possible, but cannot be confirmed.

- [43] The AR 15-6 Report also concluded that the United States air crews had acted consistently with their rules of engagement (ROE) and other relevant directives. It said:⁸⁰

The IAT executive summary stated that all engagements appeared to be in accordance with appropriate ROE and the Tactical Directive ... This investigation concurs with the IAT findings. Although there are areas where things could have been done differently or better, the unit effectively used this mission as a way to make improvements in their processes with regard to weapons maintenance, crew training, and overall understanding of the Tactical Directive. It is also important to understand the stresses placed upon the crew at the time of the mission – night, terrain, poor communications, and a high level of threat to friendly forces all played into the situation.

The last sentence of this extract is noteworthy as it emphasises the difficult circumstances in which Operation Burnham was carried out.

⁷⁶ “Appointment Order” (17 September 2010), in Inquiry doc: FOIA release, above n 31, at 3.

⁷⁷ “Action Memo” (19 October 2010), in Inquiry doc: FOIA release, above n 31, at 1.

⁷⁸ Inquiry doc: FOIA release, above n 31.

⁷⁹ “Findings and Recommendations” at 8, in Inquiry doc: FOIA release, above n 31, at 13.

⁸⁰ “Findings and Recommendations” at 6, in Inquiry doc: FOIA release, above n 31, at 11.

- [44] Although NZDF personnel were aware that a further investigation had been ordered, we have seen no evidence that NZDF knew that the AR 15-6 investigation was that further investigation or that it was advised of the investigation's outcome at the time. It appears that NZDF first received a redacted version of the AR 15-6 Report on 17 May 2017.⁸¹
- [45] Several months later, on 10 December 2010, the Chief of Defence Force provided a briefing note to the Minister of Defence about Operation Burnham and the follow-up operation, Operation Nova, with a recommendation that the note be referred to the Prime Minister and the Minister of Foreign Affairs.⁸² Colonel Kelly was directly involved in drafting the note⁸³ and is named in it as the first contact point within NZDF in relation to it.⁸⁴
- [46] As we noted in chapter 4, this briefing note stated that on the basis of intelligence gathered “... the CRU [Afghan Crisis Response Unit], supported by the NZSAS, developed an operation plan targeting the insurgent leadership which was approved by the Afghan Ministry of Interior (MOI) and Commander ISAF to disrupt the insurgent operations centred on Tigiran village”.⁸⁵ The paper went on to describe the intent of “the combined CRU/NZSAS” operation and its outcome. The cover sheet, which repeated the recommendations section of the briefing note, contained the following comment in relation to Operation Burnham:

Note that the allegations into civilian casualties and destroyed houses were investigated by a joint assessment team and they concluded that the allegations were baseless and cleared the actions of the Response Task Force and coalition air of all allegations.

- [47] The briefing note explained this in more detail, as follows:⁸⁶

Following the operation Afghan citizens from the Talewa Berfak district alleged that up to twenty (20) civilians had been killed by aerial bombardment and twenty (20) houses destroyed by fire. Based on these allegations and reported in the New York Times, a joint assessment team composed of representatives from the Afghan Ministries of Interior and Defence and ISAF officials conducted a full assessment of the operation. The assessment team visited the provincial and district capitals, the hospital where the alleged casualties were receiving treatment, viewed the gun tapes from the coalition air assets and spoke to the NZSAS personnel. As a result of their investigation, the joint assessment team concluded that the allegations were baseless and categorically cleared the actions of the [Response Task Force] and coalition air of all allegations. The assessment concluded that “having reviewed the evidence there is no way that civilian casualties could have occurred”. The joint assessment team's report has not been released beyond Headquarters ISAF and our knowledge of the findings [is] based on the comments provided by the NZSAS Task Force commander, who was permitted to read the report.

⁸¹ NZDF provided the AR 15-6 Report to the Inquiry along with its covering memorandum, which was dated 17 May 2017.

⁸² NZSAS (TF81) OPERATIONS IN BAGHLAN PROVINCE AUGUST AND SEPTEMBER 2010 (10 December 2010) (Inquiry doc 09/12).

⁸³ Evidence of Maj Gen (Ret) Kelly (17 September 2010), above n 71, at 332 and Evidence of Maj Gen (Ret) Kelly, Transcript of Proceedings, Public Hearing Module 4 (18 September 2019) 341–342.

⁸⁴ Colonel Mike Thompson is named as the second contact point: see “320-10 NZSAS Operations in Baghlan Province Aug and Sep 2010” (10 December 2010) *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 164.

⁸⁵ Inquiry doc 09/12, above n 82, at [4]. Also see chapter 4 at [44](a).

⁸⁶ Inquiry doc 09/12, above n 82, at [7].

- [48] On 13 December 2010, the Chief of Defence Force provided a publicly releasable version of the briefing note to the Minister of Defence, for discussion with the Prime Minister.⁸⁷ Paragraph 4 of that document was substantially the same as paragraph 7 of the 10 December briefing note, except that the last sentence of the paragraph was not included. The attachments to the briefing note included the compilation of media stories referred to earlier,⁸⁸ which reported allegations of civilian casualties following Operation Burnham and ISAF media releases, including that ISAF had ordered a further investigation following the receipt of the Incident Assessment Team Executive Summary. There was also a note outlining the risks that NZDF considered were associated with releasing the document publicly.
- [49] In the event, the Prime Minister and Minister of Defence agreed that the briefing note should not be released publicly.
- [50] As was the case with Colonel Kelly's email of 23 September, the briefing material provided to ministers on 10 and 13 December 2010 was not accurate. It did not indicate that ISAF had ordered a further investigation, as announced in ISAF's 30 August 2010 media release. In addition:
- (a) The summary of the Incident Assessment Team's conclusions in paragraph 7 of the 10 December briefing note (and in paragraph 4 of the 13 December note) is incorrect. The Team did not in fact conclude that the allegations of civilian casualties were baseless, nor did they categorically clear both ground and air forces of all allegations.
 - (b) Following from the previous point, the apparent quote from the Incident Assessment Team Executive Summary in the penultimate sentence of paragraph 7 of the 10 December note (and in the final sentence of paragraph 4 of the 13 December note) is not in fact a quote from that document and is, in any event, substantively inaccurate.
 - (c) The person who saw the executive summary, Lt Col Parsons, was permitted to read only one four-line paragraph from it, not the whole document as the final sentence of paragraph 7 of the 10 December note indicates. One of the drafters of the briefing note, Colonel Kelly, was aware of this.⁸⁹
 - (d) The recommendation quoted at paragraph [45] says that the Incident Assessment Team investigated the allegations of "destroyed houses" as well as those of civilian casualties and concluded that they were baseless. This is incorrect—the Incident Assessment Team was established to investigate civilian casualty allegations and did not investigate the property damage allegations. More relevantly, given that NZDF did not have a copy of the executive summary, Lt Col Parsons' description of the Incident Assessment Team's findings in his 8 September 2010 email to Colonel Kelly addressed civilian casualties, not property damage.

⁸⁷ CRU AND NZSAS OPERATIONS IN BAGHLAN PROVINCE AUGUST AND SEPTEMBER 2010 (13 December 2010) (Inquiry doc 09/21). Dr Mapp said in evidence that the publicly releasable version was prepared at the initiative of the Chief of Defence Force because he was keen to be more open about NZDF operations (Evidence of Hon Dr Mapp, above n 65, at 1099–1100). However, a contemporaneous email makes it clear that it was the Prime Minister who asked the Chief of Defence Force to provide an unclassified version of events (email from Col Kelly to R Adm Steer and others "PM RELEASE" (12 December 2010, 23.54) *Inquiry Bundle for Public Hearing Module 4 – Resumed* (Public Hearing Module 4, 15 October 2019) at 71).

⁸⁸ See above at [25].

⁸⁹ Evidence of Maj Gen (Ret) Kelly (17 September 2010), above n 71, at 332–333.

- (e) Finally, as we explained in chapter 4,⁹⁰ the characterisation of Operation Burnham as a CRU-led operation in which the CRU developed the operational plan, supported by the NZSAS, was misleading.

[51] We return to these matters in chapter 9.

Period 2: April – December 2011

[52] On Wednesday 20 April 2011, *One News* ran a story on Operation Burnham in its 6pm news broadcast.⁹¹ In an exclusive, *One News* reported that it had been confirmed that NZSAS personnel had conducted an operation aimed at the insurgents believed to have been responsible for the death of Lieutenant Tim O'Donnell. As part of the story, *One News* ran excerpts from a *Q+A* interview by Guyon Espiner with the Minister of Defence, Hon Dr Wayne Mapp, which was to be broadcast four days later.⁹² That interview dealt principally with issues arising out of the New Zealand deployment in Afghanistan.

[53] During the interview, Mr Espiner asked whether Dr Mapp could confirm that New Zealanders were involved in an operation aimed at the insurgents responsible for Lieutenant O'Donnell's death. The effect of Dr Mapp's response was to confirm that there was such an operation. This exchange followed:⁹³

Q. There's an Associated Press report around that time that contains a claim that a number of civilians were killed during that operation.

A. And that's been investigated and proven to be false.

Q. So no civilians were killed in that? You're satisfied about that? You've seen some reports on it?

A. I am satisfied around that.

Q. Only insurgents were killed in that operation?

A. I am satisfied around that.

[54] Before the story ran on *One News*, several NZDF personnel were contacted for comment but no one was able to comment given the shortness of time.⁹⁴ Following the news item, there was an exchange of emails about a draft public statement,⁹⁵ which was finalised and released later on the evening of 20 April 2011.⁹⁶ NZDF's public statement read in part:

⁹⁰ Chapter 4 at [45].

⁹¹ *One News* "SAS' deadly Afghan counter attack revealed" (20 April 2011) *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 185.

⁹² Guyon Espiner "Q+A's Guyon Espiner interviews Dr Wayne Mapp" (24 April 2011) *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) from 190.

⁹³ "Q+A's Guyon Espiner interviews Dr Wayne Mapp", above n 92, at 193–194.

⁹⁴ Email from [redacted] to Cdr Bradshaw and others "SAS kill insurgents" (20 April 2011, 17.57) (Inquiry doc 13/06); email from [redacted] to Cdr Bradshaw and others "Re: SAS kills insurgents" (20 April 2011, 17.59) (Inquiry doc 13/06).

⁹⁵ Email from Lt Col Cummins to R Adm Steer and others "Draft Release" (20 April 2011, 20.33 2011) *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 180; email from R Adm Steer to Lt Col Cummins and others "Re: Draft Release" (20 April 2011, 08.37) *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 180.

⁹⁶ NZDF "NZDF operations in Bamyān Province on 22 August 2010" (20 April 2011) *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 184.

Nine insurgents (not 12 as reported) were killed in the operation which targeted an insurgent group in the area where Bamyan Province borders neighbouring Baghlan province.

Following the operation allegations of civilian casualties were made. These were investigated by a joint Afghan Ministry of Defence, Ministry of Interior and International Security Assistance Force assessment team, in accordance with ISAF procedures.

The investigation concluded that the allegations of civilian casualties were unfounded.

- [55] The story was picked up by several media outlets over the next day or so, but it does not seem to have become a major issue. A journalist who had been writing about the NZDF in Afghanistan on *Pundit* made a number of information requests of Dr Mapp under the Official Information Act 1982 on 12 May 2011. Two of those requests are relevant for present purposes. One was for the information “on which you based your recent statement [in a *Q+A* interview] that claims of civilian deaths during a raid in which NZDF personnel participated had ‘been investigated and proven to be false’.” The second was for the “estimated numbers of persons killed, injured, or detained in operations where NZDF personnel have been operating alongside Afghan national security forces”. Dr Mapp did not respond to these requests until 31 October 2011.⁹⁷ We will deal with his responses at paragraphs [73]–[75].

- [56] The story also generated a question in the House. On 16 May 2011, Dr Mapp replied to the following question for written answer from Keith Locke MP:⁹⁸

What Afghan civilian casualties, if any, have resulted from New Zealand SAS operational activity in Afghanistan since the unit was re-deployed to Afghanistan in 2009 broken down by figures, or estimates, of both the numbers killed and the numbers wounded?

Dr Mapp’s reply was:

Any persons killed in Afghanistan as a result of NZSAS operational activity have been those persons taking direct part in hostilities, and thereby presenting a direct threat to the lives of NZDF personnel, Coalition forces, Afghan security forces, or Afghan or international citizens.

The effect of this answer was to deny that any civilians were killed during Operation Burnham (or any other operation).

- [57] Following this, there were two events that require discussion. First, on the morning of 1 September 2011, Nicky Hager’s book *Other People’s Wars* was released.⁹⁹ The following day, the Vice Chief of Defence Force, Rear Admiral Jack Steer, sent an email to all NZDF personnel about the book.¹⁰⁰ Relevantly, it contained the following statement:¹⁰¹

The book goes on to make claims about an operation in the Baghlan region in August last year. This matter was fully investigated by the NATO-led International Security Assistance Force (ISAF), followed by an investigation by a joint assessment team comprising both Afghani and ISAF officials. After reviewing the evidence the investigation concluded that

⁹⁷ Letter from Hon Dr Wayne Mapp to [redacted] re “OIA Request 091-2011” (31 October 2011) NZDF <www.nzdf.mil.nz>.

⁹⁸ Question for Written Answer “3678 (2011). Keith Locke to the Minister of Defence” (16 May 2011) <www.parliament.nz>.

⁹⁹ Nicky Hager *Other People’s Wars: New Zealand in Afghanistan, Iraq and the war on terror* (Craig Potton Publishing, Nelson, 2011).

¹⁰⁰ Email from Office of Chief of Defence Force to All NZDF “[No subject]” (2 September 2011, 2.39am) *Inquiry Bundle for Public Hearing Module 4 – Resumed* (Public Hearing Module 4, 15 October 2019) at 91.

¹⁰¹ Email from Office of Chief of Defence Force to All NZDF, above n 100, at 92.

allegations of civilian casualties were unfounded, and the ground force and coalition air were cleared of all allegations.

- [58] There are two significant errors in this passage. First, it refers to an investigation by ISAF and a subsequent investigation by a joint assessment team comprising Afghan and ISAF officials. While it is correct that two investigations were carried out immediately after Operation Burnham, they were not as described in the passage. The first investigation was conducted by the Incident Assessment Team, an ISAF process. That investigation did involve ISAF and Afghan officials. The second was the AR 15-6 investigation, to which we referred earlier.¹⁰² Although that investigation arose out of the Incident Assessment Team's findings and appears to be the investigation referred to in the ISAF media release of 30 August 2010, it seems later to have been treated as an internal United States Forces' investigation. In any event, it seems clear from the passage that NZDF had a mistaken understanding of exactly what investigations had been carried out into Operation Burnham.
- [59] The other error in the passage is the assertion that "the investigation concluded that allegations of civilian casualties were unfounded, and the ground force and coalition air were cleared of all allegations". No investigation had in fact reached that conclusion. As we noted above,¹⁰³ the further investigation ordered by ISAF (the AR 15-6 investigation) explicitly endorsed the Incident Assessment Team's conclusion that civilian casualties may have resulted from errant rounds striking buildings (although NZDF first received the AR 15-6 Report in May 2017). We note that this erroneous description of the outcome of the Incident Assessment Team's investigation was repeated in talking points prepared for the Chief of Army (then Major General Tim Keating) on 8 September 2011 by NZDF's communications team.¹⁰⁴
- [60] The second event requiring discussion is the arrival of the Incident Assessment Team Executive Summary in the Office of the Chief of Defence Force. We heard evidence from Colonel (Retired) Jim Blackwell at the Inquiry's public hearing on the "cover-up" allegations in October 2019. Colonel Blackwell had become Director of Special Operations on 29 March 2011. He said in evidence that when he realised NZDF did not have a copy of the executive summary, he decided that he should try to obtain one.¹⁰⁵ Col (Ret) Blackwell said that he first asked the Senior National Officer in Kabul for the executive summary in April 2011 and was in constant communication with him, and reinforced to him (and to his successor) that NZDF wanted a copy of the executive summary. He went on to say that he did eventually receive a copy of the executive summary from the Senior National Officer (possibly via the Special Operations Liaison Officer within ISAF), who emailed it to him over a secure email system on 1 September 2011.
- [61] Col (Ret) Blackwell said that he read the executive summary and appreciated that its conclusion on the question of civilian casualties was different to NZDF's understanding of the position. He said he would have saved a copy of the executive summary electronically and filed it in the appropriate directory. Col (Ret) Blackwell went on to say that, having realised its significance, he printed a copy of the executive summary and took it to the Office of the Chief of Defence Force, where he gave it to the Deputy Chief of Staff, Colonel Thompson, who was responsible for coordination

¹⁰² See paragraphs [40]–[44].

¹⁰³ At paragraph [42].

¹⁰⁴ Email from Christopher Wright to [redacted] "RE: Key Messages" (8 September 2011, 1.47pm) *Inquiry Bundle for Public Hearing Module 4 – Resumed* (Public Hearing Module 4, 15 October 2019) at 93–95.

¹⁰⁵ Evidence of Colonel (Retired) Jim Blackwell, Transcript of Proceedings, Public Hearing Module 4 (15 October 2019) from 659.

between the Office of the Chief of Defence Force and the Minister's office. Col (Ret) Blackwell said that later he briefed the then Chief of Defence Force, Lieutenant General Rhys Jones, and the Minister of Defence, Dr Mapp, on the report. According to the Minister's diary, the only meeting he had with Col (Ret) Blackwell in the relevant timeframe occurred on 12 September 2011.¹⁰⁶ Accordingly, that is the date when any briefing on the executive summary is most likely to have occurred,¹⁰⁷ although the possibility of an unscheduled meeting cannot be ruled out.¹⁰⁸

- [62] We pause in this account of Col (Ret) Blackwell's evidence to describe what is recorded in the relevant classified document registers. The register for the safe in the Director of Special Operations' office contains no record of the Incident Assessment Team Executive Summary being lodged in it, but that is not surprising given that Col (Ret) Blackwell said he stored it electronically rather than physically. Col (Ret) Blackwell said that he took the document into the Office of the Chief of Defence Force on 1 September 2011. In relation to documents received from Colonel Blackwell on 1 September, the register for the safe in Office of the Chief of Defence Force contains two entries.¹⁰⁹ The first describes the documents in the following way:

BAGHLAN PROVINCE BRIEF

FOR MINDEF (2 SECRET DOCS)

The description for the second entry simply contains ditto marks under the description from the first entry.

- [63] Although the documents are not identified specifically in the register, one must have been the Operation Burnham storyboard as it has the relevant registration number on its front page. On Col (Ret) Blackwell's account, the second was the executive summary.¹¹⁰ The register states that the documents comprising the first entry were dispatched to the Minister's office on 1 September 2011, where receipt was acknowledged by Captain Chris Hoey (the Military Secretary for the Minister of Defence). However, Captain Hoey did not record them in the register for his safe until 2 December 2011,¹¹¹ as we discuss further below. Capt (Ret) Hoey said in his evidence that he would not have read the documents; rather, he would have "flipped through" them before leaving them with the Minister.¹¹²
- [64] The register for the safe in Colonel Thompson's office shows that documents described as "Briefing Pack on Civ Casualty – Kabul Aug 2010" with a date of origin of 1 September were

¹⁰⁶ "Extracts from Ministerial Diary of Hon Dr Mapp" (30 August 2010–14 September 2011) *Inquiry Bundle for Public Hearing Module 4 – Resumed* (Public Hearing Module 4, 15 October 2019) at 60a.

¹⁰⁷ On the basis of his diary, Dr Mapp advised he did not attend his ministerial office in the period 1–5 September 2011 (Evidence of Hon Dr Wayne Mapp, above n 65, at 1013).

¹⁰⁸ Dr Mapp said in evidence that any unscheduled meetings he had were likely to have been with the Chief of Defence Force rather than Colonel Blackwell: see Evidence of Hon Dr Mapp, above n 65, at 1080.

¹⁰⁹ "Excerpt from Classified Document Register Office of Chief of Defence Force" (1 September 2011) *Inquiry Bundle for Public Hearing Module 4 – Resumed* (Public Hearing Module 4, 15 October 2019) at 48.

¹¹⁰ It is relevant to note that Lt Col McKinstry's email of 26 August 2010 to Colonel Kelly (see paragraph [14] above) was printed off as a Microsoft Word document in the Directorate of Special Operations on 1 September 2011. This document may also have been placed into the safe as part of the briefing pack.

¹¹¹ "Excerpt from Classified Document Register Office of the Minister of Defence" (2 December 2011) *Inquiry Bundle for Public Hearing Module 4 – Resumed* (Public Hearing Module 4, 15 October 2019) at 50.

¹¹² Capt (Ret) Hoey said he was "quite certain" he would have given the documents to the Minister straightaway, because of the importance of Afghanistan to the Government (Evidence of Captain (Retired) Chris Hoey, Transcript of Proceedings, Public Hearing Module 4 (16 October 2019) at 840).

received from the Office of the Chief of Defence Force on 7 September.¹¹³ Again, it is clear from a registration number on the Operation Burnham storyboard that it was in this pack of documents.

- [65] Returning to Col (Ret) Blackwell's evidence, he said that his requests to the Senior National Officers for the executive summary were conveyed by email. He also stated that the notes he prepared for ministerial briefings were stored electronically. He indicated that he had been told that a search (for the purposes of this Inquiry) of his secure and non-secure emails and documents had been conducted but nothing had been found. The Chief of Defence Force, Air Marshal Kevin Short, was cross-examined on this topic.¹¹⁴ He advised that, as a result of enquiries he had made, he understood that if a person saved information into folders in what he described as a personal drive (an H drive or an S drive), that information would be deleted when the individual left NZDF. He understood that this may have happened in the case of Col (Ret) Blackwell's material. He said that significant material such as the executive summary should have been placed in a shared drive, where it would be properly archived.
- [66] On learning this, the Inquiry made further enquiries into NZDF's attempts to recover deleted documents and raised the possibility of engaging an independent computer expert to examine NZDF's systems to see whether the relevant material could be retrieved. However, Air Marshal Short responded by letter dated 8 November 2019 indicating that further forensic work carried out by NZDF had resulted in the discovery of some of Colonel Blackwell's emails and other electronically stored material.¹¹⁵ This material included notes that Colonel Blackwell had prepared for ministerial meetings. The notes he prepared for his meeting with the Minister on 12 September 2011 do not mention the Incident Assessment Team Executive Summary or anything else relevant to the Inquiry.¹¹⁶ Nor were any other briefing materials found relating to the executive summary.
- [67] Finally, it is important that we note that Col (Ret) Blackwell advised us that he did not save any NZDF documents to a personal drive, and always stored information in a way that would make it available to his successor. By way of example, he said that he insisted that his email address refer to his role rather than his name (ie, DSO@SWAN) so that his successor would have access to his emails. Col (Ret) Blackwell said that he saved a copy of the Incident Assessment Team Executive Summary in "DSO's Briefs, Operation Burnham" in SWAN, to which staff in the Directorate of Special Operations had access.¹¹⁷
- [68] NZDF made extensive searches of the relevant Directorate of Special Operations and Senior National Officer electronic systems for relevant emails. In particular, NZDF advised that it had located and searched the Director of Special Operations mailbox, as well as accounts for the Senior National Officer (WAATEA.SNO) and the Commanding Officer of the NZSAS.¹¹⁸ We understand that NZDF searched some 20,000 items.¹¹⁹ No emails were found asking the Senior National Officers to obtain the executive summary. No email was found from one of the Senior National Officers to Colonel Blackwell, or from the Special Operations Liaison Officer within

¹¹³ "Excerpt from Classified Document Register Directorate of Coordination, OCDF" (7 September 2011) *Inquiry Bundle for Public Hearing Module 4 – Resumed* (Public Hearing Module 4, 15 October 2019) at 44.

¹¹⁴ Evidence of Air Marshal Kevin Short, Transcript of Proceedings, Public Hearing Module 4 (18 October 2019) at 1121–1122 and 1166–1167.

¹¹⁵ Re_ Recent correspondence about NZDF email and information management systems (8 November 2019) (Inquiry doc 13/01).

¹¹⁶ "Min Brief Mon 12 Sep" (12 September 2011) (this document remains classified).

¹¹⁷ Evidence of Colonel (Ret) Blackwell, above n 105, at 711, 810 and 822.

¹¹⁸ Inquiry doc 13/01, above n 115, at [13], [15] and [19].

¹¹⁹ At [19].

ISAF to the Senior National Officer or to Colonel Blackwell, attaching the executive summary. No copy of the executive summary was found stored in the electronic system of the Directorate of Special Operations. There is, in short, no electronic footprint of either the emails to which Col (Ret) Blackwell referred in his evidence or to an electronic copy of the executive summary.¹²⁰

[69] In addition, Col (Ret) Blackwell's account of events was explored with Dr Mapp, Lt Gen (Ret) Jones and Col (Ret) Thompson:¹²¹

- (a) In summary, Col (Ret) Thompson said that he had no recollection of Colonel Blackwell giving him the executive summary and telling him that he needed to bring it to the attention of the Chief of Defence Force. While he did not disagree that it could have happened, he said he thought it was something that would have stuck in his mind if it had happened. He said that if he had understood that he held the executive summary and that it was inconsistent with NZDF's public statements, he would have done something about it. As far as he was concerned, he received some documents, identified them as a briefing pack on civilian casualties in Afghanistan (either by looking briefly at them or because that was what he was told), and registered them in his safe.¹²²
- (b) Lt Gen (Ret) Jones had no recollection of receiving a briefing about the executive summary and did not think he was briefed about it. However, he did not feel able to say so definitively, and accepted the possibility that he might be wrong about this. He noted that when, as Chief of Defence Force, he was being briefed on something, the material would be given to members of his staff to analyse so that they could prepare joint advice for him. Nothing of that sort happened in relation to the executive summary.¹²³ He also agreed that, given the importance of the executive summary, he would have done something about it had he been briefed on it.¹²⁴
- (c) Dr Mapp said that he had a "fragmentary memory" of being told by Colonel Blackwell that there was no evidence of civilian casualties but that it was possible they might have resulted from a misaligned gun on one of the Apaches.¹²⁵ Dr Mapp accepted that Colonel Blackwell may have sent the executive summary to his office, but did not accept that he ever read it.¹²⁶

We also note that neither of the Senior National Officers concerned could remember being asked to obtain the executive summary by Colonel Blackwell. Nor did either of them remember sending it to him.

¹²⁰ The Inquiry does have one email dated 1 September 2011 to Colonel Blackwell from the Commander of the NZSAS, Lt Col Parsons, that is related to Operation Burnham: see email from Lt Col Parsons (NZSAS.CO) to Colonel Blackwell (HQNZDF.DSO) "FW: External Release Update Obj Burnham Op 21 Aug 10 Update 4" (1 September 2011, 12.33) (Inquiry doc 13/07).

¹²¹ The Minister's diary records Captain Hoey's name alongside Colonel Blackwell's name in the 12 September 2011 entry. That does not necessarily mean that Captain Hoey attended the meeting, although he could have. He would have been the contact person, however. Capt (Ret) Hoey said in his evidence that he did not recall attending a briefing about the Incident Assessment Team's report (Evidence of Capt (Ret) Hoey (16 October 2019), above n 112, at 840).

¹²² Evidence of Colonel (Retired) Mike Thompson, Transcript of Proceedings, Public Hearing Module 4 (18 September 2019); Evidence of Col (Ret) Thompson, Transcript of Proceedings, Public Hearing Module 4 (16 October 2019).

¹²³ Evidence of Lieutenant General (Retired) Rhys Jones, Transcript of Proceedings, Public Hearing Module 4 (18 September); Evidence of Lt Gen (Ret) Jones, Transcript of Proceedings, Public Hearing Module 4 (16 October 2019) at 989–990.

¹²⁴ Evidence of Lt Gen (Ret) Jones (16 October 2019), above n 123, at 989 and 991.

¹²⁵ Evidence of Hon Dr Mapp, above n 65, at 1012–1013.

¹²⁶ At 1028–1029.

- [70] We should make one other relevant point: Col (Ret) Blackwell did not mention in his evidence to us that he visited Afghanistan from 28–31 May 2011.¹²⁷ Col (Ret) Blackwell told us he did not mention the visit because he considered it irrelevant. He said his visit involved “an urgent and strategically important task” and he had more pressing concerns than obtaining the executive summary.
- [71] During cross-examination, Lt Gen (Ret) Keating said it was possible the executive summary could have been delivered ‘safe-hand’ by someone not senior in NZDF.¹²⁸ This suggestion was put to Col (Ret) Blackwell. He denied that he had received the executive summary unofficially and said that the only person he could have received it from was the Senior National Officer.¹²⁹
- [72] We return to these matters in chapter 9.
- [73] On 7 October 2011, a TV3 News reporter sought information relating to casualties in Afghanistan from NZDF under the Official Information Act 1982.¹³⁰ The second of the information requests was for:

The number of civilian deaths, resulting from NZSAS operations in Afghanistan, since their deployment first began.

NZDF consulted with the Minister’s office about proposed responses.¹³¹ An email from the Minister’s Private Secretary (Advisory) to NZDF reads in part:¹³²

The Minister was going to call DSO about this but he has changed his mind.

He has some concerns with the response to question 2. The way it is worded, combined with the response to question 3, would suggest that there have been civilian casualties. If there are none, then the response will need to state this.

...

Our suggested response would be along the lines of “*We do not release figures on deaths resulting from NZSAS operations. However, to the best of my knowledge no such casualties have occurred.*”

On 13 December 2011 the Chief of Defence Force responded to this request by saying that NZDF did “not release figures on deaths resulting from NZSAS operations” and declining the request for some or all of security, international relations and operational capability reasons.¹³³

¹²⁷ The Inquiry first learnt of this visit after the public hearings on the “cover-up” allegations from its analysis of emails provided by NZDF on 15 November 2019. In response to a question from the Inquiry, NZDF confirmed that to the best of its knowledge Colonel Blackwell was in Afghanistan from 28 to 31 May 2011.

¹²⁸ Evidence of Lieutenant General (Retired) Tim Keating, Transcript of Proceedings, Public Hearing Module 4 (19 September 2019) at 537.

¹²⁹ Evidence of Col (Ret) Blackwell, above n 105, at 715.

¹³⁰ Email from [redacted] to [redacted] and others “URGENT: OIA-1586-2011 [redacted] re Afghan Casualties TD 9 Dec 11” (8 December 2011, 3.24pm) *Inquiry Bundle for Public Hearing Module 4 – Resumed* (Public Hearing Module 4, 15 October 2019) at 105.

¹³¹ The draft response from Lt Gen Jones is in *Inquiry Bundle for Public Hearing Module 4 – Resumed* (Public Hearing Module 4, 15 October 2019) at 104.

¹³² Email from Private Secretary (Advisory) to Mike Scrivener “RE: Unclassified: OIA-1586-2011 [redacted] re AFGH casualties.doc” (6 December 2011, 4.51pm) *Inquiry Bundle for Public Hearing Module 4 – Resumed* (Public Hearing Module 4, 15 October 2019) at 101 (italics in original).

¹³³ Letter from Lt Gen R.R. Jones to [redacted] re “OIA Request 1586-2011” (13 December 2011) NZDF <www.nzdf.mil.nz>.

- [74] This is to be contrasted with the Minister of Defence's responses to the journalist's requests for information made on 12 May 2011 (see paragraph [55] above). It will be recalled that the journalist's first question was for the information "on which you based your recent statement [in a *Q+A* interview] that claims of civilian deaths during a raid in which NZDF personnel participated had 'been investigated and proven to be false'". Dr Mapp responded:¹³⁴

The source of the information on which I based my statement on *Q+A* on 2 [sic] April was classified operations reporting by the NZDF. *As I stated in the interview, there is no basis in fact that a number of civilians were killed during a raid in which NZDF personnel participated.*

The italicised sentence is important. The draft answers provided by the Directorate of Special Operations did not include it.¹³⁵ It must therefore have been added in the Minister's office. Whereas the journalist's question refers to information relied on by Dr Mapp when he gave his answer in April 2011, the italicised sentence indicates that the answer he gave on 24 April 2011 continues to state the position.

- [75] The second relevant request was for the "estimated numbers of persons killed, injured, or detained in operations where NZDF personnel have been operating alongside Afghan national security forces". In relation to that, Dr Mapp gave essentially the same answer as he had given to Mr Locke's question for written answer in May 2011:¹³⁶

Any persons killed in Afghanistan during NZDF operational activities have been persons taking direct part in hostilities, and presenting a direct threat to the lives of NZDF personnel, Coalition forces, Afghan security forces or Afghan or international citizens.

We return to Dr Mapp's responses in chapter 9.

- [76] Finally, Capt (Ret) Hoey, who was at the time the Military Secretary to the Minister of Defence, said in his evidence¹³⁷ that although he received the executive summary and the other documents in the Minister's office in September 2011, he did not sign them into the safe for which he was responsible (that is, register them) until three months later, on 2 December 2011.¹³⁸ Then, on 5 December 2011, together with the Minister's Private Secretary, he shredded the documents (along with other documents from the safe).¹³⁹ In his evidence, Col (Ret) Blackwell expressed some surprise that the executive summary had been shredded.¹⁴⁰
- [77] The reason given for the shredding was that Dr Mapp was retiring as Minister of Defence later in December.¹⁴¹ Capt (Ret) Hoey explained that he thought it likely that he had gone through all the classified material in the safe and destroyed whatever he considered was no longer needed,

¹³⁴ OIA Request 091-2011, above n 97 (italics added).

¹³⁵ OIA-091-2011 Detainee Policy NZSOF Response Redacted (26 May 2011) (Inquiry doc 13/17) at 1.

¹³⁶ OIA Request 091-2011, above n 97.

¹³⁷ Evidence of Capt (Ret) Chris Hoey, above n 112, from 838.

¹³⁸ Two safes were in the Minister's suite of offices. One safe was located in the Military Secretary's office and there was a register for it; the other safe was located in the Minister's office and there was no register for it.

¹³⁹ The Inquiry had access to the register which records "NATO/ISAF (S) OP RAHBARI OBJ BURNHAM" as entered on 2 December 2011 and shredded on 5 December 2011 ("Classified Document Register Office of the Minister of Defence (2 December 2011) *Inquiry Bundle for Public Hearing Module 4 – Resumed* (Public Hearing Module 4, 15 October 2019) at 50).

¹⁴⁰ Evidence of Col (Ret) Blackwell, above n 105, at 744.

¹⁴¹ Evidence of Capt (Ret) Hoey (16 October 2019), above n 112, at 843.

in preparation for the arrival of the new Minister. He acknowledged that he had not destroyed all material from the safe and that some had been returned to the Chief of Defence Force's office. He said that he destroyed the Incident Assessment Team Executive Summary because he thought another copy would be held in Defence Headquarters.¹⁴²

- [78] Capt (Ret) Hoey said he could not explain the three-month period between the Minister's office receiving the documents and their being entered in his safe's register.¹⁴³ He said that the documents may have been placed in the Minister's safe when they first came over from NZDF and only went into the safe in his office shortly before they were destroyed. He acknowledged, however, that the documents might have been placed in his safe when they arrived in the Minister's office and he may have neglected to enter them into the register at the time. The first of these explanations is unlikely given Dr Mapp's evidence that he did not keep any classified material in the safe in his office.¹⁴⁴

Period 3: June – July 2014

- [79] On the evening of 30 June 2014, the *Native Affairs* programme on Māori Television ran a report called *Collateral Damage*.¹⁴⁵ In this report Mr Stephenson interviewed several villagers from the Tirigiran area about Operation Burnham. They denied that there were any insurgents in the villages during the operation and alleged that all those killed or injured were civilians. In all, they said, six civilians were killed and 15 were injured. Mr Stephenson explained that no-one accused the ground forces of causing civilian casualties; rather, fire from helicopters was said to be the cause. A doctor, Dr Rahman,¹⁴⁶ who was said to be one of the first to arrive in the area after the operation, said that among the dead was a three year old girl named Fatima.

- [80] In the report, Mr Stephenson pointed to ISAF's media release of 29 August 2010, which had confirmed the possibility of civilian casualties, and said:

But it does call into question Mapp's categorical denial that civilians were killed or injured. It also raises the question of why our defence force said claims of civilian casualties were unfounded [that is, in April 2011] when eight months earlier coalition investigators had said they were credible.

- [81] The programme reported that the then current Minister of Defence, Hon Dr Jonathan Coleman, and the former Minister, Hon Dr Mapp, had declined to appear on the programme. However, Dr Mapp was reported by *Native Affairs* as having said to the programme that it had always been clear to him, based on his briefings from NZDF, that there were no civilian casualties on the operation.
- [82] NZDF provided the following written statement to *Native Affairs*, which appears on screen at the end of the report:

¹⁴² At 898.

¹⁴³ At 843.

¹⁴⁴ Evidence of Hon Dr Mapp, above n 65, at 1012.

¹⁴⁵ "*Native Affairs – Collateral Damage*" (30 June 2014) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 216; "*Native Affairs – Collateral Damage*" (30 June 2014, 8.35pm) *Te Ao Māori News* <www.teaomaori.news>.

¹⁴⁶ See chapter 5 at [64].

The NZDF stands by its statement made on 20 April 2011 and will not be making further comment.

(The relevant part of NZDF's 20 April 2011 statement is at paragraph [54] above.)

[83] The background to this is as follows. On Friday 27 June 2014, before the television report, Mr Stephenson contacted NZDF to get its responses to a number of questions, although it does not seem that he advised NZDF of the upcoming report. He telephoned Geoff Davies, who was the Senior Media Advisor at NZDF Headquarters, and outlined the essence of the story he was working on.¹⁴⁷ He followed that call with an email,¹⁴⁸ which attached copies of:

- (a) ISAF's press release of 29 August 2010, in which ISAF announced that the Incident Assessment Team considered that civilian casualties may have been caused when errant rounds from one of the Apaches hit two buildings;
- (b) NZDF's media release of 20 April 2011, where NZDF said that the Incident Assessment Team's investigation concluded that allegations of civilian casualties were unfounded; and
- (c) an extract from an official report which recorded allegations of civilian casualties as a result of Operation Burnham.¹⁴⁹

[84] Mr Stephenson posed a number of questions in the email, as follows:

Does the defence force stand by its [statement of 20 April 2011]?

Specifically, does it stand by the statement that nine insurgents were killed?

If so, can it confirm that the SAS was responsible for those nine deaths, or can it rule out being involved directly in the nine alleged deaths?

Can the defence force comment on the ISAF media release that refers to the possibility that due to a gun sight malfunction of US helicopters, cannon rounds fell short and hit two houses that were not a target, but where civilians may have been hiding?

Given its involvement in this raid, what steps has the defence force taken to ensure that allegations of civilian casualties have been carefully checked?

Is it correct that Prime Minister John Key personally approved New Zealanders involvement in the raid on Tirgiran.

Although the email did not ask for answers by a particular date, Mr Stephenson apparently indicated in his telephone conversation with Mr Davies that he would like answers on Monday,¹⁵⁰ although this was later revised to Sunday evening.¹⁵¹

¹⁴⁷ Email from Geoff Davies to [redacted] "FW:" (27 June 2014, 5.33pm) *Supplementary Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 7.

¹⁴⁸ Email from Jon Stephenson to Geoff Davies "[No subject]" (27 June 2014, 4.35pm) (Inquiry doc 13/08).

¹⁴⁹ United Nations Assistance Mission in Afghanistan (UNAMA) and Afghanistan Independent Human Rights Commission (AIHRC) *Afghanistan: Annual Report 2010: Protection of Civilians in Armed Conflict* (UNAMA and AIHRC, Kabul, March 2011) at [2.2.4].

¹⁵⁰ Email from Jon Stephenson to Geoff Davies in Inquiry doc 13/08, above n 148.

¹⁵¹ Email from Jon Stephenson to Geoff Davies "Re:" (27 June 2014, 11.33) (Inquiry doc 13/08).

- [85] Mr Stephenson wrote a further email later on the Friday evening in which he said that the operation he was referring to occurred in Tirgiran village in the Tala wa Barfak District of Baghlan province.¹⁵² He indicated he was concerned to rule out the possibility that the NZDF media release of 20 April 2011 might be referring to a different operation and so asked NZDF to confirm that Tirgiran was the village with which the 20 April media release was concerned.
- [86] On Saturday 28 June, there was an email exchange between the Chief of Staff, Commodore Ross Smith, and other NZDF personnel about how to treat Mr Stephenson's questions.¹⁵³ The particular issue was whether the request should be treated as having been made under the Official Information Act 1982, with the result that there would be some delay in providing a response, or whether a more immediate response should be given. However, by this stage the Minister's office was involved. Dr Coleman was in Wellington for the National Party Conference. While there, he received a telephone call from Dr Mapp, who expressed concern about a television report that Mr Stephenson had produced about Operation Burnham, which was to be shown on Monday evening. Dr Coleman considered that he needed to be briefed. It was arranged that he would go to Defence House later on Saturday afternoon for the briefing. At around 4pm on the Saturday afternoon, the Chief of Defence Force, Lt Gen Keating, met Dr Coleman to brief him. We do not have a copy of any talking points or other briefing notes. However, in light of what happened later, it is clear that the briefing material was prepared on the basis that the allegations of civilian casualties on Operation Burnham had been investigated by an ISAF Incident Assessment Team and that it had concluded that they were unfounded.
- [87] NZDF personnel attempted over the weekend to gather together relevant material from NZDF's files. On Monday 30 June, an analyst from the Directorate of Special Operations emailed Lt Col McKinstry, then the Commanding Officer of the NZSAS based in Auckland, attaching the material relevant to Operation Burnham gathered from database searches over the weekend.¹⁵⁴ There were over 20 items, but they did not include the Incident Assessment Team Executive Summary. This document came to light in the following way.
- [88] The Minister's Military Secretary said in evidence that on Sunday 29 June 2014 he was contacted by the Minister's political adviser, Josh Cameron, who said that the Minister had received a briefing about an NZSAS operation which was the subject of an upcoming television programme. The Military Secretary was unhappy that he had not been involved in the briefing, or even advised of it, given his role in the Minister's office. He contacted Capt (Ret) Hoey, who was the Director of Coordination for NZDF and responsible for coordinating the flow of information from NZDF to the Minister's office. The Military Secretary told Capt (Ret) Hoey that he would come over to his office at NZDF headquarters at 7am the next day to receive a briefing, so that he could discuss matters with the Minister.
- [89] The Military Secretary said that he went to Capt (Ret) Hoey's office at 7am on Monday morning to be briefed. While he was there, Capt (Ret) Hoey opened his safe and took out some documents. The Military Secretary also looked in the safe, saw what looked like relevant documents, and took them out. Capt (Ret) Hoey referred to a confidential NATO report on the operation which NATO would not release. As he was listening, the Military Secretary flicked through the papers from

¹⁵² Email from Jon Stephenson to Geoff Davies in Inquiry doc 13/08, above n 151.

¹⁵³ Email from Cdre Smith to [redacted] "RE: Media question regarding Baghlan Raid in AFGHAN IN 2010" (28 June 2014, 11.33am) *Supplementary Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 6.

¹⁵⁴ Emails from DSO analyst to Lt Col McKinstry (NZSAS.CO) "Docs re Baghlan op" (30 June 2014) *Inquiry Bundle for Public Hearing Module 4 – Resumed* (Public Hearing Module 4, 15 October 2019) at 112o–112y.

the safe and saw that they included the ISAF Incident Assessment Team Executive Summary. The Military Secretary said that Capt (Ret) Hoey was surprised at the discovery.

- [90] According to the Military Secretary, Commodore Smith, who was the Chief of Staff in the Office of the Chief of Defence Force, wandered into the room at this stage and the three men had a brief closed-door discussion. The Military Secretary said that he had read the executive summary and saw that it said that civilian casualties were likely or possible. He said that his interpretation of this was that it was a standard NATO/ISAF “fog of war” response—there may or may not have been civilian casualties.
- [91] The Military Secretary had an 8am meeting in the Minister’s office, so he took the bundle of documents from Capt (Ret) Hoey’s safe and went back to the office. As we understand it, the bundle contained:
- (a) the Operation Burnham storyboard;
 - (b) drafts of the three Ministerial briefing notes of 25 August and 10 and 13 December 2010 (with handwritten annotations);¹⁵⁵
 - (c) a Microsoft Word version of the text of an email sent from Afghanistan by the Senior National Officer on 26 August 2010 generated in the Directorate of Special Operations on 1 September 2011;¹⁵⁶ and
 - (d) the ISAF Incident Assessment Team Executive Summary.
- [92] Capt (Ret) Hoey gave a rather different account of the discovery of the executive summary.¹⁵⁷ According to his evidence, Dr Coleman asked NZDF to provide him with relevant documents in relation to Operation Burnham. Capt (Ret) Hoey remembered that he had some documents relating to operations in Afghanistan in his safe. He said that he opened his safe to retrieve all the notes to the Minister that were stored there. As he was doing this, he remembered that the safe contained a small bundle of documents relating to Afghanistan and took out the bundle. He said he looked at the bundle quickly and confirmed that it related to an operation in Afghanistan in August 2010. Given this, he provided it to the Military Secretary to provide to the Minister, along with the notes he had found.
- [93] Under cross-examination,¹⁵⁸ Capt (Ret) Hoey accepted that the Military Secretary may have called him on the Sunday evening to arrange to see him the following morning. Capt (Ret) Hoey said he had no reason to doubt that, but said that the meeting the following morning was simply to hand over the material. He did not recall any discussion. When pressed about the details given by the Military Secretary, Capt (Ret) Hoey said he did not recollect the discussion the Military Secretary described but he had no reason to doubt what the Military Secretary said. He accepted it was possible that the Military Secretary had found the Incident Assessment Team Executive Summary in the way he described. He acknowledged that there would have been discussions with Commodore Smith on the Monday or Tuesday but said he could not recall whether the discussion the Military Secretary described had occurred.

¹⁵⁵ See paragraphs [12] and [45]–[48] above.

¹⁵⁶ See [14] above.

¹⁵⁷ Evidence of Capt (Ret) Hoey, Transcript of Proceedings, Public Hearing Module 4 (16 September 2019) at 460.

¹⁵⁸ Evidence of Capt (Ret) Hoey (16 October 2019), above n 112, from 906.

- [94] For his part, Cdre (Ret) Smith said that he did not recall any discussion with the Military Secretary and Capt (Ret) Hoey on the Monday morning, and said that his diary indicated that he had an Executive Committee meeting from 8.30am onwards that morning.¹⁵⁹ He said that he did not become aware of the discovery of the Incident Assessment Team Executive Summary until the Chief of Defence Force advised him of it on Monday evening¹⁶⁰ (described at paragraph [100]). This is consistent with the fact that he approved the release of a statement to the *Native Affairs* programme on Monday afternoon, to the effect that claims of civilian casualties were unfounded.¹⁶¹
- [95] Ultimately, we do not need to come to a definitive conclusion as to which version of events is accurate. The important point is that the Incident Assessment Team Executive Summary was found in Capt (Ret) Hoey's safe on the Monday morning, where, on the evidence we heard, it had been since 7 September 2011. That said, the Military Secretary was quite specific and consistent in outlining what had happened on the Sunday evening and Monday morning, and obviously felt a degree of annoyance at not having been kept informed of NZDF's interactions with the Minister, given the nature of his responsibilities and the Minister's expectations of him. By contrast, both Capt (Ret) Hoey and Cdre (Ret) Smith said they had no recall of matters that they might have been expected to remember. These factors incline us towards the Military Secretary's account. However, there is obviously a question as to whether Commodore Smith would have engaged with the substance of the executive summary at the Monday morning meeting but gone on to approve the inaccurate statement made to Māori Television later on the Monday afternoon (see paragraph [98]). We return to this later.
- [96] After the bundle of documents from Capt (Ret) Hoey's safe had arrived at his office, Dr Coleman read the material, underlining particular passages.¹⁶² Specifically:
- (a) The Minister underlined the passages in the draft ministerial briefing notes of 10 and 13 December 2010 which purported to describe the conclusion of the Incident Assessment Team's investigation. They said the conclusion was that "having reviewed the evidence there is no way that civilian casualties could have occurred". This was presented as a quote from the executive summary.
 - (b) The Minister underlined passages in the 26 August 2010 email and in the executive summary which made it clear that there was a possibility of civilian casualties as a result of errant rounds from a misaligned weapon on one of the Apaches.
- [97] In short, Dr Coleman highlighted the parts of NZDF's briefings to the Prime Minister and Minister of Defence in December 2010 reporting incorrectly on the Incident Assessment Team's conclusions (which reflected what he had been told by NZDF on 28 June 2014), and contrasted that with the true position as reflected in the 26 August 2010 email and in the executive summary itself.

¹⁵⁹ Evidence of Commodore (Retired) Ross Smith, Transcript of Proceedings, Public Hearing Module 4 (16 October 2019) at 978.

¹⁶⁰ Evidence of Cdre (Ret) Smith, Transcript of Proceedings, Public Hearing Module 4 (16 September 2019) at 85 and 108.

¹⁶¹ Email from [Defence Communications Group] to [Press Secretary] "RE: Media question regarding Baghlan Raid in AFGHAN IN 2010" (30 June 2014, 12.46pm) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 213.

¹⁶² It is not clear to us whether Dr Coleman read the material before or after the usual Monday Cabinet meeting.

- [98] As previously noted, later that day NZDF decided to issue the statement to Māori Television that it stood by its 20 April 2011 media release (that the investigation had concluded that the claims of civilian casualties were unfounded) and would not be commenting further. The draft was approved by Commodore Smith because the Chief of Defence Force was in Australia. Cdre (Ret) Smith said that he approved the release because it was consistent with the Chief of Defence Force's briefing to the Minister of 10 December 2010.¹⁶³ The draft answer was also approved by the Minister's press secretary, although it is not clear whether it was discussed with the Minister as he was attending the usual Monday Cabinet meeting at the time.¹⁶⁴
- [99] The *Native Affairs* programme, *Collateral Damage*, was broadcast that evening. After the broadcast, the Chief of Defence Force received a telephone call in Australia from Dr Coleman. In his evidence, Lt Gen (Ret) Keating described the Minister as "upset"¹⁶⁵ and "very angry".¹⁶⁶ As noted above, Dr Coleman had by this time read the executive summary and had realised that, although it cleared the ground forces, it acknowledged that civilian casualties may have resulted from misfiring from the Apache helicopters. The Minister was concerned that this was inconsistent with NZDF's public position that the Incident Assessment Team's investigation found no civilian casualties and cleared both ground and air forces.
- [100] Lt Gen (Ret) Keating said that he immediately contacted Commodore Smith and advised him of the conversation with the Minister.¹⁶⁷ He asked Commodore Smith about the executive summary and said that he could not believe that NZDF had the document but was apparently unaware it had it. Lt Gen Keating asked Commodore Smith to put together a pack of documents for him, including the executive summary.
- [101] In addition, at 9.35pm, after the programme had finished, the Vice Chief of Defence Force, Air Vice Marshal Kevin Short, received a telephone call from the Minister of Defence's political adviser, Josh Cameron.¹⁶⁸ In that call, Mr Cameron noted the difference between what the Incident Assessment Team said in the executive summary and what NZDF was saying in relation to civilian casualties. Air Vice Marshal Short recorded the following in his diary, in quotation marks: "Primary source document contradicts the brief to [the Minister of Defence]".¹⁶⁹ The diary indicates that Mr Cameron made that comment.
- [102] At 7.16am the following morning (1 July), Prime Minister John Key was interviewed on TV3's *Firstline*.¹⁷⁰ He was asked about the previous evening's *Native Affairs* programme. In particular, the interviewer referred to Dr Mapp's previous statements that only insurgents were killed on the operation and there were no civilian casualties, and asked whether the Government now acknowledged that civilians were killed. The Prime Minister responded that the Government did not acknowledge that. He said his understanding was that there had been a thorough review of the

¹⁶³ Evidence of Cdre (Ret) Smith, above n 160, at 84.

¹⁶⁴ Email from [Press Secretary] to [Defence Communications Group] "RE: Media question regarding Baghlan raid in AFGHAN IN 2010" (30 June 2014, 12.59pm) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 213.

¹⁶⁵ Evidence of Lt Gen (Ret) Keating, Transcript of Proceedings, Public Hearing Module 4 (18 September 2019) at 481.

¹⁶⁶ Evidence of Lt Gen (Ret) Keating (19 September 2019), above n 128, at 511.

¹⁶⁷ Evidence of Lt Gen (Ret) Keating (18 September 2019), above n 165, at 481.

¹⁶⁸ Evidence of Air Marshal Short, Transcript of Proceedings, Public Hearing Module 4 (16 October 2019) at 1001.

¹⁶⁹ "Diary Notes of Air Vice Marshal Kevin Short" (June–July 2014) *Supplementary Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 10.

¹⁷⁰ Newshub "Wilson Chats with Prime Minister John Key" (1 July 2014) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 224.

mission over the weekend, and that the NZSAS had refuted the claims of civilian casualties and said all those killed on the operation were insurgents. The Prime Minister concluded this section of the interview by saying:¹⁷¹

But my understanding is that after a thorough review by the CDF in the weekend, he is very confident that the New Zealand Defence Force version of events is correct and Mr Stevenson [sic] once again is wrong.

- [103] Soon after this interview, at 8.30am, a meeting was held in the Minister's office attended by Air Vice Marshal Short (filling in for Lt Gen Keating, who was to return from Australia later in the day), Commodore Smith and the Secretary of Defence, Helene Quilter.¹⁷² The Minister said that he felt let down by the briefing he had received on Saturday 28 June. He said that it was too casual and did not provide all the information available—a critical piece was omitted. There was discussion about the accountability of the NZSAS. The Minister observed that the credibility of the NZSAS was eroding over time. While there was no issue about its core skills, there were issues about its political judgement and lack of insight. Ms Quilter agreed with the Minister's observations. She had long-standing concerns about reporting lines and accountability issues in relation to the Director of Special Operations' office.
- [104] The Minister referred to the Prime Minister's (erroneous) remarks to the media earlier that morning and asked NZDF to take a number of steps. In particular, he wanted NZDF to interview the Senior National Officer at the time of Operation Burnham, Colonel McKinstry, to ascertain what he knew and how he interpreted the executive summary. The Minister also wanted to know when and how NZDF had obtained the executive summary and why it was not available to the Chief of Defence Force when NZDF had it. He asked for a report within two days. Reflecting the fact that the Incident Assessment Team's report bears the title "Executive Summary", the Minister asked NZDF to obtain a copy of the "full report". The Minister also said he wanted an assurance on the veracity of briefs, particularly briefs involving the NZSAS.
- [105] Following this meeting, both the Prime Minister and the Minister responded to media questions about the *Native Affairs* programme throughout the day. They acknowledged that the possibility of civilian deaths could not be ruled out, but emphasised that New Zealand forces were not involved in any possible deaths.¹⁷³
- [106] The analyst in the Directorate of Special Operations who had forwarded relevant material to Colonel McKinstry the previous afternoon sent Colonel Blackwell a copy of the executive summary at around 10.15am and he passed it on to Colonel McKinstry.¹⁷⁴ Significantly, the analyst did not obtain a copy of the document from the Director of Special Operations' electronic files, but rather sent a scan of the Minister's copy as a Microsoft Word document, which included the Minister's underlining. The fact that no copy of the document was found in the electronic filing system of the Director of Special Operations is a matter of relevance to which we return in chapter 9.

¹⁷¹ "Wilson Chats with Prime Minister John Key", above n 170, at 225.

¹⁷² "Diary Notes of Air Vice Marshal Short", above n 169, at 10–11.

¹⁷³ For example, *Stuff* "Categorical: 'NZ troops did not kill civilians'" (1 July 2014) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 219; *The New Zealand Herald* "Coleman 'can't rule out' civilian deaths" (1 July 2014) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 222; and *Te Ao Māori News* "Key denies SAS involvement in civilian deaths in Afghanistan" (1 July 2014) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 229.

¹⁷⁴ Email from HQNZDF.DSO-SOANLST to Colonel Blackwell (HQNZDF.DSO) "ISAF Op Assessment Summary" (1 July 2014, 10.12am) *Supplementary Bundle for Public Hearing Module 4 – Part 2* (16 September 2019) at 77.

- [107] The Chief of Defence Force, Lt Gen Keating, arrived back from Australia later in the afternoon.¹⁷⁵ He read the briefing pack prepared for him by Commodore Smith. Lt Gen (Ret) Keating told us that this was the first time he had read the Incident Assessment Team Executive Summary. He had a meeting with the Minister and the Secretary of Defence on this issue before the Defence Weekly Meeting, which was scheduled for 4pm that afternoon. Lt Gen (Ret) Keating said that he did not recall the discussion at that meeting, but thought he would have explained that he had not seen the executive summary before and did not know that NZDF had a copy of it. We have brief minutes of the Defence Weekly Meeting that followed this meeting.¹⁷⁶ The only obviously relevant entry is the following:

Reputational Issues

Noted at meeting

“Reputational Issues” appears to have been a standing item, but presumably the Minister raised the same concerns about reputational issues as he had raised with NZDF personnel in his meeting with them at 8.30am that morning.

- [108] Commodore Smith followed up on the outstanding tasks for the Minister, although he said in his evidence he did not regard himself as conducting a formal inquiry.¹⁷⁷ He interviewed Brigadier Kelly and Colonel McKinstry, the former Director of Special Operations and former TF81 Senior National Officer (respectively) at the time of Operation Burnham.¹⁷⁸ Both said that they had not previously seen the Incident Assessment Team Executive Summary.¹⁷⁹ In terms of finding out how NZDF had obtained a copy of the executive summary and why the Chief of Defence Force did not know about it, Commodore Smith asked NZDF Legal Services whether they had obtained it, but they said they had not.¹⁸⁰ He did not trace through the various classified document registers in an effort to identify the original NZDF recipient of the report.¹⁸¹ Given the Minister’s question about how and when NZDF had obtained the report, and the information that would have been produced more or less immediately by analysing the registers, this was an obvious step—and a surprising omission. Commodore Smith did ask for a copy of the full Incident Assessment Team report from Afghanistan, but was told that there was no full report—the “Executive Summary” was all there was.¹⁸²
- [109] NZDF did not provide the Minister with a written report. Lt Gen (Ret) Keating said he would have given the Minister a verbal briefing on the outcome of Commodore Smith’s enquiries sometime later. In relation to the Incident Assessment Team Executive Summary, it appears that Lt Gen

¹⁷⁵ Evidence of Lt Gen (Ret) Keating (18 September 2019), above n 165, at 481.

¹⁷⁶ Email from Paki Ormsby to Lt Gen Keating and others “RE: Defence Weekly Meeting: Record of discussion & action items 01 July” (2 July 2014, 6.30pm) (Inquiry doc 13/09) at 3.

¹⁷⁷ Evidence of Cdre (Ret) Smith, above n 159, at 964–965.

¹⁷⁸ At 965.

¹⁷⁹ “Diary Notes of Commander Ross Smith” (June–July 2014) *Supplementary Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 20–21.

¹⁸⁰ Email from [Defence Legal Services] to Cdre Smith “ISAF IAT Report 2010” (2 July 2014, 12.58pm) *Inquiry Bundle for Public Hearing Module 4 Resumed* (Public Hearing Module 4, 15 October 2019) at 119.

¹⁸¹ Evidence of Cdre (Ret) Smith, above n 159, at 981.

¹⁸² Email from [Deputy Director Strategic Commitments – Global, HQNZDF] to Cdre Smith “FW: SCI BR RFI” (11 July 2014, 10.35am) *Inquiry Bundle for Public Hearing Module 4 – Resumed* (Public Hearing Module 4, 15 October 2019) at 121. The email chain includes an email which states: “Civcas specialists [at ISAF] told me that the report I have sent [ie, the Incident Assessment Team Executive Summary] is very likely to be the final piece of staff work for an incident of this nature” (email from [redacted] to [redacted] “RE: SCI BR RFI” (7 July 2014, 11.52pm) *Inquiry Bundle for Public Hearing Module 4 – Resumed* (Public Hearing Module 4, 15 October 2019) at 121).

Keating advised the Minister that NZDF had not been able to determine how it had arrived at NZDF Headquarters.¹⁸³ Moreover, NZDF did not issue a correction to the statement it had given the *Native Affairs* programme, to the effect that it stood by its media release of 20 April 2011. Rather, it relied on the Minister's public statements to correct the position.

[110] Again, this is a matter we return to in chapter 9.

Period 4: March 2017 – April 2018

[111] In October 2016, an organisation called the Human Rights Foundation of Aotearoa New Zealand requested certain information from NZDF under the Official Information Act 1982. Among the information sought was information in relation to:

... the involvement or participation of New Zealand forces in actions resulting in the deaths or serious injuries of civilians or non-combatants, whether the result of direct actions by New Zealand forces or by the actions of other forces acting alongside, with the cooperation of or under the supervision of New Zealand forces.

The operation in Baghlan province in August 2010 was specifically identified as a relevant operation.

[112] The NZDF response, dated 15 March 2017, was signed by Commodore Smith.¹⁸⁴ It said in part:

The 2010 raid in Baghlan involved a suspected civilian casualty. There was a formal Coalition CIVCAS investigation team assigned relating to the Baghlan Province Raid incident. The NZDF does not hold a copy of the investigation undertaken by a joint Afghan Ministry of Defence, Afghan Ministry of Interior and International Security Assistance Force (ISAF) assessment team into the raid in Baghlan. A copy of this investigation has not been released publicly. The NZDF has no reason to believe that New Zealand personnel conducted themselves other than in accordance with the applicable rules of engagement. Good reason exists for withholding any information the NZDF has relating to this matter pursuant to section 6(a) of the OIA.

[113] It is not clear which document the third sentence of this extract is referring to. If it is the Incident Assessment Team Executive Summary, it is obviously incorrect—NZDF did hold a copy of that and had done so since at least September 2011 (as Commodore Smith was aware). On the other hand, it is clear that some within NZDF Headquarters were misled by the title “Executive Summary” into believing that there was a full report which they did not hold. As we note below, NZDF made efforts to obtain the “full report” soon after this, even though it had been told that there was no full report when it sought a copy in 2014 (see paragraph [128]).

[114] *Hit & Run* was launched publicly at 5.15pm on Tuesday 21 March 2017. NZDF's evidence was that it received no prior notice and that no one tried to obtain NZDF's comment on the book's

¹⁸³ Evidence of Lt Gen (Ret) Keating (19 September 2019), above n 128, at 510.

¹⁸⁴ Letter from Commodore Smith to Human Rights Foundation of Aotearoa New Zealand (15 March 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 231–234.

account (although the Inquiry has confirmed that a short amount of notice was given).¹⁸⁵ At the time, Lt Gen Keating was overseas in Iraq with the then Minister of Defence, Hon Gerry Brownlee. In his absence, the Vice Chief of Defence Force, Air Vice Marshal Short, handled NZDF's initial response, although he did obtain Lt Gen Keating's approval for the media release that NZDF ultimately issued.¹⁸⁶ Soon after the book's launch, the media pressed NZDF to respond.

- [115] Air Marshal Short said in evidence that his preference was to take time to read the book carefully to analyse what was being said and then to examine NZDF's internal resources (people and documents), with the objective of giving a measured response.¹⁸⁷ However, given the media pressure to provide an immediate response, the decision was made simply to adopt the same position NZDF had previously adopted in its public statements. A search was made of NZDF's media releases in relation to Operation Burnham and the release made on 20 April 2011 was identified. Air Marshal Short thought it was discovered around 6.20pm that evening as a copy of it was stapled in his diary for that day, with the notation "6.20" on it.¹⁸⁸

- [116] Consequently, the media release that NZDF issued at around 8.25pm that evening contained the same erroneous assertion made in NZDF's 20 April 2011 release, namely that the Incident Assessment Team's investigation had concluded that the allegations of civilian casualties were unfounded.¹⁸⁹ The release went on to say:

The NZDF does not undertake investigations or inquiries into the actions of forces from other nations. That was the role of the joint Afghan-ISAF investigation.

The NZDF is confident that New Zealand personnel conducted themselves in accordance with the applicable rules of engagement.

- [117] Air Marshal Short said that with everything going on that evening, he did not appreciate that the allegations in *Hit & Run* related to the same operation as was the subject of the 2014 *Native Affairs* programme.¹⁹⁰ He said that if he had made the connection, he would have reviewed the Incident Assessment Team Executive Summary. As it was, the intention was to "exercise caution and moderation" since NZDF did not have full information. He denied that there was any intention to mislead and said that NZDF had no reason to obfuscate about the conclusions reached by the Incident Assessment Team.

- [118] While still overseas, Lt Gen Keating instructed his staff at NZDF Headquarters to gather information concerning post-operation procedures and to do other work in relation to the allegations in

¹⁸⁵ Cdre (Ret) Smith and Air Marshal Short said in evidence that NZDF was not provided with advance notice of the launch of *Hit & Run* or consulted during the drafting of the book (Evidence of Cdre (Ret) Smith, above n 160, at 88; evidence of Air Marshal Short (16 October 2019), above n 168, at 1003). However, the Inquiry has confirmed that about two hours before the book's public release, Mr Stephenson contacted a staff member in the Office of the Minister of Defence and asked him to advise NZDF of the impending release, and that person did so. During cross-examination, Air Marshal Short confirmed NZDF did have some notice a book was to be released, because someone went to the launch to buy some copies, although he did not know from whom or what information was passed on (Evidence of Air Marshal Short (18 October 2019), above n 114, at 1144–1145).

¹⁸⁶ Evidence of Air Marshal Short (16 October 2019), above n 168, at 1005.

¹⁸⁷ Evidence of Air Marshal Short (16 October 2019), above n 168, at 1004.

¹⁸⁸ Press release with annotations (21 March 2017) (Inquiry doc 13/05).

¹⁸⁹ "NZDF Response to Book" (21 March 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 245.

¹⁹⁰ Evidence of Air Marshal Short (16 October 2019), above n 168, at 1004–1005.

Hit & Run.¹⁹¹ This included obtaining a classified copy of the video footage from the Apaches and the accompanying audio tape.¹⁹²

[119] On 22 March 2017, there were a number of relevant public statements or comments:

(a) The then Minister of Defence, Hon Gerry Brownlee, commented to the media:¹⁹³

What I've been told is that he [Nicky Hager] is talking about an incident that has been extensively investigated, based on previous accusations of civilian deaths. And those accusations have not been proved at all accurate ... There have been several investigations including by ISAF itself and the allegations that are made simply have not been substantiated in any way whatsoever.

(b) The Prime Minister, Rt Hon Bill English, responded to an oral question in the House as follows:¹⁹⁴

The New Zealand Defence Force stands by the release that it put out last night – that is, that on the basis of independent investigation by the Afghan Government and the coalition forces back in 2011, they believe that New Zealand Defence Force personnel conducted themselves according to the rules of engagement and that civilian casualties have not been substantiated.

This answer appears to be based on talking points prepared for Air Marshal Short for a meeting with the Prime Minister at 12.30pm on 22 March 2017. Those talking points indicated that the Incident Assessment Team had concluded that “it was possible that civilian casualties occurred because two buildings were used by insurgents as cover and that women and children were in those buildings”.¹⁹⁵

(c) In a widely reported interview, Dr Mapp said that he accepted that there had been civilian casualties in Operation Burnham,¹⁹⁶ although he also made it clear that he rejected any suggestion that New Zealand forces were guilty of war crimes.¹⁹⁷

¹⁹¹ See, for example, email from Col Ferris to Brig Williams “[redacted]” (22 March 2017, 08.41) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 249; “Diary notes of Ross Smith Part 2” (23 March 2017) *Supplementary Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 26.

¹⁹² Evidence of Lt Gen (Ret) Keating (18 September 2019), above n 165, at 484.

¹⁹³ Isaac Davidson “Defence Chief: Hager’s ‘revenge raid’ book could harm New Zealand’s reputation” (22 March 2017) *Supplementary Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 34.

¹⁹⁴ (22 March 2017) 721 NZPD 16889.

¹⁹⁵ “Annex A: DOT POINT BRIEF FOR VCDF: TALKING POINTS FOR MEETING WITH PM ON 22 MARCH, above n 42.

¹⁹⁶ For example, *The New Zealand Herald* “Former Defence Minister concedes civilian casualty in 2010 SAS raid in Afghanistan” (22 March 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 250; *Newshub* “Wayne Mapp does not deny ‘Hit and Run’ Afghan raid claims” (22 March 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 253; *Radio New Zealand* “Afghan raid: Ex-minister accepts reports of civilian deaths” (22 March 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 255; and *Stuff* “Former Defence Minister Wayne Mapp says civilian deaths in Afghanistan were ‘an accident’” (22 March 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 257.

¹⁹⁷ For example, *The New Zealand Herald* “Former Defence Minister concedes civilian casualty in 2010 SAS raid in Afghanistan”, above n 196; *Stuff* “Former Defence Minister Wayne Mapp says civilian deaths in Afghanistan were ‘an accident’”, above n 196.

- (d) Lt Gen (Ret) Jones, the recently retired Chief of Defence Force, said that he was “pretty confident” that there were no civilian casualties on the operation. He said.¹⁹⁸

As far as I’m aware, the official report is accurate, I’ve no reason to believe that there was any cover-up of information from that report.

- [120] Lt Gen Keating returned from Iraq on Saturday 25 March 2017.¹⁹⁹ The following morning he read a package of relevant documents prepared for him, including the Incident Assessment Team Executive Summary. A number of NZDF personnel briefed him before he met with first, the Minister of Defence and later, the Prime Minister. He was assisted in briefing the Prime Minister by NZDF’s Senior Legal Adviser, Colonel (now Brigadier) Lisa Ferris. In the course of briefing the Prime Minister, Lt Gen Keating referred to the Incident Assessment Team’s investigation. His briefing notes for the meeting say:²⁰⁰

That report made recommendations as to any further action to be taken by ISAF and/or the troop contributing nations. The investigation team concluded that **civilian casualties may have been possible** due to the malfunction of an air weapon system, as was made public by ISAF on 29 August 2010.

The investigation concluded that no further action be taken. The NZDF was provided with a summary of that report and its conclusions, which Prime Minister you may review.

- [121] While this summary of the Incident Assessment Team Executive Summary accurately records the position in relation to the possibility of civilian casualties, it is inaccurate in stating that the investigation concluded that no further action should be taken. As noted above, the true position is that the Incident Assessment Team issued an addendum and ISAF ordered a further investigation, which ISAF publicly announced on 30 August 2010.²⁰¹ As noted previously, this announcement was picked up by overseas media and is reflected in the media compilations available to NZDF personnel at the time.

- [122] On 26 March 2017, NZDF issued what was described as a “Statement on Hager/Stephenson book”.²⁰² The statement has three significant features:

- (a) First, it said that the central premise of *Hit & Run* was incorrect. Specifically, NZDF troops never operated in the two villages identified in the book, namely Khak Khuday Dad and Naik, which, the statement said, are separated from the site of Operation Burnham by mountainous and difficult terrain.
- (b) Second, the statement said that an ISAF investigation “determined that a gun sight malfunction on a coalition helicopter resulted in several rounds falling short, missing the intended target and instead striking two buildings”, which “may have resulted in civilian casualties but no evidence of this was established”.

¹⁹⁸ *Radio New Zealand* “Checkpoint with John Campbell: ‘It’s possible’ civilians were killed – former Chief of Army” (22 March 2017) *Supplementary Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 37.

¹⁹⁹ Evidence of Lt Gen (Ret) Keating (18 September 2019), above n 165, at 484.

²⁰⁰ “Brief notes for Prime Minister on Operation Burnham” *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 411 (bold in original).

²⁰¹ See above at paragraphs [19]–[20].

²⁰² NZDF “NZDF Statement on Hager/Stephenson book” (26 March 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 308.

- (c) Third, it concluded by saying that anyone with relevant information should come forward and should be assured that “any allegations of offending by NZDF personnel would be taken seriously and investigated in accordance with our domestic and international legal obligations”.

[123] The following day, Lt Gen Keating held a media conference.²⁰³ At the conference, he reiterated the point that the villages at which *Hit & Run* said the operation occurred were not villages in which NZDF personnel had operated. Rather, they had operated two kilometres away, in another village, Tirgiran. Lt Gen Keating then explained what had happened on Operation Burnham by reference to maps. When he turned to the ISAF investigation, he asked Colonel Lisa Ferris, Director of Defence Legal Services, to take over. In the course of her remarks Colonel Ferris said:²⁰⁴

Subsequent information, received after Operation Burnham indicated that civilian casualties may have been possible ... ISAF stood up an investigation team headed by an ISAF Brigadier General and supported by a team including an ISAF Legal Officer as well as Government of the Islamic Republic of Afghanistan representatives from the Ministry of Interior and Ministry of Defence. That report made recommendations as to any further action to be taken by ISAF and/or the troop contributing nations. The investigation team concluded that civilian casualties may have been possible due to the malfunction of a weapon system, as was made public by ISAF on 29 August 2010. The investigation team also concluded that members of the NZSAS appear to have complied with the ISAF commander’s tactical directive, the rules of engagement, and accordingly the law of armed conflict. The investigation concluded no further action be taken. The NZDF was provided with a summary of that report and its conclusions.

[124] At the question and answer session after the NZDF presentations,²⁰⁵ questions were asked about NZDF’s earlier statements that allegations of civilian deaths were “unfounded”. The point was that those earlier statements seemed inconsistent with the possibility that there were civilian casualties, as the Incident Assessment Team had concluded. Lt Gen Keating answered the question by suggesting that “unfounded” meant the same as “there may have been”.²⁰⁶ The Prime Minister gave a similar response a few days later. On 3 April 2017 at a post-Cabinet press conference, the Prime Minister was asked whether it was misleading for NZDF to have used the word “unfounded” in relation to civilian casualties. He responded:²⁰⁷

... as I understand it, it’s a legal term. What has been clear from 7 years ago is that there was a possibility of civilian casualties, but what’s also become clear is that there hasn’t been evidence that there were casualties—which is not to say it certainly didn’t happen. It’s simply to say that there hasn’t been evidence that there were casualties.

203 “Speech notes for Press Conference on Operation Burnham” (27 March 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) from 316; “PowerPoint presentation from Press Conference” (27 March 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 323–339.

204 “Speech notes for Press Conference on Operation Burnham”, above n 203, at 321.

205 “Transcript: Lieutenant General Tim Keating Answers Questions on Operation Burnham as part of the press conference” (28 March 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 3* (Public Hearing Module 4, 16 September 2019) at 340–352.

206 “Lieutenant General Tim Keating Answers Questions on Operation Burnham as part of the press conference”, above n 205, at 348.

207 “Post-Cabinet Press Conference: Monday, 3 April 2017” (3 April 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 385.

- [125] The point seems to be that by describing the allegations of civilian casualties as “unfounded”, NZDF intended to convey that civilian casualties had not been substantiated but were possible. A rather different answer was given the following year. In response to concerns from the Ombudsman, NZDF agreed to release a “question and answer” style document on its website in March 2018.²⁰⁸ One of the matters covered was the use of the term “unfounded”:

If ISAF had said civilian casualties may have occurred, why did the NZDF maintain that reports of civilian casualties were “unfounded”?

There has been some confusion regarding statements made in the ISAF press release of 29 August 2010 and subsequent NZDF press releases stating that allegations of civilian casualties were unfounded.

The term “unfounded” was intended to address the suggestion that the NZDF was responsible for civilian casualties.

In so far as there may have been civilian casualties caused by a malfunction on a coalition helicopter in the same operation, the NZDF acknowledges that use of the term “unfounded” may have suggested that the NZDF does not accept this possibility.

This is not the case.

NZDF provided a longer explanation in a later document published on its website in April 2018, referring to the use of the phrase “well founded” in s 102 of the Armed Forces Discipline Act 1971 in its explanation.²⁰⁹

- [126] We return to this issue in chapter 9.

- [127] Finally, on 29 and 30 March 2017 NZDF provided briefing notes to the Prime Minister and Minister of Defence saying that the threshold for establishing an internal inquiry had not been met on the basis of the information available.²¹⁰ In the 29 March briefing note, Lt Gen Keating said:²¹¹

I would welcome and consider any new evidence presented by any individual. If any such evidence does reach the necessary threshold, causing me to consider the allegations to be well-founded, then I would be obliged under s102 of the Armed Forces Discipline Act to initiate the appropriate Defence Force inquiry, for which I have the statutory duty and authority to do.

- [128] NZDF took various steps to obtain more information about what had occurred on Operation Burnham. In particular:

On 23 March 2017, Colonel Ferris emailed NZDF’s Military Representative at NATO to ask him to obtain the Incident Assessment Team’s “full report” as NZDF had only the

²⁰⁸ NZDF “Operation Burnham Information Pack” (March 2018) <www.nzdf.mil.nz> at 18.

²⁰⁹ NZDF “Second release of information after Ombudsman direction: Parts B + C – Advice to Government” (April 2018) <www.nzdf.mil.nz>.

²¹⁰ “Legal Threshold for Defence Force Inquiry into Operation Burnham” (29 March 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 354; “Defence Force Inquiries into Allegations of Offending” (30 March 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 364.

²¹¹ “Legal Threshold for Defence Force Inquiry into Operation Burnham”, above n 210.

executive summary.²¹² The Military Representative did attempt to source such a document from NATO, but ultimately asked them to discontinue its search.²¹³ Even so, NATO did provide an electronic copy of the executive summary around this time.²¹⁴ As we indicated earlier, there was an executive summary but no “full report”.

- (a) NZDF’s Defence Attaché for the Middle East also conducted a search for the “full report”. He seems to have found out about the United States AR 15-6 report during that search and understood that it was being considered for release.²¹⁵
- (b) Lt Gen Keating directed Colonel Grant Motley to head a Fact Finding Team to visit various countries to conduct an Operation Burnham Due Diligence Task over May to June 2017. The purpose of this work was “to establish a clearer understanding of the information that exists relating to the allegations made against the NZDF”.²¹⁶ As we understand it, there was a briefing note to the Minister on 5 July 2017, but no written report of the results of this assignment.²¹⁷
- (c) Lt Gen Keating wrote to the Chairman of NATO’s Military Committee on 4 April 2017 asking for a copy of the “full” Incident Assessment Team’s report.²¹⁸

[129] Ultimately, the Prime Minister announced that the Government had decided that it would not hold an inquiry into Operation Burnham.²¹⁹

[130] Following the change of Government in 2017, the question of an inquiry was again raised. Various options were considered, including an inquiry by a Parliamentary Select Committee. Ultimately, the decision taken was to establish the present Inquiry.

[131] In a briefing note from Lt Gen Keating to the Minister of Defence on 4 April 2018, NZDF took the view that any form of inquiry was unnecessary in the circumstances.²²⁰ It highlighted what were considered to be errors in *Hit & Run*, making extensive reference to the video footage from the Apache weapons systems and the drone in the process. NZDF also drew attention to its efforts to have the Incident Assessment Team Executive Summary and the drone footage cleared for public release. NZDF offered the Attorney-General the opportunity to view the video footage and, as is apparent from his public remarks, the Attorney took up that opportunity.²²¹

[132] Finally, we note that once the decision was made to conduct an inquiry, Lt Gen Keating committed NZDF to cooperating fully with it.²²²

²¹² Email from Col Ferris to Brig Williams “ISAF/NATO Reporting” (23 Mar 2017, 20.41) (Inquiry doc 13/10).

²¹³ Email from Col Motley to Lt Gen Keating “HNR DDT SITREP: Week Ending 5 May 17” (5 May 2017, 2.46am) at [8] *Inquiry Bundle for Public Hearing Module 4 – Part 3* (Public Hearing Module 4, 16 September 2019) at 446.

²¹⁴ NZDF informed the Inquiry that email chains of April 2017 confirm its understanding that NZDF received the Incident Assessment Team report directly from NATO in electronic form in or around March 2017.

²¹⁵ Email from Brig Hayward to Brig Williams “RE: HNR DDT Update” (4 May 2017, 12.14) (Inquiry doc 13/12); email from Brig Hayward to Capt Arndell “RE: OP BURNHAM DUE DILIGENCE RFIs” (2 May 2017, 07.13) (Inquiry doc 13/11).

²¹⁶ Email from [redacted] to Brig Hayward and others “OP Burnham Due Diligence Task” (3 May 2017, 5.50pm) (Inquiry doc 13/16).

²¹⁷ “New Zealand Defence Force Update: ‘Hit and Run’ Allegations” (5 July 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 3* (Public Hearing Module 4, 16 September 2019) at 479–481.

²¹⁸ Letter from Lt Gen Keating to NATO (4 April 2017) (Inquiry doc 13/15).

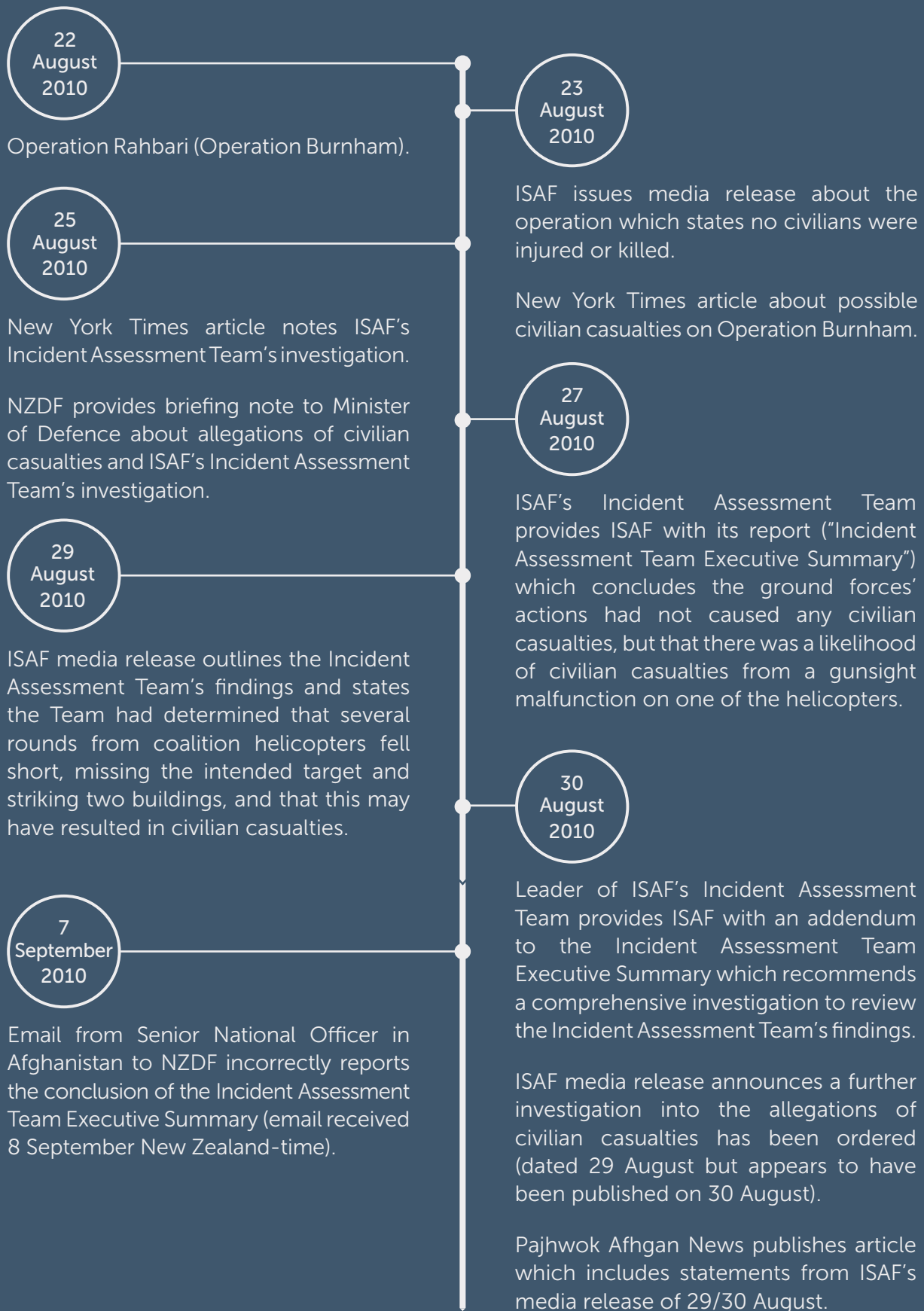
²¹⁹ “Post-Cabinet Press Conference: Monday, 3 April 2017”, above n 207.

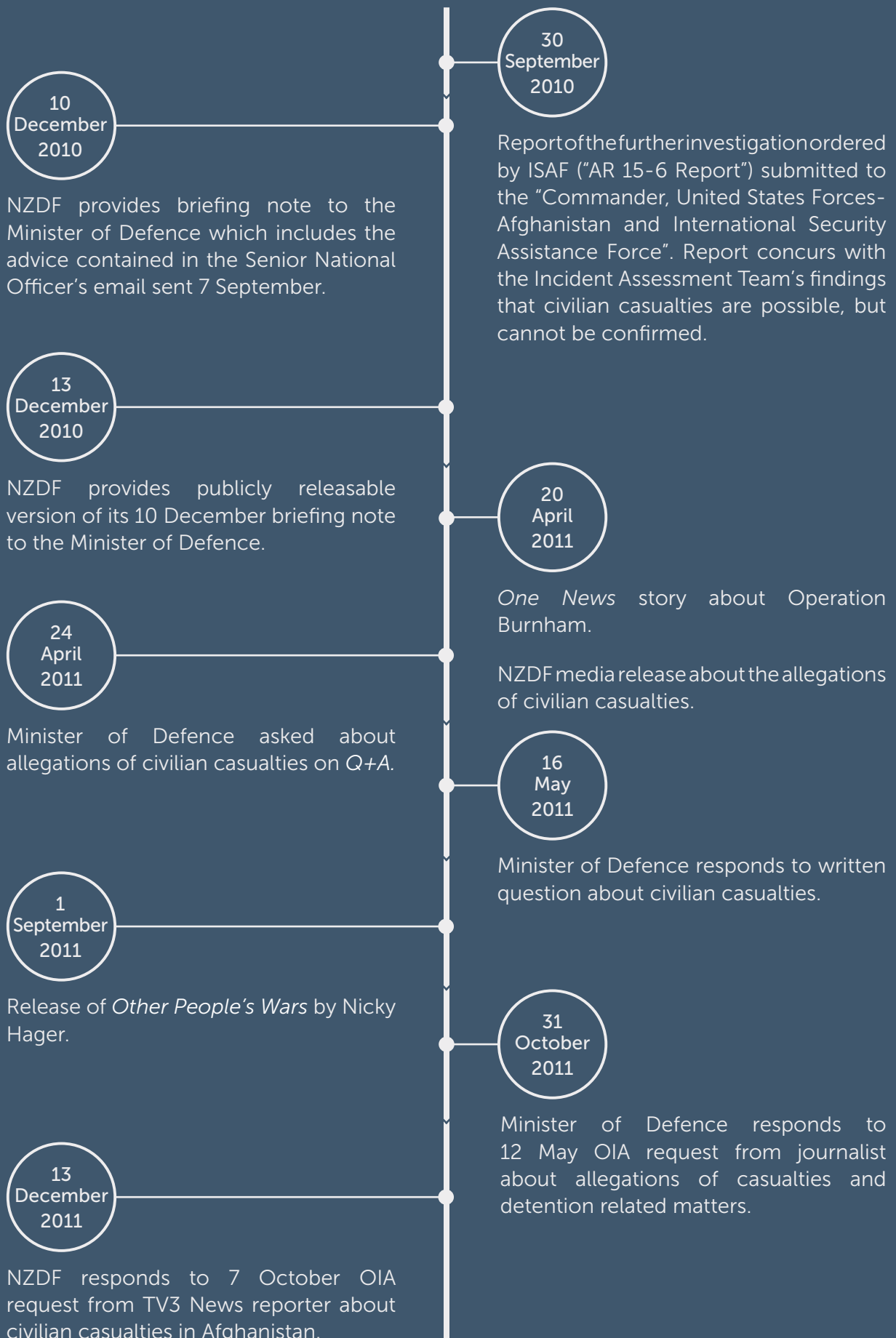
²²⁰ “Operation Burnham – Update on a number of issues including further analysis of the book *Hit and Run*” (4 April 2018) *Inquiry Bundle for Public Hearing Module 4 – Part 3* (Public Hearing Module 4, 16 September 2019) at 527.

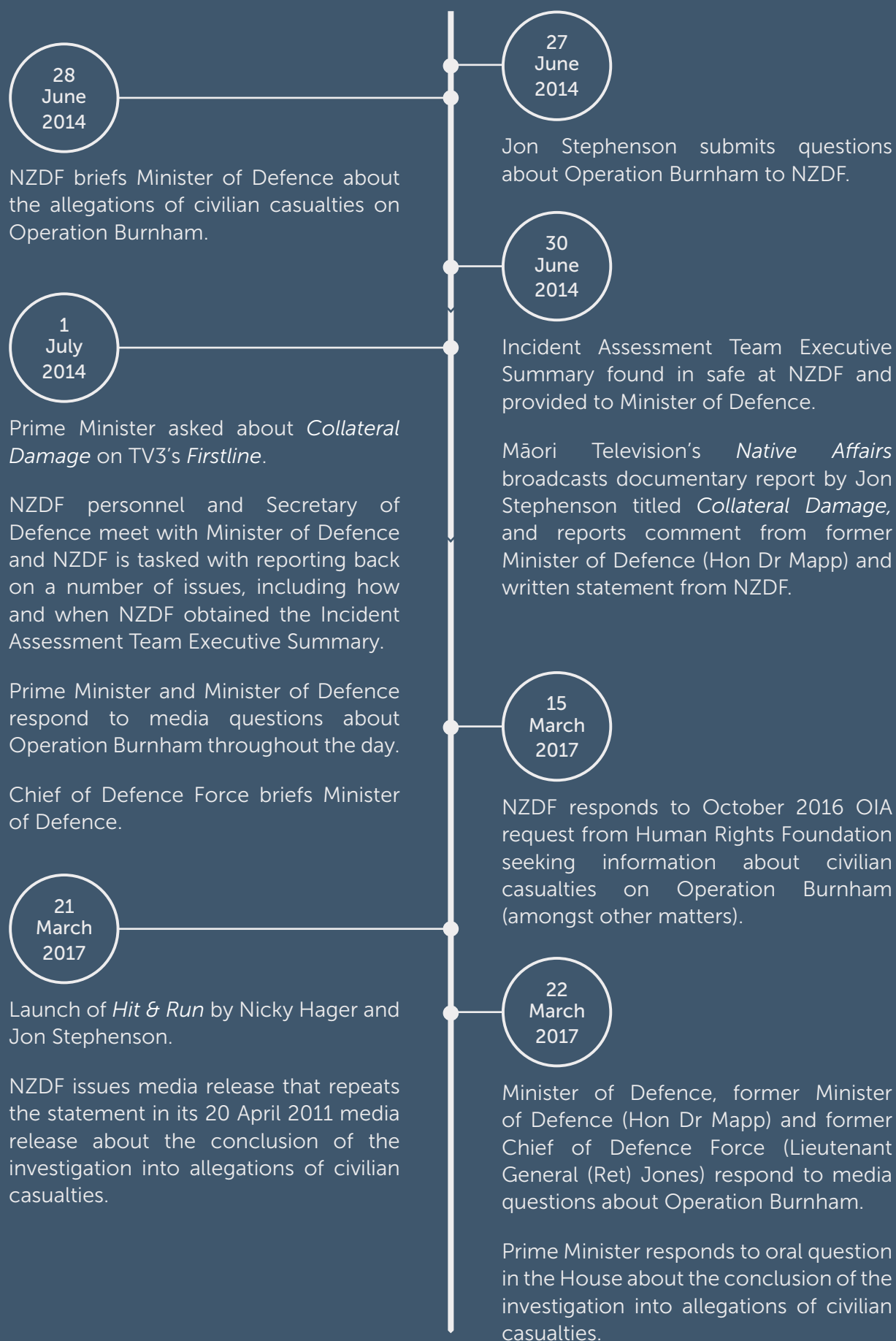
²²¹ Hon David Parker “Approval for inquiry into Operation Burnham” (11 April 2018) <www.beehive.govt.nz>.

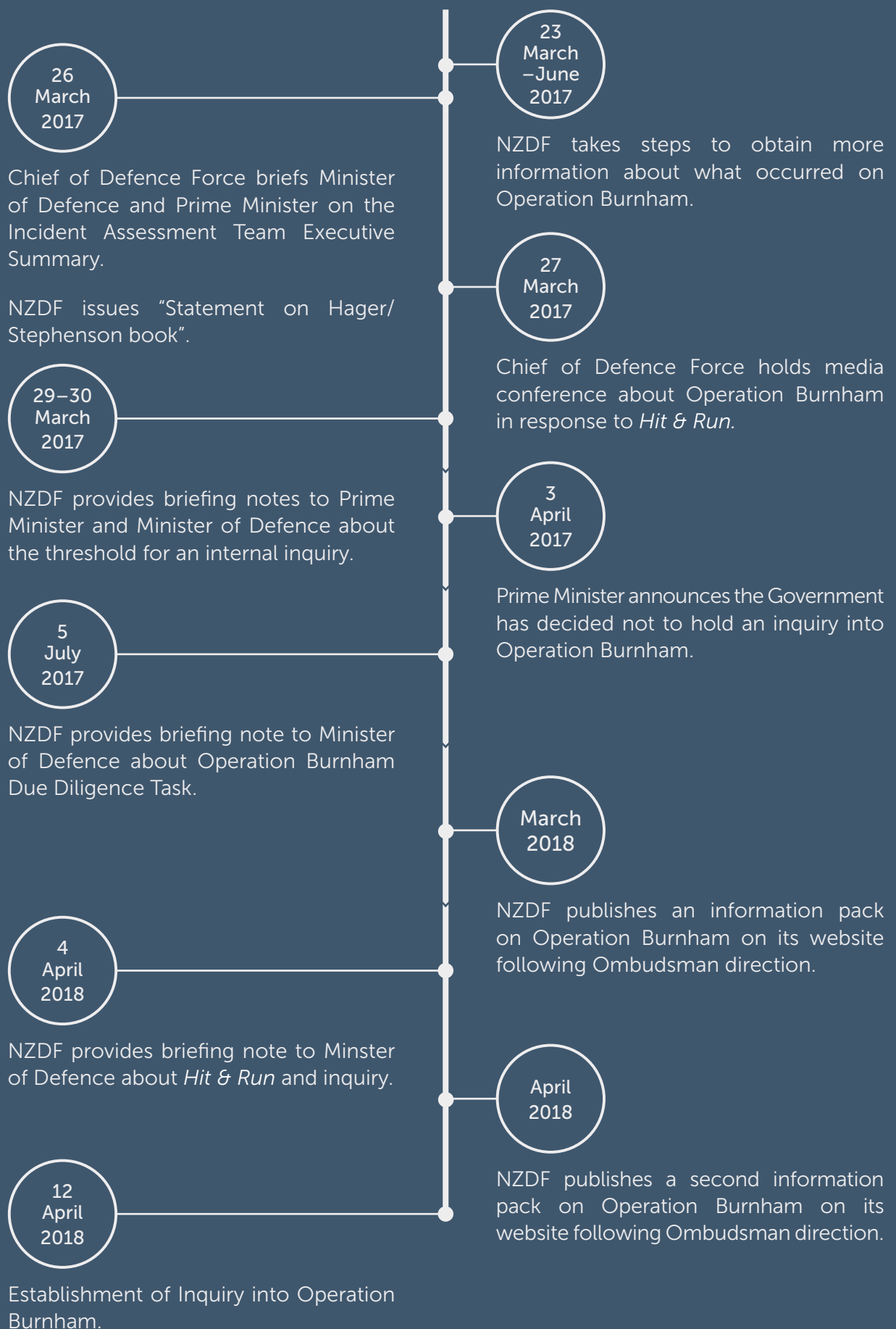
²²² NZDF “NZDF Special Inquiry Office Established” (15 May 2018) <www.nzdf.mil.nz>.

Timeline of key events relating to the “cover-up” allegations











A cover-up? Our assessment

Chapter 9

- [1] The account in chapter 8 exposes significant failings on the part of the New Zealand Defence Force (NZDF) in addressing the allegations of civilian casualties after Operation Burnham. These failings would be concerning in any public organisation. They are deeply troubling in an organisation such as NZDF, given the nature of its responsibilities, the importance of the principles of civilian control and ministerial accountability and the image of dedicated and organised professionalism that NZDF seeks to project. The failings are particularly concerning because they are not confined to one or more isolated incidents but are reflected in conduct and events over a number of years. They fall along a spectrum of seriousness.
- [2] We will illustrate and explore NZDF's failings by reference to the way NZDF personnel dealt with the Incident Assessment Team's investigation, as well as by reference to other features that arise from the facts. Before we do so, however, we make two contextual points, which pull in different ways, but should not be forgotten.
- [3] First, Sir Jerry Mateparae, the Chief of Defence Force at the time of Operation Burnham, accepted that any suggestion of civilian casualties arising from an operation in which New Zealand forces were involved would be of concern, not only to NZDF, but also to the Government and the New Zealand public more generally. This reflects the fact that since the end of the Vietnam War, New Zealand's military activities have mainly been of a peace-keeping nature.¹ In terms of NZDF's operational experience, then, such allegations were unusual and, potentially, serious.
- [4] Second, as we explained in chapter 5, it was common for insurgent forces in Afghanistan to conduct operations to influence public opinion ("information operations"), in which the numbers of civilian casualties from coalition activities were exaggerated or even fabricated entirely.² Accordingly, some coalition forces tended to treat claims of civilian casualties after operations with a degree of scepticism, understandably perhaps. While both these factors were in play in respect of the claims of civilian casualties after Operation Burnham, we have the sense that, within the New Zealand Special Air Service (NZSAS) leadership at least, the latter predominated over the former.
- [5] Before undertaking our detailed analysis, we mention a persistent error by NZDF that is not, of itself, particularly significant, but which illustrates a bigger problem that will become something of a theme in the discussion that follows. NZDF, seemingly confused by the Incident Assessment Team's report being described as an "executive summary", made repeated requests to the North Atlantic Treaty Organization (NATO) and International Security Assistance Force (ISAF) for a copy of the "full report", despite being advised after the first request that there was no "full report". As far as we can tell (and putting to one side Lieutenant Colonel Chris Parsons' request for the report in early September 2010), NZDF first requested a copy of the "full report" in early July 2014 following the *Collateral Damage* documentary on Māori Television. That was when Commodore Ross Smith, who was tasked to deal with the issues that Hon Dr Jonathan Coleman had raised with Chief of Defence Force, Lieutenant General Tim Keating, asked NZDF staff in

1 Evidence of Lieutenant General (Retired) Sir Jerry Mateparae, Transcript of Proceedings, Public Hearing Module 4 (16 September 2019) at 26. See also at 38–39.

2 Chapter 5 at [42].

Afghanistan to obtain a copy. He was advised by email (after apparently thorough enquiries) that there was no “full report”, only the executive summary.³

- [6] Despite this advice in 2014, and despite holding the executive summary since 2011, NZDF took further steps to obtain the “full report” in 2017:
- (a) On 23 March 2017 Director of Legal Services Colonel Lisa Ferris asked NZDF’s military representative at NATO to obtain a copy of the “full report” from NATO.⁴
 - (b) On 4 April 2017 Lt Gen Keating wrote to the Chair of the Military Division at NATO requesting a copy of the “full report”.⁵
 - (c) NZDF instructed its defence attaché for the Middle East to conduct a search for a copy of the “full report” and he apparently made various requests of Afghan and United States Government officials for it in April and May 2017.⁶
- [7] This sequence provides a small illustration of a significant defect in the way that NZDF dealt with the civilian casualty issue, namely the lack of corporate memory within NZDF or, more precisely, NZDF’s failure to ensure that corporate memory on this matter was recorded, preserved and accessible. As we described in chapter 8,⁷ NZDF did not prepare a written report to Dr Coleman in 2014 on the results of the enquiries that he had asked them to make about how NZDF had obtained the executive summary. Rather, Lieutenant General (Retired) Keating said in evidence that he assumed he would have given the Minister a verbal briefing.⁸ But, as is amply demonstrated by the factual account in chapter 8, a corporate record of (among other matters) the outcome of Commodore Smith’s enquiries and the advice given to the Minister would have assisted those NZDF personnel dealing with the allegations of civilian casualties subsequently. This was not simply a matter of preserving an accurate historical record—written records, properly kept by electronic means, should enhance efficiency within NZDF (for example, by avoiding duplication of effort) and facilitate proper accountability in ministerial, parliamentary and other contexts. It should also promote public confidence in NZDF as an organisation, as we discuss further in chapter 12.
- [8] Relying on oral briefings was especially problematic as no one person or office had consistent charge of Operation Burnham-related matters over time. Information was effectively ring-fenced by “need to know” restrictions, reflecting in part the separation of the NZSAS and its operations from mainstream NZDF structures and processes. This was exacerbated by NZDF’s practice of regularly moving people to new roles. All this contributed to a lack of coordination and a loss of visibility of some information, as is most strikingly illustrated by NZDF’s treatment of the executive summary. That document, an overseas partner-sourced document of critical importance, likely came into NZDF’s possession in 2011. It was placed in a safe appropriate to its classification but was then apparently forgotten about, only to be discovered by chance several years later.

³ See chapter 8 at [108].

⁴ Email from Col Ferris to Brig Williams “ISAF/NATO Reporting” (23 March 2017, 8.41pm) (Inquiry doc 13/10).

⁵ Letter from Lt Gen Keating to NATO (4 April 2017) (Inquiry doc 13/15).

⁶ Email from Col Motley to Brig Boswell and others “HNR DDT Update” (4 May 2017, 10.47) (Inquiry doc 13/12); email from Brig Williams to Capt Arndell “RE: OP BURNHAM DUE DILIGENCE RFIs (1 May 2017, 11.13pm) (Inquiry doc 13/11).

⁷ See chapter 8 at [109].

⁸ Evidence of Lieutenant General (Retired) Tim Keating, Transcript of Proceedings, Public Hearing Module 4 (19 September 2019) at 529.

- [9] Against that background, we now undertake our analysis of NZDF’s response to the allegations of civilian casualties on Operation Burnham. For ease of analysis, we will present our assessment under the same headings as we used in chapter 8, before drawing everything together in a conclusion at the end of the chapter.

Period 1: 23 August – 31 December 2010

- [10] We discuss three points arising from this period:
- (a) Lt Col Parsons’ “misunderstanding” of a paragraph from the Incident Assessment Team Executive Summary (executive summary);
 - (b) NZDF Headquarters’ acceptance of Lt Col Parsons’ description of the executive summary; and
 - (c) the apparent disappearance of a video of a child’s funeral provided to NZDF immediately after the operation but not provided to us until we made specific enquiries.

Lt Col Parsons’ “misunderstanding” of the Incident Assessment Team Executive Summary

- [11] We begin with Lt Col Parsons’ “misunderstanding” of the paragraph from the executive summary on 7 September 2010, the day he took over from Lieutenant Colonel Rian McKinstry as Senior National Officer for Task Force 81 (TF81).
- [12] Lt Col McKinstry’s reports from Afghanistan to the Director of Special Operations, Colonel Peter Kelly, and to NZDF Headquarters following Operation Burnham set out the position in relation to the possibility of civilian casualties accurately. Those reports reflected Lt Col McKinstry’s viewing of the weapons videos and what ISAF said in its 29 August 2010 media release about the Incident Assessment Team’s findings, namely that there was a possibility of civilian casualties from helicopter weapons fire falling short and striking two buildings.⁹ They also reflected the immediate intelligence reporting available to NZDF, which indicated the possibility of civilian casualties.
- [13] Lt Col McKinstry handed over command as Senior National Officer to Lt Col Parsons on 7 September 2010. After his visit to ISAF Joint Command Headquarters later that day, Lt Col Parsons sent an email (the 8 September email) to Colonel Kelly reporting that he had “sighted” the Incident Assessment Team’s “conclusion” and it:¹⁰

... **categorically clears both [ground] and air [components] of any allegations.** It states that having reviewed the evidence there is no way that civ cas could have occurred.

As we have previously noted, this purported description was wrong because the Incident Assessment Team did not categorically clear the air components. Nor did it say that there was no way that civilian casualties could have occurred; indeed, it said the opposite—that civilian

⁹ See chapter 8 at [14] and [18].

¹⁰ Email from Lt Col Parsons (WAATEA.SNO) to Col Kelly (SWAN – HQNZDF.DSO) “RE: [EXTERNAL RELEASE] External Release: Info/Updates” (8 September 2010, 7.12am) (Inquiry doc 09/15). Bold in original. As we noted in chapter 8, this email was sent at 11.42pm on 7 September (Afghanistan time) and received in New Zealand at 07.12am on 8 September (New Zealand time).

casualties were possible. Lt Col Parsons' confidently expressed yet erroneous description was based on what was (as he accepted in cross-examination) a "fleeting glance"¹¹ at one paragraph of the executive summary.¹²

- [14] Although we quoted the paragraph at issue from the executive summary in chapter 8, we quote it again given its importance to the present analysis:

An accurate CIVCAS review of Op [Burnham] requires separating [TF81] operations from the AWT [Air Weapons Team] and AC-130 engagements. The ground engagement appears to have been conducted IAW all ROE, the Tactical Directive, and according to the pre-planned CONOP. The AF reported no CIVCAS and the IAT was unable to find any part of their operation where CIVCAS could have occurred.

- [15] Brigadier Parsons said in his evidence that he misinterpreted the paragraph in the executive summary because he misunderstood the abbreviation "AF" in the third sentence. He said he interpreted "AF" to mean "Air Force" whereas in fact, as he now realises, it had been defined earlier in the document to mean "ground assault force".¹³ He told us that "AF" was not a NATO acronym for Assault Force, but could have any of four meanings, the most common being Air Force. Nor was it an acronym with a fixed meaning in New Zealand, where it was defined to mean Air Force or Audio Frequency. Being a NATO document, he gave the acronym the most common NATO meaning—Air Force.

- [16] Brigadier Parsons also said that comments made by the (unknown) ISAF officer, probably an American, who showed him the document tended to confirm his understanding of what it said.¹⁴ Brigadier Parsons said under cross-examination that he had told the ISAF officer that he wanted to know whether there were any civilian casualties caused by anybody. He said that he took from the answer he was given that there were none. Brigadier Parsons then said:¹⁵

A. So I asked him, it was clear to me from his answer that there were no civilian casualties. I said well I can't very well report that without having seen the report, it would not be the right thing to go back without having verified, at which point he conceded that point, and showed me the paragraph that he was able to show me.

Q. So are you saying that this American, was it American, this person?

A. I think it probably was, yeah.

Q. This person who was probably American lied to you?

A. No I'm not saying that.

Q. Well you are, aren't you, because you're saying he told you there was no civilian casualty?

A. I'm saying that what I understood from what he said was very clearly in my mind that there were no civilian casualties.

¹¹ Evidence of Brigadier Chris Parsons, Transcript of Proceedings, Public Hearing Module 4 (17 September 2019) at 295.

¹² Lt Col Parsons' email said that he had "sighted the [Incident Assessment Team's] conclusion" (above n 10). Under cross-examination, he said that he thought he would have clarified to Colonel Kelly in a subsequent telephone call that he had only sighted one paragraph of the report: above n 11, at 295–296. We address this further at paragraphs [40]–[42] below.

¹³ Evidence of Brigadier Parsons, above n 11, from 269.

¹⁴ At 283–284.

¹⁵ At 284–285.

Later, Brigadier Parsons accepted that, on his account, the ISAF officer was either mistaken or had misled him,¹⁶ but also emphasised that there may have simply been a misunderstanding between them.¹⁷

[17] Before we discuss this evidence, we will make three short points of a contextual nature.

The context

[18] First, Brigadier Parsons has provided us with material showing that he visited ISAF Joint Command on the afternoon of 7 September 2010, the day he took over as Senior National Officer. Although he attended an ISAF Special Operations Forces' meeting, he had time to enquire about the Incident Assessment Team's findings, which we accept he did.

[19] At the time of his visit, Lt Col Parsons knew, as did other NZDF personnel, that ISAF had concluded that it was possible that civilian casualties had been caused when firing from the AH-64 Apache helicopters fell short and hit two buildings. As we have said, this had been stated in ISAF's media release of 29 August 2010 and was supported by video footage that some NZDF personnel had been able to view.¹⁸ Although he had apparently not seen the video footage, Lt Col Parsons had received several of Lt Col McKinstry's post-Operation Burnham updates, which referred to the possibility of civilian casualties, and was also aware of Lt Col McKinstry's email of 6 September 2010 to Colonel Kelly.¹⁹ That email noted that the Commander ISAF Joint Command had been briefed on the findings of the Incident Assessment Team and had accepted that TF81 "had no case to answer". The email went on to say that ISAF would not be taking any further action in the matter, but there might "still be some fallout for the aviation elements". The email attached an ISAF email of 3 September recording this information.²⁰

[20] The Incident Assessment Team had, then, drawn a distinction between the ground force and the air assets in terms of allegations of civilian casualties. Lt Col Parsons acknowledged in his evidence that he had received these emails and was aware of their content.²¹ Quite apart from all this, it is clear that Lt Col Parsons was fully briefed on the situation by Lt Col McKinstry prior to taking over as Senior National Officer.²²

[21] Second, Lt Col Parsons was well aware that the Prime Minister and other ministers were interested in knowing what had happened on Operation Burnham.²³ He said in his evidence that he was aware that Colonel Kelly was keen to obtain a copy of the Incident Assessment Team's report so that the

¹⁶ At 285.

¹⁷ At 285, 291 and 303–304.

¹⁸ Lt Col Parsons was a recipient of Lt Col McKinstry's email of 26 August 2010, in which he said that the video footage of the United States air assets indicated that civilian casualties were possible from the accidental impact of rounds on a particular house: see chapter 8 at [14]; email from Lt Col McKinstry to Col Kelly and Lt Col Parsons "External Release Update Obj Burnham Op 21 Aug 10 Update 4" (26 August 2010, 11.27pm) (Inquiry doc 02/13).

¹⁹ Email Lt Col McKinstry (WAATEA.SNO) to Col Kelly (HQNZDF.DDSO) "External Release Issues External to the Sitrep" (6 September 2010, 01.32) (Inquiry doc 09/13).

²⁰ Email from ISAF SOF HQ CJ3 DIR IS to ISAF SOF HQ CG COM SOF IS and others "FW CIVCAS INVESTIGATION ON TF81" (3 September 2010, 2.29pm) (Inquiry doc 09/14).

²¹ At 264–266.

²² As was confirmed by both Colonel McKinstry and Lt Col Parsons: see Evidence of Colonel Rian McKinstry, Transcript of Proceedings, Public Hearing Module 4 (17 September 2019) at 252; Evidence of Brigadier Parsons, above n 11, at 264–266 and 307.

²³ Evidence of Brigadier Parsons, above n 11, at 273–275.

Chief of Defence Force and the Minister of Defence could be briefed.²⁴ He was also responsible for briefing the Prime Minister about Operation Burnham on at least two occasions.²⁵ When Operation Burnham got underway, he contacted the Prime Minister to advise him of that.²⁶ After the operation, he again contacted the Prime Minister, at the request of the Chief of Defence Force, to tell him how it had gone.²⁷ Brigadier Parsons told us that he did not discuss the issue of civilian casualties with the Prime Minister and we accept that. But Brigadier Parsons acknowledged what is obvious on the evidence, namely that he was aware of the high level of political interest in the operation,²⁸ as were other NZDF officers—particularly Colonel Kelly.

- [22] Brigadier Parsons suggested to us that ministers were concerned about the possibility that New Zealand forces might have caused civilian casualties and were less concerned with whether the United States air assets might have done so. We understand, however, that civilian casualties occurring on an operation in which New Zealand was involved, however caused, were something that concerned ministers.²⁹ In any event, Brigadier Parsons did acknowledge in his submissions that the issue of civilian casualties on the operation was a matter of “intense interest”.
- [23] Third, we undertook detailed natural justice processes with Brigadier Parsons given the possibility of adverse findings against him. In fairness to him, we should record the context from his perspective.
- [24] In brief, Brigadier Parsons advised us that his efforts to obtain the Incident Assessment Team’s report and to understand its contents were sandwiched between multiple tasks that resulted in him working for “20 hours straight”. He had broken ribs at the time. By the time he wrote the relevant email to Colonel Kelly shortly before midnight on 7 September (Afghanistan time), he had been “on the job for over 15 hours”. Also, he had not had an opportunity to read ISAF’s Standard Operating Procedure that dealt with the Incident Assessment Team process, so was not aware that a preliminary assessment would be undertaken to see whether a fuller investigation was merited. He said he thought that the paragraph he was shown from the Incident Assessment Team Executive Summary reflected the final result of an on-going investigation and did not realise that a further investigation had been ordered. He had not at that stage seen the video footage showing rounds from an Apache helicopter hitting buildings.
- [25] In reaching the views expressed below, we have taken into account the submissions that both Brigadier Parsons and NZDF made in relation to his position.³⁰

²⁴ At 266.

²⁵ Dr Mapp gave evidence that Lt Col Parsons “talked regularly” with the Prime Minister: Evidence of Hon Dr Wayne Mapp, Transcript of Proceedings, Public Hearing Module 4 (18 October 2019) at 1104–1105. Brigadier Parsons acknowledged this but said his contacts related to his duties and were frequently at the behest of his superiors. He said he tried to keep the NZDF hierarchy informed of his contacts.

²⁶ Evidence of Brigadier Parsons, above n 11, at 275.

²⁷ Email from Lt Col Parsons to Gp Capt Poot “Re: Brief to PM” (22 August 2010, 7.18 pm) (Inquiry doc 13/02); see chapter 8 at [8].

²⁸ Evidence of Brigadier Parsons, above n 11, at 275–276.

²⁹ For example, the then Minister of Defence, Hon Dr Wayne Mapp, gave evidence that the Government took a particular interest in any allegations of civilian casualties arising from operations that New Zealand was involved in, irrespective of whether New Zealand forces were directly responsible: Evidence of Hon Dr Mapp, above n 25, at 1015.

³⁰ We should also note that we have received natural justice submissions from others whose conduct is discussed in this chapter. We have, of course, taken those submissions into account in reaching our final views.

The meaning of the paragraph

- [26] In his submissions, Brigadier Parsons explained his contemporaneous interpretation of the paragraph from the executive summary quoted at paragraph [14] as follows:

The paragraph commences with a single sentence making the point that two elements need to be considered to make overall conclusions about CIVCAS: element 1 and element 2. The first sentence to then follow deals with the first element. The second sentence to follow then deals with the second element. In short, the paragraph introduces the need to deal with both elements and then appears to provide the findings for both.

- [27] Given the language of the paragraph and what Lt Col Parsons knew when he read it, this was, we consider, an implausible interpretation of the paragraph, as we now explain.
- [28] First, in relation to the meaning of “AF”, we acknowledge that one accepted meaning of the acronym “AF” in NATO and NZDF terminology is “Air Force”. But there is a difference between “the Air Force” as a service and some air assets provided by the United States Army.³¹ We note that several NZDF documents concerning Operation Wātea use the term “Assault Force” frequently to refer to the assault force component of the ground force, as one would expect.³² More significantly, a TF81 document headed “Summary of Incident”, which was completed after Operation Burnham for the Incident Assessment Team, refers to the “Assault Force (AF)”, and then uses the acronym “AF” thereafter on numerous occasions in reference to the ground assault force.³³ It is not clear who within TF81 prepared the document: the Ground Force Commander thought it possible that he had prepared it but has no memory of doing so. But the relevant point is that this is a contemporaneous TF81 document, which Brigadier Parsons acknowledged that he would have seen,³⁴ that uses the acronym “AF” to refer to the ground assault force, albeit having defined it. While the “AF” at issue appears in a paragraph from an ISAF document, it is not obvious why an NZDF reader would treat the acronym as referring to the air assets on the operation rather than to the ground assault force, especially if there was only a brief opportunity to read the paragraph.
- [29] Second, when he went to ISAF Joint Command Headquarters on 7 September, Lt Col Parsons knew that the Incident Assessment Team had distinguished between the positions of the ground forces and the air assets in terms of possible civilian casualties. The Incident Assessment Team had found no issues with the actions of the ground forces but the actions of the air assets required further investigation because video footage showed that they may have, inadvertently, caused civilian casualties when errant rounds from the Apache helicopters hit two buildings. Lt Col Parsons was aware of this from Lt Col McKinstry’s emails,³⁵ as he acknowledged in his evidence,³⁶ and from the media articles about the ISAF media releases that he had been sent.³⁷

³¹ Brigadier Parsons said he interpreted “AF” to refer back to the “AWT and AC-130” referred to in the first sentence.

³² See, for example, OP RAHBARI Mission Approval (12 Aug 2010) (Inquiry doc 09/28); OP RAHBARI ORDERS (Inquiry doc 09/39); Accompanies OP RAHBARI ORDERS (Inquiry doc 09/38); OP-RAHBARI-OBJ-BURNHAM-OPSUM (22 August 2010) (Inquiry doc 02/14); OP SUMMARY (Inquiry doc 02/03).

³³ Summary of Incident (Inquiry doc 02/10).

³⁴ Evidence of Brigadier Parsons, above n 11, at 301.

³⁵ Inquiry doc 02/13, above n 18; Inquiry doc 09/13, above n 19. Although the email of 6 September 2010 (Inquiry doc 09/13) is not addressed to Lt Col Parsons, he has indicated in evidence (see Evidence of Brigadier Parsons, above n 11, 266) and submissions that he was aware of it at the time.

³⁶ Evidence of Brigadier Parsons, above n 11.

³⁷ Email from [Defence Intelligence Officer] to Col Kelly “FW: First take: 1 Sep” (2 September 2010, 9.20am) *Inquiry Bundle for Public Hearing Module 4 – Resumed* (Public Hearing Module 4, 15 October 2019) at 61; and email from Col Kelly to Lt Col McKinstry and others “FW: First take: 1 Sep” (1 September 2010, 22.14) *Inquiry Bundle for Public Hearing Module 4 – Resumed* (Public Hearing Module 4, 15 October 2019) at 61.

- [30] On Lt Col Parsons' interpretation of the paragraph, it was fundamentally inconsistent with what he knew to that point. As he interpreted it, the paragraph said that the Incident Assessment Team had been unable to find any part of the air assets' operation where civilian casualties could have occurred. Yet it was clear from the emails he had seen and ISAF's media releases that the Incident Assessment Team had identified a "part of their operation" where the air assets could have caused civilian casualties. Although Lt Col Parsons said he had not seen the video footage of the rounds hitting the houses, Lt Col McKinstry's email of 26 August had described what it showed—errant rounds impacting a house near where a woman and children had been seen earlier. Moreover, Colonel McKinstry said in evidence that when he had watched the weapons video footage, it was obvious to him that there might have been civilian casualties. When Brigadier Parsons was asked whether Lt Col McKinstry had shared that view with him, he said that he was sure they had discussed it.³⁸ So, the outstanding question in relation to the air assets was not whether there was an occasion on which civilian casualties could have occurred but rather whether civilian casualties had in fact occurred, a question that would have been difficult to resolve quickly, especially given the remote location of the operation.
- [31] Third, if the Incident Assessment Team had intended to say in the paragraph that neither the ground forces nor the air assets had caused any civilian casualties, they would have stated that conclusion in a straightforward way. As written, the paragraph does not plausibly bear that interpretation. What the Incident Assessment Team expressed in the paragraph is, we think, clear:
- (a) In the first sentence of the paragraph, the Incident Assessment Team says that an accurate review of the allegations of civilian casualties requires separating TF81's operations from the air asset engagements.
 - (b) In the second sentence, which refers to the "ground engagement", the Incident Assessment Team does not expressly say TF81 was not responsible for civilian casualties, only that it complied with the rules of engagement, tactical directives and the concept of operations, which, as Lt Col Parsons would have understood, is a different matter. Compliance with those did not preclude the possibility of civilian casualties, as we discussed in chapter 6.
 - (c) In the third sentence, the Incident Assessment Team says that it was unable to find any part of "their operation" where civilian casualties could have occurred. This is the final element of the Incident Assessment Team's findings in relation to TF81—in effect, that it caused no civilian casualties.
- [32] Finally, we should record that, at a very late stage in the Inquiry's processes (on 4 June 2020),³⁹ Brigadier Parsons advised that he had a notebook that he kept during his period as Senior National Officer for Operation Wātea. Among the entries for 7 September 2010 is the following: "AIT conclusion no case to answer air or gnd". We accept that this entry was made by Lt Col Parsons at the time. It is, of course, consistent with what Lt Col Parsons reported to Colonel Kelly in the 8 September email.
- [33] We will return to the issue of Lt Col Parsons' interpretation of the paragraph in the conclusion and findings section, beginning at paragraph [60].

³⁸ Evidence of Brigadier Parsons, above n 11, at 307.

³⁹ We comment on the late production of relevant material in chapters 1 and 12. We note that Brigadier Parsons was not responsible for the failure to produce the diary earlier.

Miscommunication between Lt Col Parsons and the ISAF officer

- [34] As noted above, Brigadier Parsons explained in his evidence that his view of what the Incident Assessment Team had concluded was reflected in what was said by the ISAF officer who showed him the paragraph. While he acknowledged the possibility that the ISAF officer may have lied to or misled him, he thought this implausible (as do we), and advanced the explanation that he and the ISAF officer must have been talking at cross-purposes—that there must have been some form of miscommunication between them.⁴⁰ He said he asked the ISAF officer whether there were any civilian casualties caused by coalition forces (that is, “by anybody”) on the operation, and he took from the ISAF officer’s answer that the Incident Assessment Team had concluded that there were none at all.⁴¹ It was after that exchange that Brigadier Parsons said he asked to see the report itself, and it was then that he was shown the paragraph.
- [35] Given that Lt Col Parsons was the Senior National Officer and was dealing with an ISAF officer—probably American and presumably also reasonably senior—about a limited and specific subject matter, it would be surprising if a fundamental miscommunication of that nature had occurred. Brigadier Parsons said that the ISAF officer had told him that he was not allowed to see the executive summary. He said the officer “went out on a limb” by pointing him to the paragraph in the executive summary. This indicates that the officer would almost certainly have limited his observations to what he would have regarded as New Zealand’s legitimate area of interest, that is, the actions of New Zealand forces on the operation.
- [36] Furthermore, if the ISAF officer did say anything about the position of the United States air assets, we consider it improbable that his comments would have been inconsistent with ISAF’s public announcements to that point. These were the media releases of 29 and 30 August 2010,⁴² which reflected the Incident Assessment Team’s findings. The first has already been mentioned; the second complemented the first by announcing that a further investigation had been ordered based on the information provided by the Incident Assessment Team, and the results would be provided on completion. (As we understand it, that further investigation was the AR 15-6 investigation, which was conducted in the period 17–30 September 2010.)⁴³
- [37] The ISAF officer would no doubt have known that a further investigation had been ordered into the position of the air assets and that it had not been completed. We think it implausible that the officer would somehow have managed to communicate to Lt Col Parsons that there were no civilian casualties on any part of the operation when the Incident Assessment Team’s conclusion was the opposite, namely that there was a possibility of civilian casualties from the air asset engagements. It was suggested that the ISAF officer might have said something to the effect that there was no evidence or no proof that there were civilian casualties. But such an observation would not have ruled out the possibility identified by the Incident Assessment Team that civilian casualties had occurred. As we have noted, ruling out that possibility would have been difficult given the location of Operation Burnham.
- [38] Brigadier Parsons accepted that the ISAF officer would not have said anything that was inconsistent with ISAF’s public position and would most likely have restricted his remarks to addressing

⁴⁰ Evidence of Brigadier Parsons, above n 11, at 284, 291 and 303–304.

⁴¹ Evidence of Brigadier Parsons, above n 11, at 283 and following.

⁴² Discussed in chapter 8 at [17] and [20].

⁴³ As we note in chapter 8, NZDF has advised us that it does not hold a copy of ISAF’s 30 August media release, which may mean that it never received it: see chapter 8 at [21].

New Zealand's position. However, he says that this is not how he understood what the officer said to him at the time.

- [39] As we have already said, everything NZDF had heard to this time about the Incident Assessment Team's conclusion was that it was possible that there had been civilian casualties as a result of errant fire from the Apache helicopters. Lt Col McKinstry's email of 6 September (attaching the ISAF email chain) confirmed this. Given that background, advice on 7 September that the Incident Assessment Team had ruled out the possibility of any civilian casualties at all would have been an unanticipated and dramatic development, as is shown by the way Lt Col Parsons communicated the information (in bold print) in his 8 September email. Despite the pressured environment, any conscientious and reasonable officer in Lt Col Parsons' position would surely have ensured that he understood the position correctly (by, for example, double or even triple checking the information he thought he had been given, or asking what had led to the change of position or if an updated ISAF media release might be expected). Brigadier Parsons said that he did question the ISAF officer, but whatever he did was obviously insufficient to identify his fundamental misunderstanding.

Lt Col Parsons' telephone call

- [40] As we noted in chapter 8, Brigadier Parsons said under cross-examination that he realised that he had sent his email of 8 September 2010 to Colonel Kelly too quickly, and that he thought he would have addressed the matter in one of his regular telephone calls with Colonel Kelly, or perhaps Colonel Kelly's deputy, Lieutenant Colonel Karl Cummins. Brigadier Parsons said in his evidence that he would have "tried to clarify what I saw, what I believed, why I believed that", and "that I only saw that one paragraph".⁴⁴ He also advised us that at the time he had been working long hours and was under pressure as TF81 was about to start another significant operation.
- [41] When cross-examined on this, Major General (Retired) Kelly said he was on a skiing holiday at the time, so that his secure communications were patchy and having a secure phone conversation was difficult. He did not recall any discussion with Lt Col Parsons about this, although he accepted it might have happened, perhaps a few days later when he had returned from holiday.⁴⁵ He did accept, however, that by 10 December 2010 (the date of the first December briefing note to the Minister), he was aware from conversations with Lt Col Parsons that he had only seen one paragraph of the executive summary.⁴⁶ Colonel Cummins was also cross-examined about this and did not recall whether, at the time, he understood Lt Col Parsons to have read the report, or whether he was told that Lt Col Parsons had only taken what has been described as a "fleeting glance" at it.⁴⁷
- [42] On the assumption that Lt Col Parsons did raise the matter with either Colonel Kelly or Lt Col Cummins soon after the email was sent, there are two points to be made. The first is that Lt Col Parsons must have had some misgivings or second thoughts about the emphatic nature of what he had said in his email, given that he had only had a brief look at one paragraph of the executive summary. Brigadier Parsons denied this, saying that he had no doubt as to the accuracy of what

⁴⁴ Evidence of Brigadier Parsons, above n 11, at 295–296.

⁴⁵ Evidence of Major General (Retired) Peter Kelly, Transcript of Proceedings, Public Hearing Module 4 (17 September 2019) at 330–332.

⁴⁶ At 332–333.

⁴⁷ Evidence of Colonel Karl Cummins, Transcript of Proceedings, Public Hearing Module 4 (18 September 2019) at 423.

he reported; the point of his call was simply to correct the impression that he had read the whole report when he had not. However, it is difficult to see why he would have felt a need to do this at the time if it was not material in some way.

[43] The second is that whatever he told Colonel Kelly (or Lt Col Cummins, as the case may be), it did not prevent NZDF personnel from giving inaccurate accounts of the Incident Assessment Team's conclusions over the following months to the Chief of Defence Force, the Minister of Defence and, ultimately, the Prime Minister and the Minister of Foreign Affairs. So, either whatever he said did not cast doubt on what was said in the email or, if it did, that doubt was subsequently ignored by whoever received the call.

[44] Another aspect of Lt Col Parsons' interactions with Colonel Kelly is relevant in the present context. As we described in chapter 8, Colonel Kelly emailed Lt Col Parsons on 24 September with an enquiry. Under the subject heading "MINISTERS CONCERN" Colonel Kelly wrote:⁴⁸

The Min has a concern over the 22 Aug job and the media release by ISAF stating they were going to do an investigation (refer ISAF media release on their Website dated 29 Aug) into a civcas allegation stemming from our operation. This was then followed by a subsequent media release on 30 Aug which said that some rounds from the helicopter may have gone astray [and] caused some casualties.

You advised that the assessment team has now cleared all coalition forces involved in the operation and found no evidence of any civcas.

The Min wants to know how then does HQ ISAF close this loop formally, in essence what is their process and are the findings released to the media. In his mind he believes the issue is still left hanging with no formal closure.

Can you chat to whoever and give us some words that we can reassure the Minister. A signed letter from IJC [ISAF Joint Command] formally closing this process would be most useful.

See what you can do, don't sweat it but any comment would be useful.

[45] Lt Col Parsons replied to this enquiry on 29 September, as follows:⁴⁹

As to release ... of the IAT findings to the media – I am informed that this hasn't happened yet and may not. The DCOM ISAF SOF will look into it. Honestly, though – you need to steady our Minister down. There is no link from the media to say that NZ had any involvement and therefore the whole incident has passed NZ by. Furthermore the allegations levelled against the AWT [Air Weapons Team] are just that – to date, the Governor has not produced any proof of any accidental deaths despite the investigation team pressing him to do so. Moreover, our Minister should be absolutely satisfied that all NZ actions are completely defensible and undertaken with the highest standards of discipline and IAW [in accordance with]... the ROE.

Plus, he should not be concerned about any kiwi reaction should it become public knowledge – If Kiwis found out that the blokes who killed Lt O'Donnell had had another crack at Kiwis and came off second best this time – most would be very happy about it.

⁴⁸ Email from Col Kelly (HQNZDF.DSO) to Lt Col Parsons (WAATEA.SNO) "MINISTERS CONCERN" (24 September 2010, 9.37am) (Inquiry doc 13/04).

⁴⁹ Email from Lt Col Parsons (WAATEA.SNO) to Col Kelly (SWAN – HQNZDF.DSO) and @CO "RE: VISIT TO BAF DETENTION CENTRE" (29 September 2010, 6.50am) (Inquiry doc 13/26).

- [46] What is interesting about this response for present purposes is the way it is expressed. It indicates that the allegations against the air assets remain as potentially viable allegations, subject to the Governor providing proof. This is to be contrasted with Lt Col Parsons' 8 September email, which stated that the Incident Assessment Team had "categorically cleared" the air assets of any allegations and had concluded that there was "no way that civilian casualties could have occurred". On the face of it, these emails are difficult to reconcile.

Lt Col Parsons' interactions with a junior officer

- [47] The Inquiry heard evidence that around the same time that Lt Col Parsons said he saw the paragraph from the executive summary, one of his officers also became aware of the language of the paragraph through an ISAF contact. The officer had fostered relationships with equivalent officers at ISAF and asked a contact about the Incident Assessment Team's findings. The officer initially told us that he received either verbal advice or an email to the effect that the Incident Assessment Team investigation had concluded that there were no civilian deaths as a result of the actions of New Zealand forces. He said he was not given any information about the investigation's conclusion as to whether the actions of the United States air assets had resulted in civilian casualties, but everyone knew that was a possibility. Subsequently, he said he thought he had received an email over the ISAF system—an email containing text that was, as it turns out, from the paragraph in the executive summary that Lt Col Parsons saw. He said he either forwarded the email to Lt Col Parsons, also on the ISAF system, or discussed it with him.⁵⁰ In any event, he brought the email to Lt Col Parsons' attention.
- [48] As part of his periodic reporting obligation to Wellington, the officer prepared a situation report ("SITREP") dated 9 September 2010, which included commentary on the Incident Assessment Team's findings. The final version of the SITREP contained the following summary of the outcome of the investigation:
- ... the conclusion of the inquiry was that all TF 81 actions appeared to have been conducted IAW all ROE, the ISAF Tactical Directive, and according to the pre-planned CONOP. The investigation could not find any part of the operation where CIVCAS could potentially have occurred.
- [49] As will be apparent, the first sentence of this extract from the SITREP is essentially the same as the second sentence of the paragraph from the executive summary quoted at paragraph [14] above, except that the word "ISAF" has been added before "Tactical Directive". The second sentence of the extract is a modified version of the third sentence in the paragraph—the opening words ("The AF reported no CIVCAS and") are omitted and the words "their operation" are replaced with the words "the operation". Obviously, these changes make a significant difference to the meaning of the sentence. The question is, how did they occur?
- [50] The officer who drafted the report had a work station immediately beside that of the Senior National Officer—first Lt Col McKinstry, then Lt Col Parsons. He said that, while he wanted to adopt a "whole of operation" perspective,⁵¹ both officers emphasised to him that his concern was only with the actions of NZDF personnel, not with the actions of the United States air assets. He

⁵⁰ The officer may not have appreciated at the time that the text came from the executive summary. The Inquiry notes that it has not had access to the ISAF email system; in any event, it may be that emails from it are no longer available.

⁵¹ For example, the officer said he had raised the possibility of NZDF conducting an investigation when the allegations of civilian casualties emerged.

said that when he drafted his 9 September SITREP, he included language about the possibility that the Apaches' firing had resulted in inadvertent civilian casualties. This was consistent with his wish to give the full picture.

- [51] The officer said he removed the language about the United States air assets from the draft at the direction of Lt Col Parsons. The result was that the SITREP stated there were no civilian casualties on the operation and that the Incident Assessment Team investigation had found there were none. The officer said that Lt Col Parsons directed the changes to the sentence in the SITREP taken from the third sentence of the paragraph from the executive summary.⁵² While the officer preferred not to change the SITREP to remove reference to the possibility of civilian casualties, he felt able to do so because he considered that those for whom the report was written would understand that it addressed only the New Zealand position. He said that to ensure they did understand, he spoke to a Wellington-based officer by telephone to make that clear.⁵³
- [52] The officer noted that he was not privy to his commanders' reporting back to Wellington about civilian casualties on the operation. He said that the first time he realised "something was awry" was when he later saw NZDF's press release of 20 April 2011 saying that the Incident Assessment Team's investigation had concluded that the allegations of civilian casualties were unfounded. He said he became concerned because, to his knowledge, the release was inaccurate. He raised the matter with more senior officers in his team, one of whom acknowledged to us that the discrepancy was indeed brought to his attention at the time by one of his officers (although he could not recall specifically the discussion with the officer in question).
- [53] There is a question as to exactly when any exchange between the officer and Lt Col Parsons would have occurred. Lt Col Parsons visited ISAF Joint Command on the afternoon of 7 September (Afghanistan time) and his email to Colonel Kelly was sent shortly before midnight (arrived at 7.12am on 8 September (New Zealand time)). The officer's SITREP was dated 9 September and, according to the officer, was written that day. It was dispatched by email on 10 September, so the interaction likely occurred on 9 September or possibly on the morning of 10 September.
- [54] What emerges from all this? First, it is clear that the officer who wrote the SITREP did, as he claimed, receive a communication from his ISAF contact which accurately stated part of the Incident Investigation Team's conclusion about TF81's actions on Operation Burnham. That is established first by the fact that the SITREP recorded a meeting with his contact on the issue of civilian casualties and second by the two essentially identical sentences in the executive summary and the SITREP about the ground force's compliance with rules of engagement, the Tactical Directive and the concept of operations. Further, the communication which the officer received from his ISAF contact did not change the officer's existing understanding that civilian casualties were possible as a result of air asset engagements.
- [55] Second, it is equally clear that there are material differences in the language of the third sentence of the paragraph from the executive summary when compared to the equivalent sentence in the SITREP (see paragraph [48] above). The effect of these differences was that the language of the sentence in the SITREP indicated that the Incident Assessment Team had concluded that there was no part of the operation where civilian casualties could have occurred, contrary to what the

⁵² NZDF has advised the Inquiry that there are no drafts of the SITREP on its systems. The officer said he shared a very small office space with Lt Col Parsons and that he submitted the SITREP to Lt Col Parsons. We understand the changes could have been done directly on screen, so that no draft was saved.

⁵³ The Wellington-based officer has no recollection of the call.

Incident Assessment Team had in fact concluded. Who, then, was responsible for the differences in language?

- [56] As to that, it is implausible that the New Zealand officer's ISAF contact would have sent him the modified wording. First, that wording was inconsistent with, and misrepresented, the Incident Assessment Team's findings. There is no reason why an ISAF officer would have misrepresented the findings to a New Zealand officer in that way. Second, the ISAF contact would have understood that the third sentence in the paragraph from the executive summary was dealing with the TF81 assault force, which was, from ISAF's perspective, the New Zealand officer's legitimate area of interest. The New Zealand officer said his ISAF contact had told him that he would not provide the Incident Assessment Team's findings in relation to the actions of the United States air assets; he would only provide its conclusions in relation to TF81.
- [57] This means that the modifications to the sentence in the SITREP which changed the meaning of the third sentence of the paragraph from the executive summary must have been made by either Lt Col Parsons or the officer. The modified language was, of course, consistent with what Lt Col Parsons advised Colonel Kelly in his email on 8 September, namely that the allegations of civilian casualties on Operation Burnham had no basis in fact. On the other hand, the modified language was inconsistent with the officer's understanding about the possibility of civilian casualties on the part of the air assets—an understanding that was the basis of his approach to his superior officers following NZDF's inaccurate media release of 20 April 2011.⁵⁴
- [58] Brigadier Parsons said that he did not recall directing the officer to make any changes to the draft SITREP, although he acknowledged that, as Senior National Officer, he routinely reviewed and amended outward reports. He said this was, and continues to be, his practice, just as he frequently submits his drafts for review by others. Given their relative positions in the command structure and their close working proximity, it would be surprising if Lt Col Parsons did not review the officer's draft report.
- [59] Ultimately, Brigadier Parsons accepted that he might have told the junior officer to make his report specific to New Zealand. He said that anyone reading the SITREP would have interpreted it as applying only to New Zealand's position.

Conclusion and findings

- [60] We now attempt to draw all this together.
- [61] First, Brigadier Parsons accepted that what he said in the 8 September email about the Incident Assessment Team's conclusion was inaccurate and acknowledged that he did not take the care that he should have in undertaking what he accepted was an important task. He strongly denied, however, that he had deliberately misrepresented what the paragraph from the executive summary said in his 8 September email. He told the Inquiry that it was simply a genuine and reasonable mistake. He said his inaccurate description of the Incident Assessment Team's conclusion was based on two things: (a) his interpretation of the paragraph from the executive summary; and (b) what the ISAF officer said to him when he was shown the paragraph.

⁵⁴ We acknowledge, however, that even though the officer was uncomfortable with not giving the full picture in the SITREP, he was prepared to adopt the changed wording as he considered that readers of the SITREP would have understood that it applied only to the actions of New Zealand personnel. There were two other statements in the SITREP to the same effect.

- [62] As to (a), we have concluded that Brigadier Parsons' interpretation is not one that the language of the paragraph can reasonably bear in the circumstances as Lt Col Parsons knew them to be. We consider it clear that the paragraph does not have the meaning described (and emphasised) in Lt Col Parsons' 8 September email, for the reasons we have discussed above.
- [63] That said, after much consideration we accept that Lt Col Parsons in fact interpreted the paragraph in the way he said he did. We place some weight on the diary entry in reaching this view. We consider this was a case of confirmation bias: Lt Col Parsons read the paragraph in a way that supported his preconceptions—he saw what he wanted to see and discarded what he otherwise knew. Brigadier Parsons explained that at the time he had broken ribs, was working on multiple tasks and had been working non-stop for many hours. That may be a partial explanation—but it does not excuse what was a serious failure. Lt Col Parsons was the Senior National Officer and was tasked with following up and reporting back to a superior officer on an issue that he knew was of interest to the Chief of Defence Force and to ministers. On any view, the way he both interpreted and reported on the paragraph was unreasonable and unacceptable.
- [64] As to (b), we consider that the “misunderstanding” with the ISAF officer was a further element of Lt Parsons' confirmation bias—he heard what he wanted to hear. The circumstances were such that either the ISAF officer would have talked simply about the New Zealand position (which seems likely given ISAF's reticence about discussing another nation's affairs and the fact that the ISAF officer did not know Lt Col Parsons); or, if he did talk about the position of the United States air assets, he would have done so consistently with ISAF's public announcements (which accurately reflected the findings in the executive summary). Given what Lt Col Parsons knew about the Incident Assessment Team's findings in relation to the United States air assets at the time he went to ISAF Joint Command, his seniority and his position of responsibility, it is difficult to understand how there could have been a “misunderstanding” on his part about what would have been a fundamental—and sudden—change in the Incident Assessment Team's conclusions over the course of a few days. On any view of it, what he says he understood was so at odds with what he knew at the time that he needed to make further enquiries. Brigadier Parsons said that he did question the ISAF officer, but if he did, anything he asked was insufficient to identify the fundamental misunderstanding that he said occurred.
- [65] Second, we accept that Lt Col Parsons did direct the officer to change his SITREP to remove references to the possibility that the air assets had caused civilian casualties. Surprisingly in the circumstances, he did not, either then or later, advise the officer of his understanding of the Incident Assessment Team's conclusion, because the officer continued to think that the air assets may have caused civilian casualties and raised the point with his commanding officer in April 2011. If the draft SITREP contained the final two sentences from the executive summary paragraph essentially word for word, as we believe it did, then those sentences did not change the officer's understanding of the Incident Assessment Team's conclusion (that is, he did not interpret them as Lt Col Parsons had).
- [66] Further, although he seems to have been busy with a variety of matters at the time, Lt Col Parsons would have been able to consider the language more closely than he did at ISAF Joint Command—he would have had the opportunity, in other words, for more than a “fleeting glance”. Finally, we note that Lt Col Parsons accepted that he may have directed the officer to change the wording of the sentence, but said that it would have been to reflect New Zealand's legitimate area of interest (particularly from a legal standpoint), namely, the actions of New Zealand. But the changed sentence is unqualified: “The investigation could not find any part of the operation where CIVCAS could potentially have occurred.” It is also consistent with the tenor of the report

as a whole that there were no civilian casualties on the operation. We do not read the SITREP as confining this conclusion to the actions of TF81: indeed, we think it is clear that it does not.

- [67] Finally, although we accept that Lt Col Parsons genuinely misunderstood the paragraph from the Incident Assessment Team executive summary at the time he read it (albeit that he read it seeing what he wanted to see and ignoring what he otherwise knew), we consider that he had misgivings or second thoughts about the email soon after he sent it. That is why he felt the need to make a telephone call to explain that he had read only one paragraph of the report. There was no need to explain if he was certain as to the accuracy of what he had reported.
- [68] Further, we consider that his exchange with the junior officer who prepared the SITREP must have alerted him to the possibility that he had misunderstood the position. Had he advised that officer of what he thought he had learnt about the Incident Assessment Team's conclusions, his misunderstanding could have been quickly corrected. He did not advise the officer, however. Finally, the content of his email of 29 September to Colonel Kelly is not consistent with the emphatic terms of his 8 September email, as the later email recognises that the allegations that the air assets caused civilian casualties remained extant.
- [69] In short, we consider that soon after he had sent the 8 September email, Lt Col Parsons appreciated that there remained doubts about whether civilian casualties had resulted from the air assets' actions and that he had misstated the position in the 8 September email. Despite this, he took no effective steps to clarify or rectify the situation. Brigadier Parsons denied this, but we do not accept his denial.
- [70] Further, even on his own account, the circumstances which we have discussed above display such a lack of care and rigour by a senior NZSAS officer on a matter of obvious importance, both to his superiors and to the Government of the day, that whether or not he appreciated that he might have misunderstood the paragraph hardly matters. On any view, what happened was inexcusable, especially as it resulted in NZDF giving erroneous information to the Chief of Defence Force, to ministers (and through them, to Parliament) and to the public over the ensuing years.

NZDF Headquarters' acceptance of Lt Col Parsons' description of the executive summary

- [71] We now turn to the reaction of Colonel Kelly and others in NZDF Headquarters to Lt Col Parsons' advice of 8 September 2010. Surprisingly, Colonel Kelly appears to have accepted Lt Col Parsons' report without question and acted on it, despite:
 - (a) Lt Col McKinstry's reports to him and ISAF's 29 August 2010 media release, which highlighted the possibility of civilian casualties;⁵⁵
 - (b) ISAF's 30 August 2010 media release and the ISAF email chain attached to Lt Col McKinstry's reporting email of 6 September 2010, which indicated that while TF81 "had no case to answer", there was an ongoing investigation into the air assets;⁵⁶

⁵⁵ See chapter 8 at [9], [11], [13], [17], [18] and [27].

⁵⁶ See chapter 8 at [20] and [25]–[27]. Colonel Kelly prepared a Directorate of Special Operations brief for the Chief of Defence Force dated 31 August 2010, which noted that firing from one of the helicopters had fallen short and appeared to hit the roof of a house where women and children had been seen earlier. The possibility of civilian casualties from this was noted: 2010-08-31 CDF Ops Brief (31 August 2010) (Inquiry doc 13/22) at 8.

- (c) the Apache weapons video footage he had viewed, which he accepted showed the possibility of civilian casualties;⁵⁷ and
- (d) the intelligence reporting available to NZDF, which indicated that civilians may have been killed and/or injured.⁵⁸

Lt Col Parsons' email became the basis for an erroneous briefing to the Chief of Defence Force⁵⁹ and then for similarly erroneous briefing notes prepared for the Minister (to go as well to the Prime Minister and Minister of Foreign Affairs) on 10 and 13 December.⁶⁰ These erroneous briefings later resulted in NZDF making the same erroneous statements to the media and to ministers in 2011, 2014 and 2017, and in ministers making inaccurate statements in the House and to the public.⁶¹

[72] When cross-examined about this, Maj Gen (Ret) Kelly said he accepted Lt Col Parsons' description of the effect of the executive summary because it was the first time any NZDF officer had seen the document. Previously, NZDF had only had access to second-hand accounts of it. The fact that Lt Col Parsons said he had seen the source document overwhelmed anything else—Parsons' email "superseded all other information and the press releases".⁶²

[73] To be fair to Maj Gen (Ret) Kelly, we make two points:

- (a) First, it is obvious from the contemporaneous emails that he thought the Incident Assessment Team would be producing a final report and asked Lt Col McKinstry to obtain a copy as soon as possible, given the ministerial interest in the matter.⁶³ It may be that he thought Lt Col Parsons had viewed the Incident Assessments Team's final report rather than its preliminary assessment (that is, the executive summary).
- (b) Second, Lt Col Parsons' 8 September 2010 email to Colonel Kelly about the executive summary was highly misleading. Although it did indicate that Lt Col Parsons had been unable to obtain a copy, it described the Incident Assessment Team's findings in categorical terms and did not indicate that it was based on a brief reading of one short paragraph of a three-page report. That said, as we discussed at paragraphs [40]–[42], Maj Gen (Ret) Kelly did accept that Lt Col Parsons made him aware at some point that he had seen only one paragraph from the executive summary. While Maj Gen (Ret) Kelly could not recall when he learnt that, he accepted that he knew it by 10 December when the briefing note he was involved in drafting was sent to the Minister.⁶⁴ That briefing note, it will be recalled, said that Lt Col Parsons had been "permitted to read the report".⁶⁵

⁵⁷ Evidence of Major General (Retired) Peter Kelly, Transcript of Proceedings, Public Hearing Module 4 (18 September 2019) at 392.

⁵⁸ See chapter 8 at [9], [11], [13] and [18].

⁵⁹ DOT POINT BRIEF FOR CDF (Inquiry doc 08/14).

⁶⁰ NZSAS (TF81) OPERATIONS IN BAGHLAN PROVINCE AUGUST AND SEPTEMBER 2010 (10 December 2010) (Inquiry doc 09/12); CRU AND NZSAS OPERATIONS IN BAGHLAN PROVINCE AUGUST AND SEPTEMBER 2010 (13 December 2010) (Inquiry doc 09/21). The 13 December note was the result of a request from the Prime Minister for something that could be released publicly, although it was not in fact released.

⁶¹ See, for example, chapter 8 at [53], [54], [56], [82], [86], [102] and [116].

⁶² Evidence of Maj Gen (Ret) Kelly (17 September 2019), above n 45, at 334. See also Evidence of Maj Gen (Ret) Kelly (18 September 2019), above n 57, at 340–341.

⁶³ Email from Colonel Kelly (HQNZDF.DSO) to Lt Col Parsons (WAATEA.SNO) and others "RE: External Release Issue External to the Sitrep" (30 August 2010, 6.38am) *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 81.

⁶⁴ Evidence of Maj Gen (Ret) Kelly, (17 September 2019), above n 45, at 332–333.

⁶⁵ See chapter 8 at [47].

- [74] Maj Gen (Ret) Kelly emphasised in his evidence that he did not act alone in accepting Lt Col Parsons' account. He said he co-drafted the ministerial briefing note of 10 December 2010 with Colonel Mike Thompson, who was the Deputy Chief of Staff at NZDF Headquarters.⁶⁶ He also said that there was a process within NZDF Headquarters for preparing such notes, which involved a number of inputs and running a draft past NZDF's legal section. Others involved would have been aware of, for example, the intelligence reporting after Operation Burnham.⁶⁷ We accept this description of the process that was likely followed. However, it produced a ministerial briefing paper that was inaccurate in fundamental respects. That a consultative process of the type described produced such an outcome is obviously a cause for considerable concern—and, indeed, suspicion.
- [75] We acknowledge that Colonel Kelly did make some effort to understand the apparent discrepancy between what Lt Col Parsons had said about the Incident Assessment Team's findings and what ISAF had itself said. On the afternoon of 23 September 2010, Colonel Kelly sent an email to the Military Secretary in Hon Dr Wayne Mapp's office, Group Captain Edward Poot.⁶⁸ The email referred to discussions earlier that day between the Minister and the Vice Chief of Defence Force on "casualty allegations". It reported that after the allegations of civilian casualties emerged, an Incident Assessment Team was established and it found that there were no civilian casualties. As a result of the Incident Assessment Team's investigation, "all forces were cleared of causing civilian casualties, the matter was closed and no formal investigation initiated. The SNO was advised of this and he saw the written report". The email went on to note that "the SNO was adamant that ISAF will not be releasing the report even after he reinforced the national interest angle".
- [76] In his response, Grp Capt Poot said:⁶⁹
- The only critical issue that remains opaque is as follows. NATO put out a press release at the time. Our recollection is that it talks about an investigation. How does NATO close the loop with the wider public in Afghanistan (and troop contributing nations) to advise the outcome of the investigation?
- [77] The text of Colonel Kelly's email of 23 September 2010 in response to Grp Capt Poot's query is set out in chapter 8 at paragraph [35]. This was the email in which Colonel Kelly forwarded a report of the ISAF media release of 29 August (which referred to the possibility of civilian casualties from helicopter rounds landing short and hitting two buildings), describing it as "the last I saw from ISAF on this". He went on to say that he was "not aware of any other releases since".
- [78] However, ISAF had issued a further media release on 30 August 2010, in which it announced that it was recommending a further investigation.⁷⁰ Maj Gen (Ret) Kelly said in his evidence that he was not aware of the 30 August media release.⁷¹ However, in the email he sent to Lt Col Parsons

⁶⁶ In his evidence, Colonel Thompson said he did not recall being involved in the production or drafting of the 10 or 13 December 2010 briefing notes to the Minister (Evidence of Colonel (Retired) Mike Thompson, Transcript of Proceedings, Public Hearing Module 4 (18 September 2019) at 425).

⁶⁷ Evidence of Maj Gen (Ret) Kelly (18 September 2019), above n 57, at 341–344.

⁶⁸ Email from Col Kelly to Gp Capt Poot "VCDF FOR OFFICIAL USE ONLY" (23 September 2010, 3.33pm) *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 115.

⁶⁹ Email from Gp Capt Poot to Col Kelly "Report" (23 September 2010, 03.41) *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 115.

⁷⁰ See chapter 8 at [20].

⁷¹ Evidence of Maj Gen (Ret) Kelly (17 September 2019), above n 45 at 322.

on 24 September 2010 (that is, the day after his email to Grp Capt Poot), he referred specifically to ISAF's media release of 30 August as well as to that of 29 August, so he was obviously aware of it then.⁷²

- [79] Although this email does show an attempt by Colonel Kelly to obtain more clarity about Lt Col Parsons' description of the Incident Assessment Team's conclusion, it is inconsistent with what is said in the email of the previous day to Grp Capt Poot, to the effect that the ISAF media release of 29 August 2010 was the last Colonel Kelly had seen from ISAF and he was not aware of any subsequent releases. We will return to this in the conclusion section.
- [80] To summarise, as is apparent from his email of 31 August 2010,⁷³ Colonel Kelly knew that the Prime Minister and ministers were exercised about the possibility of civilian casualties on Operation Burnham and were anxious to learn the "official outcome". Presumably others at NZDF would also have been aware of the ministerial concern. In the face of that, it is obvious that care should have been taken to ascertain the true position before providing advice to the Chief of Defence Force, the Prime Minister and other ministers. As we described in chapter 8,⁷⁴ Colonel Kelly and other key officers within both the NZSAS and NZDF more generally were sent copies of media reports (both individual reports and compilations). These referred to claims of civilian casualties and to the two ISAF media releases of 29 and 30 August, so key personnel should have been aware of what was happening in-theatre. They had also received the early September email chain from ISAF, which recorded the outcome of the Incident Assessment Team's investigation.⁷⁵ On top of that, intelligence reporting indicated the likelihood (or at least possibility) of civilian casualties.
- [81] Lt Col Parsons' description of the effect of the executive summary was radically different from what was otherwise known, and what ISAF had stated publicly. While the emails discussed above show some awareness of this, nobody within NZDF Headquarters seems to have questioned Lt Col Parsons' description of the executive summary's conclusion. Rather, his description was taken as accurate. Given the obvious and significant discrepancy between the earlier reports and Lt Col Parsons' advice, some scrutiny or questioning might have been expected, yet we have seen no evidence of any. The need for such scrutiny became particularly acute when Colonel Kelly learnt that Lt Col Parsons had seen only one paragraph from the executive summary and in light of Lt Col Parsons' email to him of 29 September, which was inconsistent with what was said in the 8 September email. Overall, there appears to have been a disappointing lack of commitment and rigour to finding out what had happened.

⁷² Inquiry doc 13/04, above n 48. The relevant text of the email is set out at paragraph [44] above. It appears from the email that Colonel Kelly has confused the order of ISAF's two media releases. The first in fact refers to the possibility of civilian casualties from helicopter rounds going stray (the 29 August media release); the second refers to the ordering of a further investigation (what this report refers to as the 30 August media release: see chapter 8, footnote 35). As explained in chapter 8, there is some confusion over the respective dates given the varying dates on which the statements were reported in the media. This email shows Colonel Kelly knew about both ISAF releases although he reversed the order in which they were issued and gives the date of 29 August to the release this report refers to as the "30 August media release". 29 August is the date that was indicated on ISAF's website (now archived) In any case, the important point is that he was aware of the content of both media releases.

⁷³ Email from HQNZDF.DSO to WAATEA.SNO and others "CIVCAS REPORTING BY INTERNATIONAL MEDIA" (31 August 2010, 13.05) *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 84.

⁷⁴ See chapter 8 at [25].

⁷⁵ Email from ISAF SOF HQ CJ3 TF 81 LNO IS to ISAF SOF TF 81 OC IS and ISAF SOF TF 81 SNO IS "FW: CIVCAS INVESTIGATION ON TF81" (3 September 2010, 4.53pm) (Inquiry doc 09/14).

- [82] Despite these unsatisfactory features, we do not consider that this was part of a deliberate cover-up within NZDF Headquarters. As Colonel Kelly said in his evidence, Lt Col Parsons was regarded as a “smart lad” and a “very accomplished officer”.⁷⁶ He went on to say:

When he looked at that, he knew what he was looking at in terms of the conclusions of the report, and the way he presented that to us, that was our only factual connection to the summary of the report.

Colonel Kelly denied that there was a general interest in denying civilian casualties on an operation associated with the NZSAS.⁷⁷

- [83] We return to this in the final section of this chapter.

Video of a child’s funeral

- [84] As we said in chapter 5,⁷⁸ shortly after Operation Burnham, NZDF personnel in Bamyān received cell phone video clips which were claimed to show the aftermath of Operation Burnham. Among them were some videos of funerals of people said to have been killed as a result of the operation. We were told that one of these showed a small body wrapped for burial. Other video clips received at the same time showed, for example, damage to Abdullah Kalta’s house. NZDF provided copies of these video clips to us, with the notable exception of the video showing what appeared to be a small, wrapped body. We asked NZDF to conduct further searches for it, resulting in the production of a video that shows an adult male being prepared for burial and, later, a smaller wrapped body. To the naked eye, the size of the body suggests it is a child aged less than 10.
- [85] NZDF engaged a well-qualified expert to examine the video forensically in order to estimate the length of the wrapped body. That expert expressed the view that the body was 168 cms long; that is, the size of an average Afghan adult male. By contrast, the imagery expert engaged by the Inquiry put the body’s length at 130 cms, the size of a child approximately 8–10 years old. The difference between them may be explained by a difference of view as to where the body’s feet end in the burial wrapping. Given the range of assumptions that underlie the expert opinions, the difference may ultimately not be capable of resolution.
- [86] Based on the evidence we have heard, we are satisfied that:⁷⁹
- (a) a video clip which on the face of it appears to show the body of a child aged up to 10 prepared for burial was provided to NZDF personnel in Bamyān along with the other video clips;
 - (b) the video clips were sent electronically to TF81’s base in Kabul;
 - (c) some of the video clips are almost certainly authentic, in the sense that they can be identified with some confidence as portraying events related to Operation Burnham;
 - (d) others cannot be authenticated with assurance one way or the other; and

⁷⁶ Evidence of Maj Gen (Ret) Kelly (18 September 2019), above n 57, at 392.

⁷⁷ Evidence of Maj Gen (Ret) Kelly (18 September 2019), above n 57, at 393.

⁷⁸ See chapter 5 at [89]–[93].

⁷⁹ As we said in chapter 5 at paragraph [93], we cannot be confident that we have received all the video footage that witnesses told us they recalled seeing at the time. From the descriptions they gave, it is possible some witnesses were referring to other video footage not provided to the Inquiry.

- (e) all the videos were saved on NZDF's electronic systems and were provided to us, except the one that appears to show a child's funeral, which was only produced after we made specific enquiries.

[87] Obviously, an important question arises as to why the video that appears to show a child's body was not initially produced to the Inquiry. We understand the version now provided was sourced from the New Zealand Provincial Reconstruction Team (NZPRT)'s records in storage,⁸⁰ and that the video could not be found in any other location despite evidence indicating that it was provided to TF81 at the time.⁸¹ Given that the videos accompanying it were provided to the Inquiry earlier after NZDF found them in more accessible systems, we can only assume that this video was deleted or misfiled at some stage, most likely in Afghanistan. We return to this in the conclusion section.

Period 2: April – December 2011

[88] In relation to this time period, we conduct our assessment under two headings:

- (a) How NZDF obtained the Incident Assessment Team Executive Summary; and
- (b) Hon Dr Mapp's understanding of the possibility of civilian casualties.

How NZDF obtained the Incident Assessment Team Executive Summary

[89] While we accept that NZDF had a copy of the executive summary in 2011, and think it likely that Colonel (Retired) Jim Blackwell obtained it, we do not accept his account of how he obtained it.⁸² We note that when first approached by Counsel for NZDF and asked whether he was the person who had obtained the report, Col (Ret) Blackwell said he could not recall whether he had seen it and suggested that counsel should contact his analyst, who was still with NZDF. Counsel contacted the analyst, who was unable to find anything of relevance in NZDF's email or other records (including electronic records).⁸³

[90] When, as a result of the Inquirers' questions at the September 2019 public hearing, it became clear that Colonel Blackwell had provided a copy of the executive summary to the Office of the Chief of Defence Force in September 2011, he was contacted again and agreed to give evidence. He explained his failure to recall the executive summary when initially approached by NZDF's counsel by indicating that he was distracted at the time and he had read many such reports over the years.⁸⁴ He said that once the media reported that he was the person who had taken the executive summary to the Chief of Defence Force's office, he thought more deeply about the matter and began to recall some of the details, which he was happy to share with the Inquiry.

⁸⁰ As we said in chapter 5 at paragraph [91], the video was saved in the NZPRT's computer system in early September 2010 and had a file name indicating that it may have been showing casualties of Operation Burnham.

⁸¹ As noted in chapter 5 at [90], we are satisfied, on the basis of the oral evidence we have heard, that this video was among those sent to TF81 at the time.

⁸² We put our conclusion to Col (Ret) Blackwell as part of the natural justice process. He maintains the veracity of his account.

⁸³ Evidence of Lucila van Dam, Transcript of Proceedings, Public Hearing Module 4 (19 September 2019) at 595.

⁸⁴ Evidence of Colonel (Retired) Jim Blackwell, Transcript of Proceedings, Public Hearing Module 4 (15 October 2019) at 668.

- [91] Given what we now understand about the ability of NZDF to interrogate its electronic systems, we think it improbable that there would be no relevant electronic record if Col (Ret) Blackwell's account was correct. We think it most unlikely that there would be no electronic footprint of any of the emails dealing with the executive summary that Col (Ret) Blackwell said he sent to Afghanistan and received back, or of the executive summary being sent from Afghanistan, received in Wellington and electronically saved and filed in the Directorate of Special Operations' directory. This is especially so because we have received copies of other emails, briefings and such like generated by Colonel Blackwell in this period.
- [92] We also think it unlikely that the Senior National Officers concerned would not remember Colonel Blackwell asking them to obtain the report given the emphasis Col (Ret) Blackwell told us he placed on it. We also note that in July 2014, while Colonel Blackwell was still the Director of Special Operations, his analyst emailed a copy of the executive summary to him, which he forwarded to Lt Col McKinstry. That copy was a Word document containing a scanned version of the hard copy of the executive summary NZDF had provided to Dr Coleman and showed Dr Coleman's underlining.⁸⁵ The significance of this is that when the analyst had been looking for relevant files over the weekend, she did not find the executive summary in the Directorate of Special Operations' electronic files.⁸⁶
- [93] We are also concerned that Col (Ret) Blackwell failed to mention in his evidence that he visited Afghanistan from 28 to 31 May 2011.⁸⁷ Col (Ret) Blackwell advised us that he did not mention the visit because he considered it was irrelevant. However, it is clearly relevant, as we now explain.
- [94] Col (Ret) Blackwell said in his evidence that he made vigorous efforts from April 2011 onwards to obtain the executive summary. He accepted that from April on, he would have been "constantly asking" the Senior National Officer for a copy of the report, including by email.⁸⁸ At the beginning of May 2011, there was an exchange of emails between Colonel Blackwell and the Senior National Officer which dealt in part with Colonel Blackwell's forthcoming trip to Afghanistan.⁸⁹ The email chain comprised three emails dated 2 May, one dated 3 May, two dated 4 May, two dated 5 May and two dated 6 May 2011. Those emails covered a variety of topical matters, including that Colonel Blackwell intended to visit Camp Warehouse on the way back from a conference in Europe and arrangements for the visit. None of these emails mentions obtaining a copy of the executive summary, even though the visit would have been an obvious opportunity to do that.
- [95] Moreover, by email dated 29 May 2011, the Senior National Officer circulated a detailed programme for Colonel Blackwell's visit.⁹⁰ It included a meeting with the Commander ISAF Special Operations Forces as well as other introductions to ISAF personnel, which would have provided an opportunity to pursue obtaining a copy of the executive summary.

85 Email from Col Blackwell (HQNZDF.DSO) to Lt Col McKinstry (@CO) "FW: ISAF Op Assessment Summary" (1 July 2014, 10.15) *Supplementary Bundle for Public Hearing Module 4 – Part 2* (16 September 2019) at 77.

86 This does not necessarily mean there was no copy of the executive summary stored on the Directorate of Special Operations' electronic files as it may have been filed in a way that meant it was not picked up by the search terms used by the analyst.

87 See chapter 8 [70].

88 Evidence of Col (Ret) Blackwell, above n 84, at 702–703.

89 Emails between Col Blackwell (HQNZDF.DSO) and WAATEA.SNO "Matters External to the SITREP" (2–6 May 2011) (Inquiry doc 13/24).

90 Email from WAATEA.SNO to WAATEA.S2 and others "DSO Programme" (29 May 2011, 01.45) (Inquiry doc 13/25); see also emails between WAATEA.SNO and Col Blackwell (HQNZDF.DSO) and others, above n 89.

- [96] As we have said, Col (Ret) Blackwell's explanation for not mentioning his visit was that it was irrelevant for present purposes. He said that during the visit, he was engaged on "an urgent and strategically important task" and had more pressing concerns than obtaining the executive summary. It is, of course, possible that Colonel Blackwell's plans changed after the email exchange with the Senior National Officer at the beginning of May, which contains no indication of "an urgent and strategically important task"—quite the reverse, in fact. But if his plans did change, Colonel Blackwell did not inform the Senior National Officer of that before the latter circulated the 29 May email containing the programme for Colonel Blackwell's visit.⁹¹
- [97] The relevance of all this is that it goes to Col (Ret) Blackwell's evidence that he was "constantly asking" the Senior National Officer to obtain a copy of the report, including by email. If this was so, it is most surprising that there is no reference to obtaining the executive summary in the email exchange about his proposed visit, given the nature of exchange and what was then contemplated for the visit.
- [98] Further, our understanding (based on evidence from those with experience of ISAF's procedures in-theatre) is that the reports prepared by Incident Assessment Teams were generally made available to those with an obvious interest in seeing them. If Colonel Blackwell did not take the opportunity while in Afghanistan to speak to the Senior National Officer or anyone else about the executive summary, or do anything to obtain a copy, that indicates that he was not as vigorous in his attempts to obtain it as he indicated in his evidence, or that it was obtained by other means.⁹²
- [99] Obviously, NZDF did obtain a copy of the executive summary, probably in 2011. However, in light of the matters discussed above, we do not accept Col (Ret) Blackwell's account of how it was obtained.
- [100] In addition, we are satisfied that Colonel Blackwell did not brief either the Chief of Defence Force (Lieutenant General Rhys Jones) or Colonel Thompson about the executive summary in the way he claimed. Neither of them can remember any such briefing—or even of being told that NZDF held the executive summary. We think it improbable in the circumstances that they would have forgotten a briefing on what was undoubtedly an important document. We note that the issue of civilian casualties on Operation Burnham was topical—Dr Mapp had commented on it in an interview in April 2011 and NZDF had issued a media release;⁹³ Dr Mapp had answered a parliamentary question about it in May;⁹⁴ and in early September NZDF had circulated a statement to NZDF personnel which addressed the issue after the publication of *Other People's Wars*.⁹⁵ Given that the executive summary was inconsistent with what had been said on these occasions, we consider that both officers would have remembered a briefing of the type Col (Ret) Blackwell said he gave them.
- [101] Further, we accept what Lieutenant General (Retired) Jones told us about the way such a document would have been handled within his office in the normal course.⁹⁶ We have seen no indication

⁹¹ Col (Ret) Blackwell told us the task he was referring to was not a matter the Senior National Officer needed to know about.

⁹² As we noted in chapter 8, Col (Ret) Blackwell denied that he obtained the executive summary unofficially and said that the only person he could have received it from was the Senior National Officer: Evidence of Col (Ret) Blackwell, above n 84, at 715.

⁹³ See chapter 8 at [52]–[54].

⁹⁴ See chapter 8 at [56].

⁹⁵ See chapter 8 at [57]–[59].

⁹⁶ Evidence of Lieutenant General (Retired) Rhys Jones, Transcript of Proceedings, Public Hearing Module 4 (16 October 2019) at 989.

that the executive summary was subject to the type of analysis that would normally have been undertaken. Further, we think it relevant that we have seen no documentary evidence (such as a briefing note) that supports Col (Ret) Blackwell's account, although he said he had prepared a briefing note (which would have been a dot-point executive summary),⁹⁷ from which he would have briefed both the Chief of Defence Force and the Minister.⁹⁸

- [102] This brings us to the question of Dr Mapp's understanding of the Incident Assessment Team's conclusions.

Dr Mapp's understanding of the possibility of civilian casualties

- [103] In relation to Dr Mapp's understanding of the executive summary, the position is unclear. On the evidence available to us, we accept that Dr Mapp's understanding prior to September 2011 was based on the briefings he had received from NZDF, to the effect that the Incident Assessment Team's investigation had concluded that no civilian casualties were caused on the operation by either the ground force or the air assets. This was the position set out in the briefings he received in December 2010 and which he expressed publicly in his interview with Guyon Espiner in April 2011, for example. The question is, what was the position once the executive summary came into NZDF's possession?
- [104] Captain (Retired) Chris Hoey, the Minister's Military Secretary, said that when he received the document pack said to contain the executive summary in the Minister's office on 1 September 2011, he "flipped through" (but did not read) the documents before giving them to the Minister. He was certain he would have given them to the Minister in light of the Government's interest in matters relating to Afghanistan.⁹⁹ Col (Ret) Blackwell said in his evidence that he had a meeting with Dr Mapp about the executive summary. He said that the Minister had a copy of the executive summary, had read it and was very familiar with its contents and that they had a detailed discussion about it.¹⁰⁰
- [105] By contrast, Dr Mapp said he had a "fragmentary memory" of a meeting with Colonel Blackwell in connection with the executive summary.¹⁰¹ He said he could remember Colonel Blackwell sitting on the other side of the table, but could not remember the detail of what they discussed or being given a copy of the executive summary. If he had been given the executive summary, he was sure he would have read it. Later in his evidence he stated categorically that he had never read the executive summary and denied that he was familiar with its contents.¹⁰²
- [106] On the basis of the Minister's diary, it is likely that the briefing meeting with Colonel Blackwell would have taken place on 12 September 2011. We have Colonel Blackwell's briefing notes for that meeting. They do not mention Operation Burnham, the executive summary or civilian casualties. As to the possibility of an unscheduled meeting, that seems unlikely given first, the

⁹⁷ Evidence of Col (Ret) Blackwell, above n 84, at 714.

⁹⁸ At 712–713. Also see chapter 8 at [66] regarding notes prepared by Colonel Blackwell for a meeting with the Minister on 12 September 2011.

⁹⁹ Evidence of Captain (Retired) Chris Hoey, Transcript of Proceedings, Public Hearing Module 4 (16 October 2019) at 840.

¹⁰⁰ Evidence of Col (Ret) Blackwell, above n 84, at 748.

¹⁰¹ Evidence of Hon Dr Mapp, above n 25, at 1012.

¹⁰² At 1033. Dr Mapp was not cross-examined about Capt (Ret) Hoey's evidence that he had left the documents with him. He said he had read Capt (Ret) Hoey's brief of evidence and that he did not remember being given the report to read, and that Secret documents were kept in the Military Secretary's safe. He does not believe he had read the Incident Assessment Team report before he met with Colonel Blackwell. See Evidence of Hon Dr Mapp, above n 25, at 1012 and 1036.

lack of a relevant briefing note¹⁰³ and second, Dr Mapp's evidence that the unscheduled meetings that occurred were with the Chief of Defence Force, not Colonel Blackwell.¹⁰⁴

[107] In any event, the absence of any relevant reference in a briefing note to the executive summary or the operation, and the fact that Dr Mapp did not recall any details of what was a matter of significant interest to him, suggest that any briefing Colonel Blackwell gave Dr Mapp was short and cursory rather than detailed, and that it was, in effect, dismissive of the Incident Assessment Team's findings. Ultimately, we think it unnecessary to resolve which of the two accounts is correct. This is because the two witnesses agree in part about what happened, and this is sufficient to enable us to reach conclusions, as we now explain.

[108] Col (Ret) Blackwell said that when the Minister asked him whether there had been any civilian casualties, he described the Incident Assessment Team's report as "a standard NATO response", which was to neither confirm nor deny such casualties. He said he explained to Dr Mapp that he had seen no evidence (including the video footage, storyboard and discussions with his colleagues) that led him to believe there were civilian casualties, although the possibility could not be discounted.¹⁰⁵ Later in his evidence he said: "I had no reason to believe there were civilian casualties, but there may have been."¹⁰⁶ Dr Mapp accepted in cross-examination that Colonel Blackwell had told him that there was no evidence of civilian casualties, but they were possible.¹⁰⁷

[109] Colonel Blackwell's description of the outcome of the Incident Assessment Team's investigation was, of course, inconsistent with the position that NZDF had expressed in the briefing notes intended for the Prime Minister and ministers in December 2010, as Colonel Blackwell appreciated.¹⁰⁸ For example, the 10 December briefing note said:¹⁰⁹

... the allegations into civilian casualties and destroyed houses were investigated by a joint assessment team and they concluded that the allegations were baseless and cleared the actions of the Response Task Force and coalition air of all allegations.

Nor was it consistent with Dr Mapp's public remarks about Operation Burnham. For example, in his 24 April 2011 interview on *Q+A*, Dr Mapp was asked by Guyon Espiner about the allegations of civilian casualties on Operation Burnham, and Dr Mapp said that the allegations had been investigated and proven to be false. When asked whether he was satisfied that no civilians were killed, Dr Mapp replied that he was "satisfied around that".¹¹⁰

[110] Dr Mapp was cross-examined about the apparent contradiction between what he and NZDF had said publicly about the results of the Incident Assessment Team's investigation and what he accepted Colonel Blackwell had told him about it in 2011. Dr Mapp said that he did not think he needed to do anything to correct the public record as, based on what Colonel Blackwell told him,

¹⁰³ In his evidence, Col (Ret) Blackwell said he created briefing notes for his own use to support his briefings to the Minister which would be saved electronically: Evidence of Col (Ret) Blackwell, above n 84, at 712 and 753.

¹⁰⁴ Evidence of Hon Dr Mapp, above n 25, at 1080.

¹⁰⁵ Evidence of Col (Ret) Blackwell, above n 84, at 677

¹⁰⁶ At 678.

¹⁰⁷ Evidence of Hon Dr Mapp, above n 25, at 1085.

¹⁰⁸ Col (Ret) Blackwell said that it was this inconsistency that led him to march the executive summary into the Office of the Chief of Defence Force and to brief the Minister about it: Evidence of Col (Ret) Blackwell, above n 84, at 710–711.

¹⁰⁹ Inquiry doc 09/12, above n 60, at [11](d).

¹¹⁰ "*Q+A's* Guyon Espiner interviews Dr Wayne Mapp"—TVNZ" (24 April 2011) *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 194.

there was no “actual evidence” of civilian casualties. He ultimately accepted, however, that he should have discussed the matter with others and that he may have made the wrong decision.¹¹¹

[111] Despite Dr Mapp’s persistent refusal to acknowledge it, the inconsistency between the public statements that he and NZDF had made about the outcome of the Incident Assessment Team’s investigation and what he accepted he was told by Colonel Blackwell about its conclusions is both obvious and material. We consider that Dr Mapp should have corrected the public record when he learnt what the Incident Assessment Team had in fact found. Unfortunately, not only did he fail to correct the record, Dr Mapp also furthered the narrative that there was no possibility of civilian casualties on Operation Burnham, as we now explain.

[112] As noted in chapter 8, in the course of the natural justice process, the Inquiry learnt that a journalist had requested certain information from Dr Mapp under the Official Information Act on 12 May 2011. As soon as we learnt of the journalist’s request, we asked NZDF to provide the relevant documentation, which it did over the period 12–20 March 2020. Although we have described the journalist’s requests and Dr Mapp’s responses in chapter 8, we will set them out again for ease of reference.

[113] It will be recalled that the journalist’s first request was for the information “on which you based your recent statement [in a *Q+A* interview] that claims of civilian deaths during a raid in which NZDF personnel participated had ‘been investigated and proven to be false’”. Dr Mapp responded:¹¹²

The source of the information on which I based my statement on *Q+A* on 2 [sic] April was classified operations reporting by NZDF. *As I stated in the interview, there is no basis in fact that a number of civilians were killed during a raid in which NZDF personnel participated.*

[114] The second relevant request was for the “estimated numbers of persons killed, injured, or detained in operations where NZDF personnel have been operating alongside Afghan National security forces”. In relation to that, the Minister gave essentially the same answer as he had given to Mr Locke MP’s question for written answer in May 2011:

Any persons killed in Afghanistan during NZDF operational activities have been persons taking direct part in hostilities, and presenting a direct threat to the lives of NZDF personnel, Coalition forces, Afghan security forces or international citizens.

[115] It is necessary to understand how these responses were developed. As we noted in chapter 8, after NZDF made its public statement of 20 April 2011 that the Incident Assessment Team’s investigation had concluded that allegations of civilian casualties were “unfounded”, the junior officer whose SITREP was altered at the instigation of Lt Col Parsons pointed out to his commanding officer that NZDF’s statement was incorrect—the investigation had in fact found that civilian casualties were possible.¹¹³ We were told that, shortly after, his commanding officer attended a meeting convened to discuss the journalist’s information requests. That meeting was attended by, among others, either the Director of Special Operations or his Deputy. The commanding officer told us that he raised the need to obtain the Incident Assessment Team’s report at that meeting, on the

¹¹¹ Evidence of Hon Dr Mapp, above n 25, at 1039–1045.

¹¹² Letter from Hon Dr Wayne Mapp to [redacted] re “OIA Request 091-2011” (31 October 2011) NZDF <www.nzdf.mil.nz>. Emphasis added.

¹¹³ See paragraph [52] above.

basis that relying on a second-hand report of it was not good enough. He said that he also had a discussion with Lt Gen Jones around the same time about attempting to obtain a copy of the report.¹¹⁴

[116] The outcome of the meeting about the journalist's information requests was that responsibility for preparing answers to them was divided between two units—"NZSOF" (New Zealand Special Operations Forces—effectively, as we understand it, the Directorate of Special Operations) and another unit, with responsibility for answers to the two requests discussed above being assigned to "NZSOF".

[117] The Directorate of Special Operations produced suggested answers for the requests for which it was responsible on 26 May.¹¹⁵ In relation to the first of the requests above, the suggested answer was:

The source of the information on which I based my statement that claims that a number of civilians were killed during a raid in which NZDF personnel participated had "been investigated and proven to be false" (*Q+A* 24 April 2011) was classified operations reporting provided by the NZDF.

In relation to the second request, the suggested answer was essentially the answer in fact given by the Minister in his 31 October letter. It appears that the reason for the long delay in providing answers to the journalist's requests was that the other unit did not provide its suggested responses to the questions assigned to it until September.

[118] As we noted in chapter 8,¹¹⁶ the final sentence of Dr Mapp's response to the first information request is important. As can be seen, the draft answer that NZDF provided to the Minister's office did not include it. It must therefore have been added in the Minister's office. Whereas the journalist's question refers to information relied on by Dr Mapp when he gave his answer in April 2011, the effect of the final sentence of the answer is that the statement he gave in April 2011 continues to reflect the factual position. The effect of Dr Mapp's responses to both of these information requests, then, is to assert that there were, in fact, no civilian casualties on Operation Burnham.

[119] However, if Dr Mapp's account of what he was told by Colonel Blackwell is correct (that the Incident Assessment Team had concluded that civilian casualties on Operation Burnham were possible), the answers he gave the journalist were misleading and he should have appreciated that. When we asked Dr Mapp about this, he made two points. First, he said that the final sentence of his answer to the first request was intended to refer only to the state of his knowledge as at April 2011. The fact that it expressed a view current at the time he gave the answer to the journalist was an error. Second, he accepted that the answer to the second request was inaccurate, but said he had forgotten about his September briefing from Colonel Blackwell when he finalised the response. Dr Mapp told the Inquiry he felt personal responsibility for the deaths of Corporal Doug Grant and Lance Corporal Leon Smith, which occurred in August and September 2011 respectively. He believes these traumatic events caused him to fail to recall his September briefing with Colonel Blackwell when he responded to the journalist's information requests. Dr Mapp told us that he

¹¹⁴ In his evidence, Lt Gen (Ret) Jones referred to a discussion around this time with either Col Blackwell or Lt Col Cummins about attempting to obtain the executive summary. He said he was told that it was unlikely that it could be obtained as NZDF had already tried, unsuccessfully: see Evidence of Lt Gen (Ret) Jones, above n 96, at 467–468.

¹¹⁵ OIA-091-2011 Detainee Policy NZSOF Response Redacted (26 May 2011) (Inquiry doc 13/17).

¹¹⁶ See chapter 8, paragraph [74].

would not knowingly have given an incorrect answer; but we find it difficult to believe that Dr Mapp would have forgotten about a briefing that he received six weeks earlier on the issue of civilian casualties on an NZDF-led operation, given both his particular interests and the level of interest in the issue that ministers had previously shown.

[120] We return to this in the concluding section.

Period 3: June – July 2014

[121] Three issues require discussion in this section, although the discussion can be brief as chapter 8 addresses them in some detail. The first concerns NZDF's erroneous advice to Dr Coleman when he requested a briefing about Operation Burnham before the broadcasting of *Collateral Damage* on Māori Television, which led to the discovery of the Incident Assessment Team Executive Summary. The second concerns the fact that NZDF did not issue a media statement correcting the erroneous statement issued on 30 June. The third concerns the enquiries NZDF made at Dr Coleman's request.

[122] NZDF's initial response to learning that a television documentary about Operation Burnham would be shown was to repeat the misinformation it had previously given—the Incident Assessment Team had concluded that there were no civilian casualties. This response was despite the fact that NZDF had received the executive summary some time in 2011, and also had information showing that ISAF had ordered a further investigation based on the Incident Assessment Team's conclusions. Lt Gen Keating briefed the Minister, Dr Coleman, using the same “no civilian casualties” response, on Saturday 28 June 2014, presumably on the basis of material provided to him by his staff. Further, Commodore Smith authorised the release of a public statement to *Native Affairs* on Monday 30 June to the same effect;¹¹⁷ although by the time he did, the executive summary had been found in an NZDF safe and provided to the Minister's office.

[123] We are satisfied that Lt Gen Keating was not advised that NZDF had the executive summary until the evening of 30 June, when he received a telephone call from Dr Coleman telling him that he had read the executive summary and expressing displeasure that he had been given an erroneous briefing on the Saturday. Given that NZDF had accurate information in its possession, there can be no excuse for providing an inaccurate briefing to the Minister. As we have already said, this incident at least illustrates the inadequacy of NZDF's information storage and retrieval processes and the way information was compartmentalised within NZDF. Whether it involves more than that, we leave to the concluding section.

[124] As we noted in chapter 8, on 30 June 2014 NZDF provided a statement to *Native Affairs* which was screened following *Collateral Damage*, that it stood by its media release of 20 April 2011 and would be making no further comment. The 20 April media release had said that the Incident Assessment Team's investigation had concluded that the allegations of civilian casualties were unfounded. NZDF soon realised that its 30 June statement was incorrect, yet it did not issue a correction. When cross-examined about this, Lt Gen (Ret) Keating said that NZDF did not issue a correction because the Minister had effectively corrected the position on 1 July when he acknowledged publicly that civilian casualties were possible.¹¹⁸

¹¹⁷ Email from [redacted] to [Press Secretary] “RE: Media question regarding Baghlan Raid in AFGHAN IN 2010” (30 June 2014, 12.46pm) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Module 4, 16 September 2019) at 213.

¹¹⁸ Evidence of Lt Gen (Ret) Keating, above n 8, at 517.

- [125] We see two problems with this approach. First, NZDF had expressed a public position on a matter of public interest that it realised soon after was inaccurate. As a public organisation, it should have acknowledged its error and corrected the position publicly. In principle, that is what good public administration requires. Second, when the issue arose again in 2017 following the publication of *Hit & Run*, one of the first steps NZDF took was to look at its past media releases, which led it back to the inaccurate 20 April 2011 release. Had a correcting media release been issued in 2014, those who dealt with the initial response to the book in 2017 should not have been misled. In the result, then, in the absence of a specific direction from the Minister not to do so, we consider that NZDF should have issued a correcting media statement.
- [126] Finally, the investigation that Commodore Smith carried out following Dr Coleman's request for answers to various questions appears to have been thorough in some respects and inadequate in others. For example, Commodore Smith did initiate thorough enquires to ascertain whether there was a full Incident Assessment Team report in addition to the executive summary. He also interviewed the Senior National Officer and the Director of Special Operations at the time of Operation Burnham, Colonel McKinstry and Brigadier Kelly respectively, although there appears to be no formal record of what they said.¹¹⁹
- [127] However, in relation to the Minister's instruction that enquiries were to be made to find out how NZDF had obtained the executive summary, Commodore Smith did not follow an obvious line of enquiry based on the registers, which would have led to Colonel Blackwell. Col (Ret) Blackwell's evidence as to why he had not advised Commodore Smith that he was the person who had obtained the executive summary, was that he was not asked and so proffered no explanation.¹²⁰ The consequence was that Lt Gen Keating advised the Minister that NZDF did not know how it obtained the executive summary. Commodore Smith did not offer a convincing explanation for this obvious investigative failure.
- [128] Further, Commodore Smith did not produce a written report of the results of his work. His evidence was that he did not see himself as conducting a formal inquiry, which would have required greater formality (terms of reference, for example).¹²¹ Given the nature of the Minister's concern, we consider that a written report should have been prepared. Effective civilian control of the military, proper accountability and preservation of corporate memory required as much. If an adequate written report had been prepared and was available to those NZDF personnel responding to issues arising out of Operation Burnham later, it may have prevented errors such as occurred immediately after *Hit & Run* was publicly released in 2017.

Period 4: March 2017 – April 2018

- [129] The principal aspect for discussion in this section is NZDF's response to *Hit & Run*.
- [130] As we set out in chapter 8, the Chief of Defence Force, Lt Gen Keating, was away in Iraq when the book was publicly released at 5.15pm on 21 March 2017. The Vice Chief of Defence Force, Air Vice Marshal Kevin Short, dealt with the matter in his absence. Mr Jon Stephenson attempted to

¹¹⁹ Commodore Smith recorded notes from the interviews in his diary ("Diary Notes of Ross Smith Part 1" (June–July 2014) *Supplementary Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 20–21). See also Evidence of Commodore (Retired) Ross Smith, Transcript of Proceedings, Public Hearing Module 4 (16 October 2019) at 982.

¹²⁰ Evidence of Col (Ret) Blackwell, above n 84, at 668 and 788–789.

¹²¹ Evidence of Cdre (Ret) Smith, above n 119, at 964.

give NZDF several hours' notice of the release,¹²² although that does not seem to have registered at NZDF Headquarters. Pressed by the media for a response, NZDF's first public reaction later that evening was to repeat what NZDF had said previously about Operation Burnham, namely that the Incident Assessment Team had concluded that the allegations of civilian casualties were unfounded. Air Vice Marshal Short said that, with all that was going on, he did not immediately make the connection between the operation that *Hit & Run* addressed and the incident described in the 2014 *Collateral Damage* television programme.¹²³ However, the connection was soon made, and the briefing material provided to the Prime Minister the following day did accurately reflect the Incident Assessment Team's findings.¹²⁴

- [131] While he was still overseas, Lt Gen Keating had directed his staff to compile relevant material and undertake an analysis of what was claimed in *Hit & Run*. He directed staff to make various enquiries and tasked Colonel Grant Motley with heading a fact-finding team to establish a clearer understanding of the issues raised in *Hit & Run* and information relating to them, including by travelling overseas to make enquiries. In his public statements, Lt Gen Keating invited people with relevant information to come forward and said any allegations of offending by NZDF personnel would be taken seriously.¹²⁵ He instructed the Military Police to conduct an investigation into the assault allegations in relation to Qari Miraj.¹²⁶ This was to enable him to reach a decision about whether there was a "well founded" case sufficient to lay charges under s 102 of the Armed Forces Discipline Act 1971. Lt Gen Keating also sought permission from NATO and the United States to make available publicly the executive summary and the weapons systems videos. These requests were declined.¹²⁷
- [132] We think it clear that Lt Gen Keating treated the allegations in *Hit & Run* seriously, that he attempted to find out what had happened on Operation Burnham and that he tried to achieve greater transparency for the public about what had happened. This is what one would expect to see in any professional, well-run organisation. In other respects, however, NZDF's response fell below the standard of such an organisation.
- [133] There are two respects in particular in which we consider that NZDF's approach to the book fell below an acceptable standard. First, we consider that Lt Gen Keating erred in giving the prominence he did to the location errors in *Hit & Run* and not acknowledging that the book was accurate in important respects. For example, in a media release of 26 March 2017, Lt Gen Keating said that the central premise of *Hit & Run* was incorrect as NZDF troops never operated in the two villages identified in the book. The media release said:¹²⁸

The villages are named in the book as Naik and Khak Khuday Dad, but the NZDF can confirm that NZDF personnel have never operated in the villages.

¹²² See chapter 8 at footnote 185.

¹²³ Evidence of Air Marshal Kevin Short, Transcript of Proceedings, Public Hearing Module 4 (18 October 2019) at 1144.

¹²⁴ "170323 DPB-for-CDF" *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 260–281.

¹²⁵ "NZDF Statement on Hager/Stephenson book" *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 308.

¹²⁶ NZDF MP Incident Report III Treatment of a Detainee (May 2017) (Inquiry doc 11/24).

¹²⁷ Office of the Ombudsman "Chief Ombudsman's opinion on OIA requests about Operation Burnham" (9 April 2018) <www.ombudsman.parliament.nz> at [80] and [98]. See also "Brief notes for Prime Minister on Operation Burnham" *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 415; and "Transcript: Lieutenant General Tim Keating answers questions at Press Conference" (28 March 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 343.

¹²⁸ "NZDF Statement on Hager/Stephenson book" *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 308.

The authors appear to have confused interviews, stories and anecdotes from locals with an operation conducted more than two kilometres to the south, known as Operation Burnham.

The villages in the Hager and Stephenson book and the settlement which was the site of Operation Burnham, called Tirgiran, are separated by mountainous and difficult terrain.

Similar remarks were made by Lt Gen Keating in the course of a media conference conducted by him and the Director of Defence Legal Services, Colonel Ferris, on 27 March 2017.¹²⁹

- [134] The current Chief of Defence Force, Air Marshal Short, explained in his evidence the rationale for NZDF's approach. This was essentially to say "Let's put to one side an operation that did not happen (ie, the operation as described in *Hit & Run*), and NZDF will tell you about the operation that did take place".¹³⁰
- [135] However, the effect of NZDF's approach was to indicate that *Hit & Run* was describing a different operation when that was obviously not the case. We make two points:
- (a) The media release of 26 March 2017 (see paragraph [134]) said that NZDF never operated in Naik. While NZDF did generally refer to the area where the operation was carried out as Tirgiran village or Tirgiran Valley, some contemporaneous material also indicates that NZDF understood that there was a village named Naik in that locality. For example, the Joint Prioritised Effects List (JPEL) target pack for Kalta stated that he lived in "Dehane Nayak Village" and gave the grid reference 42SVD 2303691463 which is the exact location of A1.¹³¹ In an update setting out the intelligence gathered by the NZPRT after the 3 August attack, "Dahane Nayak" (also referred to as "Nayak") was identified as a place where Kalta might have a house and again gave a reference that is the same as the reference for A1.¹³² In addition, a reference map attached to the intelligence update delineates the intersecting river valleys where the operation took place and identifies the area as "Tirgiran/Dahane Nayak Area".
 - (b) *Hit & Run* describes an operation following the 3 August attack on the NZPRT patrol. It names Abdullah Kalta, Qari Miraj and Maulawi Neimatullah as persons identified by NZDF as having been involved in that attack and against whom the NZSAS (allegedly) sought revenge. It uses the term "Operation Burnham" which is close to NZDF's "Objective Burnham". The date given for Operation Burnham is accurate. While many of the photographs in the book are mislabelled or otherwise inaccurate, the photograph of A1 (Kalta's house) and A3 (Neimatullah's house) on page 60 is accurate. Moreover, four of the six names listed on page 126 of the book as having been killed on Operation Burnham are the same as the names that intelligence available to NZDF after the operation indicated had been killed, as we described in chapter 5.¹³³ Details such as these make it plain that the authors were talking about Operation Burnham even though the satellite imagery in the book showed the wrong location.¹³⁴

¹²⁹ "Speech notes for Press Conference on Operation Burnham" (27 March 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 316.

¹³⁰ Evidence of Air Marshal Short, above n 123, at 1142–1143. This is the Inquiry's summation of the effect of Air Marshal Short's evidence.

¹³¹ RTAF 2307 ABDUL KALTA (12 August 2010) (Inquiry doc 07/18) at 4.

¹³² KTIC TIC 03 AUG 10 (Inquiry doc 09/01) at 2.

¹³³ See chapter 5 at [74].

¹³⁴ We also note that an email from Mr Stephenson to NZDF prior to the broadcast of *Collateral Damage* in June 2014 confirmed the operation he was referring to in his questions occurred in Tirgiran village in the Tala wa Barfak District of Baghlan province. In the circumstances, this was another piece of information that ought to have indicated to NZDF that the authors were in fact talking about the same operation, in the same location. See chapter 8 at [85].

- [136] The notion that the villagers who spoke to the authors could have been describing another operation is implausible. This was not an area where there had been a visible coalition presence before Operation Burnham, as NZDF personnel knew. It would have been possible to check whether there were any subsequent operations in the area that might have confused the locals. There was Operation Nova but that could not have been mistaken for Operation Burnham and was, in any event, another New Zealand-led ISAF operation.
- [137] Consequently, we consider that Lt Gen Keating made too much of the location errors and ignored, unfairly, what was accurate in the book. We can appreciate the frustration—and anger—that he and other members of NZDF must have felt, given that *Hit & Run* made a number of serious allegations against NZDF personnel that were inaccurate and unjustified. As Lt Gen Keating noted, the allegations struck at the heart of the professionalism and integrity expected of a trained and disciplined force.¹³⁵ NZDF was, of course, entitled to respond—and to respond forcefully—but it should have focused on the issues of substance rather than on points that were of little real significance. In addition, NZDF should have been prepared to acknowledge that the book was accurate in important respects.
- [138] Similarly, we consider that NZDF's attempts to explain its use of the word “unfounded” in its public statements¹³⁶ were misguided. It will be recalled that a number of media statements issued by NZDF said that allegations of civilian casualties on Operation Burnham were “unfounded”. For example, NZDF's media release of 20 April 2011 said:

Following [Operation Burnham] allegations of civilian casualties were made. These were investigated by a joint Afghan Ministry of Defence, Ministry of Interior and International Security Force Assessment team, in accordance with ISAF procedures.

The investigation concluded that allegations of civilian casualties were unfounded.

This reflected the advice for ministers in NZDF's 10 December 2010 briefing note, as follows:¹³⁷

... the allegations into civilian casualties and destroyed houses were investigated by a joint assessment team and they concluded that the allegations were baseless and cleared the actions of the Response Task force and coalition air of all allegations.

- [139] Those statements were based on Lt Col Parsons' erroneous advice that the Incident Assessment Team had found there were no civilian casualties on the operation. We think it obvious that the “unfounded” statement was intended to mean that the possibility of any civilian casualties had been positively ruled out, and that was how the media generally interpreted it.¹³⁸
- [140] When asked about this at a media conference shortly after the publication of *Hit & Run*, Lt Gen Keating said “unfounded” meant the same as “there may have been”. His point was that although the Incident Assessment Team had concluded that civilian casualties were possible, there was no

¹³⁵ “NTM 098-2017 Defence Force Inquiries into Allegations of Offending” at [11] (30 March 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 364.

¹³⁶ “Transcript: Lieutenant General Tim Keating answers questions at Press Conference”, above n 127, at 348; “NZDF release: Op Burnham information pack” *Inquiry Bundle for Public Hearing Module 4 – Part 3* (Public Hearing Module 4, 16 September 2019) at 568; “Second release of information” (9 April 2018) *Inquiry Bundle for Public Hearing Module 4 – Part 3* (Public Hearing Module 4, 16 September 2019) at 584.

¹³⁷ Inquiry doc 09/12, above n 60, at [11](d).

¹³⁸ See, for example, David Fisher “*Hit & Run*: Why doesn't NZDF start by answering this question?” *Pundit* (online ed, 6 April 2017).

corroboration of any civilian casualties; that is, no certainty.¹³⁹ Later, NZDF said that “unfounded” only related to NZDF personnel, whose conduct had been cleared by the Incident Assessment Team—it did not refer to the conduct of the operation as a whole.¹⁴⁰ NZDF explained:

The NZDF is conscious of its responsibilities regarding allegations of use of force against civilians not participating in hostilities by its personnel. Under the Armed Forces Discipline Act (AFDA), allegations of this nature (against NZDF personnel) must be investigated where they are “well founded”. As there was no evidence produced at the time of any specific civilian casualties, and those that may have occurred were not as a result of any actions undertaken by NZDF, any such allegations were not “well founded” in terms of the AFDA. This is the reason the term “unfounded” was the particular term used in NZDF’s press releases.

When the Prime Minister, Rt Hon Bill English, was asked about this, he commented that he understood “unfounded” was a legal term.¹⁴¹

[141] While we note that NZDF appeared to acknowledge that its use of the term “unfounded” caused confusion, we think its attempt to defend the term’s use was unfortunate. The term was used because it reflected NZDF’s belief at the time that the Incident Assessment Team had ruled out the possibility of any civilian casualties on Operation Burnham. That belief was erroneous. We consider that NZDF should have simply acknowledged its mistake, rather than attempting to explain its use of the term in the way it did. We note that NZDF now acknowledges that its description of the allegations of civilian casualties on Operation Burnham as “unfounded” was incorrect.¹⁴²

[142] Finally, we mention NZDF’s stance on whether there should be an inquiry to investigate the claims made in *Hit & Run*. NZDF took the position that no inquiry was required. It explained its position in a briefing note to the Minister of Defence dated 30 March 2017.¹⁴³ In that briefing, Lt Gen Keating set out what he saw as the options available to him. These were a command investigation, a court of inquiry and a disciplinary investigation. Lt Gen Keating said that the internal enquiries that NZDF had carried out to that point were essentially command investigations, but that this process was not suitable for formally investigating allegations of unlawful conduct. He also rejected the possibility of a court of inquiry, saying such a process was inappropriate given the unsubstantiated allegations of unlawful conduct. Lastly, he rejected the option of a disciplinary investigation under s 102 of the Armed Forces Discipline Act 1971, on the basis that there was insufficient credible evidence to justify such an investigation.

[143] As we have said, we accept that NZDF took a number of steps following the publication of *Hit & Run* to make further enquiries and endeavoured to have relevant material made publicly available. We have said that this was what would be expected of a well-run public organisation. However, we also consider that NZDF was too defensive, in the sense that it was unwilling to concede what was obvious; namely that, despite the location errors, *Hit & Run* was in fact referring to Operation Burnham, and that some of the important detail in the book was accurate.

¹³⁹ “Transcript: Lieutenant General Tim Keating answers questions at Press Conference”, above n 127, at 348.

¹⁴⁰ NZDF “Second release of information after Ombudsman direction” (November 2017) NZDF <www.nzdf.mil.nz>.

¹⁴¹ Nicholas Jones “PM: No Inquiry into SAS allegations in Afghanistan” *The New Zealand Herald* (online ed, 3 April 2017) <www.nzherald.co.nz>.

¹⁴² Paul Radich QC *Closing submissions for NZDF following September and October hearings* Submission to Inquiry (1 November 2019) at [1].

¹⁴³ “NTM 098-2017 Defence Force Inquiries into Allegations of Offending”, above n 135, at [14].

- [144] Moreover, NZDF was unwilling to admit error on its part. As an organisation, it had at the outset misled the Prime Minister, ministers, members of Parliament and the public about the possibility of civilian casualties on Operation Burnham, describing the allegations as “unfounded”.¹⁴⁴ NZDF did acknowledge in public comments in 2017 that civilian casualties were possible,¹⁴⁵ and Lt Gen Keating accepted that NZDF had missed opportunities to clarify the position, which, he said, happened for a variety of reasons over a lengthy period, including before he became Chief of Defence Force. A partial explanation for NZDF’s overly defensive approach may be that the two authors have been persistent critics of NZDF over a number of years. Yet criticism, even if it is sometimes unwarranted, is part and parcel of the culture of a liberal democracy such as New Zealand’s; organisations such as NZDF have to accept that and be prepared to address criticism constructively, with an open mind. As Mr Stephenson reminded us, the Fourth Estate plays a vital role in a free and democratic society, and public institutions need to recognise this.¹⁴⁶

Drawing it all together

- [145] Taken as a whole, the factual account set out in chapter 8 and the analysis in this chapter do not reflect well on NZDF as an organisation. NZDF acknowledged in its submissions following the hearing on the “cover-up” allegations that it made a number of missteps in relation to its public statements on Operation Burnham, but denied any intention to mislead or conceal information from the public.¹⁴⁷
- [146] It is worth re-stating the constitutional framework relevant to the discussion which follows. As we explained in chapter 2, two fundamental constitutional principles are at issue—civilian control of the military and ministerial accountability to Parliament and through that, to New Zealanders. The successful operation of those two principles is critically dependent on NZDF providing ministers with accurate, comprehensive and timely information. Where NZDF provides ministers with inaccurate or incomplete information, the two principles cannot operate effectively.
- [147] Both Mr Nicky Hager and Mr Jon Stephenson, through their respective counsel, contested NZDF’s denial of any intention to mislead or conceal information in their submissions following the public hearing into the “cover-up” allegations. Mr Hager submitted that some senior members of NZDF deliberately misrepresented what they knew about the likelihood of civilian casualties to their colleagues, to the Government and to the public so as to avoid greater scrutiny of their actions and the associated repercussions.¹⁴⁸ This was part of a culture that was hostile to criticism and involved “multiple acts of active dishonesty”.

¹⁴⁴ NZDF continued to attempt to justify its use of “unfounded” in the material it published on its website in March and April 2018 following Ombudsman direction: see chapter 8 at [125].

¹⁴⁵ “NZDF Statement on Hager/Stephenson book” (26 March 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 308–309; “Speech notes for Press Conference on Operation Burnham” (27 March 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 316–322; “PowerPoint presentation for Press Conference” (27 March 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 323–339.

¹⁴⁶ One senior officer acknowledged in evidence to us that when the book was released he saw it as an attack on the credibility of NZDF and his initial response may not have been as balanced as it should have been. He considered that NZDF as an organisation reacted defensively, and should have been more willing to step back and take a broader view of what the authors were trying to say. He emphasised, however, that there was also an obligation on those making allegations to do so in a balanced way.

¹⁴⁷ *Closing submissions for NZDF following September and October hearings*, above n 142, at [6].

¹⁴⁸ Counsel for Mr Nicky Hager *Submission on behalf of Nicky Hager in relation to Public Hearing 4* Submission to Inquiry (1 November 2019) at [2.1]–[2.2].

- [148] Mr Stephenson’s argument, supported by a careful analysis of the evidence, is encapsulated in the opening paragraph of his submissions:¹⁴⁹

After Operation Burnham occurred, materially misleading statements were made by New Zealand Defence Force to the Minister of Defence ... and to the public on whether civilian casualties (CIVCAS) had occurred and how allegations of CIVCAS had been investigated: a matter of immense public interest. There is considerable evidence to suggest that this conduct was not only sustained but deliberate. This conduct seems symptomatic of a culture in which accuracy and accountability were not valued. It may have included a coordinated agreement to cover up mistakes that were made. Based on the evidence presented at Public Hearing 4, it is open to the Inquiry to conclude that the NZDF’s culture and systems leave it vulnerable to repeating this behaviour.

- [149] One striking feature of the aftermath of Operation Burnham was that NZDF did no internal investigation into the allegations of civilian casualties. Nor does NZDF appear to have given serious thought to doing so,¹⁵⁰ even though intelligence suggested that civilians had been killed during the operation and it received a video that appeared to show the funeral of a child. As Counsel for Mr Stephenson emphasised, at the time of Operation Burnham NZDF did not have its own internal process for investigating allegations of civilian casualties. When Sir Jerry Mateparae was Chief of Defence Force, work was underway to prepare a Defence Force Order about how to address allegations of civilian casualties, but for one reason or another that work was never completed.¹⁵¹ The result was that NZDF relied on the Incident Assessment Team’s investigation. But that investigation was a preliminary assessment, designed to ascertain whether a fuller investigation should be ordered, as it ultimately was. NZDF knew that ISAF Incident Assessment Team investigations were not intended to replace national investigations, if warranted.¹⁵² Given that Operation Burnham was a New Zealand-led operation, albeit carried out under the authority of ISAF, and that NZDF knew that the Prime Minister and ministers were exercised by the issue of civilian casualties, there was an obvious case for some form of investigation, even if informal; yet none was conducted.¹⁵³ Meanwhile, TF81 moved on to other operations almost immediately.

- [150] NZDF’s approach is to be contrasted with that of the Australian Defence Force, at least when Sir Angus Houston was its Chief of Defence Force. He described his approach as follows:¹⁵⁴

In Australia, while I was CDF, we conducted an Inquiry or investigation whenever there were confirmed or alleged civilian casualties. This was important from a transparency and accountability aspect. This was in addition to any other investigation by other bodies or agencies including ISAF, the United Nations, and the International Committee of the Red Cross.

¹⁴⁹ Counsel for Mr Jon Stephenson *Closing submissions of counsel for Jon Stephenson following Public Hearing 4* Submission to Inquiry (4 November 2019) at [1].

¹⁵⁰ Given the allegations of civilian casualties, an NZDF officer in Camp Warehouse raised the possibility of NZDF undertaking an investigation with the Senior National Officer. He was told that ISAF had investigated: the actions of New Zealand forces were lawful and New Zealand had no ability to address the actions of United States forces.

¹⁵¹ Evidence of Lt Gen (Ret) Sir Jerry Mateparae, above n 1, at 75.

¹⁵² See, for example, Evidence of Colonel Rian McKinstry, Transcript of Proceedings, Public Hearing Module 4 (17 September 2019) at 210; Evidence of Maj Gen (Ret) Kelly (18 September 2019), above n 57, at 350.

¹⁵³ NZDF submitted that the enquiries made by Lt Col McKinstry and Lt Col Parsons about obtaining a copy of the executive summary amounted to an “informal investigation” in the nature of a command investigation. Those efforts fall significantly short of what we regard as an “investigation”, even an informal one.

¹⁵⁴ Sir Angus Houston, former Chief of the Defence Force of Australia “The military context” (Public Hearing Module 1, 4 April 2019) at 14.

- [151] Although NZDF did not have a specifically developed mechanism for investigating allegations of civilian casualties, we consider that an investigation in the nature of a commander's inquiry could have been conducted, at least in the first instance. The Armed Forces Discipline Act 1971 provides for the establishment of courts of inquiry and one was established after the death of Lieutenant Tim O'Donnell to establish the circumstances of his death. However, a court of inquiry would not necessarily be the best means of conducting an investigation of the type required in this instance. Besides the absence of a specifically adapted mechanism, it seems clear there was concern about the resource implications of NZDF conducting investigations itself,¹⁵⁵ although, as we have said, it did devote resources to investigating the circumstances of Lieutenant O'Donnell's death. Senior officers in Afghanistan were also influenced by the fact that NZDF had no jurisdiction in relation to the actions of the United States air assets.¹⁵⁶ Despite this, we consider that there is much to be said for the approach outlined by Sir Angus Houston, particularly where the operation at issue is New Zealand-led—as we will discuss further in chapter 12.
- [152] In making our assessment of what occurred, we have been conscious of the fact that we have subjected the events at issue to close scrutiny, whereas for those involved they were part of a wide range of daily activities and concerns. Despite this, we consider that there is ample justification for the views we have reached, as set out below. We begin with some specific findings and end with an overall conclusion.
- [153] First, we consider that Lt Col Parsons' misinterpretation of the paragraph from the executive summary resulted from confirmation bias—he saw what he wanted to see. In that sense Lt Col Parsons made a genuine mistake when he misinterpreted the paragraph. However, in all the circumstances, his mistake was not, as he claimed, a reasonable one. He was a senior officer and was charged with fulfilling a task on an issue that he knew was important to the Chief of Defence Force and to ministers. Given what he knew about developments in relation to the possibility of civilian casualties from the emails and ISAF's media releases, we consider it inexcusable that he failed to provide his superior officers with a correct statement of the Incident Assessment Team's conclusions, especially if—as he claimed—he thought that they had completed their investigation. We do not regard a heavy workload or insufficient time to familiarise himself with ISAF procedures as a sufficient explanation—much less an excuse—for his errors. We see his misunderstanding of what the ISAF officer told him in the same way.
- [154] In addition, we consider that Lt Col Parsons realised soon after he sent his email that he may have misdescribed the Incident Assessment Team's conclusions; yet he failed to take any effective steps to correct the position or to find the true position. We consider that his interactions with the officer about the wording of the SITREP should have caused him to reassess matters. In any event, his email of 29 September to Colonel Kelly shows that by that time he must have appreciated that the possibility of civilian casualties from errant Apache helicopter rounds striking buildings had not been ruled out.
- [155] In summary, Lt Col Parsons failed to ensure that he obtained and relayed accurate information about the Incident Assessment Team's findings and failed to take adequate steps to rectify the position once he appreciated that he may have misinterpreted the paragraph.

¹⁵⁵ See, for example, Evidence of Maj Gen (Ret) Kelly (18 September 2019), above n 57, at 395; Evidence of Air Marshal Short, above n 123, at 1163.

¹⁵⁶ Evidence of Lt Gen (Ret) Keating, above n 8, at 625–626.

[156] Second, we consider that Colonel Kelly and other senior officers within NZDF Headquarters were too willing to accept uncritically Lt Col Parsons' account, given that it was inconsistent with the significant amount of other credible information they held about the operation, which came from a variety of sources, including ISAF and the weapons video footage. While they may well have had many other pressing issues to address, the outcome of Operation Burnham was something that ministers were not only interested in but, as Colonel Kelly put it in a contemporaneous email, were "exercised" about. Ministers were entitled to accurate and complete reporting from NZDF. They did not receive it. As we have said, without the provision of full and accurate information, the principles of civilian control of the military and ministerial responsibility to Parliament cannot operate effectively. They did not operate effectively in this instance. Some NZDF personnel responsible for dealing with this matter showed a lamentable lack of a collective commitment to finding out what the true position was and an equally lamentable failure to take individual responsibility to ensure that this was done properly.

[157] Third, it is disturbing that the 10 December 2010 briefing note for the Minister of Defence¹⁵⁷ not only reported the inaccurate advice in Lt Col Parsons' 8 September email, but also added to the inaccuracies:

- (a) First, the briefing note stated that Lt Col Parsons had been "permitted to read the report", when one of its authors, Colonel Kelly, knew that Lt Col Parsons had been permitted to read only one paragraph of the report.
- (b) Second, the briefing note quoted language from Lt Col Parsons' email in such a way that it appeared to be a quote from the Incident Assessment Team itself.
- (c) Third, the briefing note stated that the Incident Assessment Team had concluded that "the allegations of civilian casualties *and destroyed houses*" were baseless.¹⁵⁸ However, Lt Col Parsons' 8 September email was concerned with civilian casualties and said nothing about the allegations that had been made and reported in the media about the destruction of houses.¹⁵⁹

When cross-examined about the first inaccuracy, Maj Gen (Ret) Kelly said simply that the drafting was "sloppy".¹⁶⁰ When cross-examined about the second inaccuracy, he said this was "another error".¹⁶¹

[158] Moreover, the briefing note characterised Operation Burnham in a way that was misleading and likely to result in misunderstandings on the part of ministers. This was because it stated that "the CRU, supported by the NZSAS, developed an operation plan targeting the insurgent leadership". We explained in chapter 4 why that characterisation is inaccurate.¹⁶² It simply does not accord with the reality of what occurred. The Afghan Crisis Response Unit (CRU) had little to no involvement in planning the operation.¹⁶³

¹⁵⁷ Inquiry doc 09/12, above n 60. Also see chapter 8 at paragraphs [45]–[50].

¹⁵⁸ Emphasis added.

¹⁵⁹ Nor, for that matter, did the paragraph of the executive summary that Lt Col Parsons read.

¹⁶⁰ Evidence of Maj Gen (Ret) Kelly (17 September 2019), above n 45, at 333.

¹⁶¹ Evidence of Maj Gen (Ret) Kelly (18 September 2019), above n 57, at 352. There was no cross-examination on the third point.

¹⁶² See chapter 4 at [44]–[46].

¹⁶³ Maj Gen (Ret) Kelly suggested that there were diplomatic sensitivities at play here. We do not see how they could possibly justify an inaccurate description in a briefing to a New Zealand minister.

- [159] This document was a briefing note to the Minister. It was intended to be provided as well to the Prime Minister and the Minister of Foreign Affairs. The briefing note was fundamentally inaccurate both in the way it characterised the operation and in its presentation of the Incident Assessment Team's conclusions:
- (a) The characterisation of the operation as CRU-led cannot be the result of sloppiness or inadvertent error. Apart from anything else, the fact that planning an operation of the complexity of Operation Burnham was beyond the capacity of the CRU must have been well understood by Colonel Kelly and others involved in the drafting of the note. We consider that the misleading characterisation of the operation in the note was an attempt to further the partnering narrative, which had been an important part of the Government's decision to authorise Operation Wātea in 2009. Moreover, it is difficult to see how a quotation taken from Lt Col Parsons' email could inadvertently have been presented in the briefing note as a quotation from the Incident Assessment Team's conclusion.
 - (b) Greater care should have been taken to provide accurate information about the Incident Assessment Team's investigation—"sloppiness" and "errors" in reporting by senior NZDF officers to ministers on matters of such moment are unacceptable.
- [160] These matters go to the core of New Zealand's constitutional arrangements in relation to the military. The provision of inaccurate information to ministers about Operation Burnham undermined the efficacy of civilian control of the military; it also undermined the principle of ministerial accountability to Parliament. This is unacceptable. In this particular context, Colonel Kelly failed to meet the standards required of him. It goes beyond failing to exercise the standard of care and diligent oversight that ministers and the public were entitled to expect from a senior officer in his position; regrettably, it also involves the presentation of a narrative about the respective roles of the CRU and the NZSAS on Operation Burnham that Colonel Kelly must have appreciated was not in accordance with the facts.
- [161] Fourth, there is a question as to exactly what happened after the officer whose report was altered at the direction of Lt Col Parsons pointed out to his commanding officer that NZDF's media statement of 20 April 2011 was incorrect. As we noted in chapter 8, we were told that, shortly after, the commanding officer attended a meeting at which the journalist's Official Information Act request of 12 May 2011 was discussed and queried why NZDF did not have a copy of the Incident Assessment Team's report. However, any misgivings about the accuracy of NZDF's understanding of the Incident Assessment Team's conclusion, as expressed in the 20 April 2011 media statement, were not reflected in the answers ultimately given by Dr Mapp to the journalist on 31 October 2011. In the circumstances, it is difficult to see how this could have been an inadvertent error, particularly if, as we discuss below, Dr Mapp was, like Colonel Blackwell, aware of the true position concerning the Incident Assessment Team's investigation from mid-September 2011.
- [162] Fifth, we accept that NZDF obtained a copy of the executive summary sometime in 2011 and that Colonel Blackwell likely obtained it. However, we do not accept his account of how he received it; nor do we accept that he gave full explanations of what it said to any of Lt Gen Jones, Colonel Thompson or Dr Mapp. Despite this, what Dr Mapp accepted Colonel Blackwell did tell him about the executive summary was sufficient to alert Dr Mapp to the fact that the advice provided to him by NZDF about civilian casualties in the December 2010 briefing papers was wrong; that the public statement made by NZDF in April 2011 was wrong; that what he said in his interview with Guyon Espiner on 24 April 2011 was wrong; and that his written answer

to Mr Locke's parliamentary question in May 2011 was wrong. Furthermore, in light of what Dr Mapp accepted Colonel Blackwell told him in mid-September 2011, he ought to have been aware that the two answers he gave to the journalist's Official Information Act requests on 31 October 2011 were inaccurate.¹⁶⁴ In addition, the *Native Affairs* programme on 30 June 2014 reported that Dr Mapp had told the programme that it had always been clear to him, based on his briefings from NZDF, that there were no civilian casualties on Operation Burnham. Again, this was not an accurate statement in light of what he accepted he had been told by Colonel Blackwell.

- [163] Accordingly, Dr Mapp did not simply fail to correct the public record—he continued the false narrative that the Incident Assessment Team had found there were no civilian casualties on the operation even though he knew the true position about its conclusion, which was that civilian casualties were possible. Obviously, this was a significant departure from the standards expected of ministers and contributed to the persistence of NZDF's false narrative in subsequent years.¹⁶⁵
- [164] Sixth, during its various submissions and evidence, NZDF asked rhetorically why it would “cover up” the findings of the Incident Assessment Team given its conclusion that TF81 had “no case to answer”.¹⁶⁶ However, as we have said, it is apparent from the documentary record that the Prime Minister and ministers in 2010 were concerned at the possibility of civilian casualties, no matter who caused them. As Sir Jerry Mateparae accepted, *any* civilian casualties on an operation in which TF81 was involved would have caused concern.¹⁶⁷ Had evidence of civilian casualties been clear and incontrovertible, we believe NZDF would have faced up to that. But as there was no such evidence, NZDF was content to rest on the Incident Assessment Team's findings that TF81 had “no case to answer” and was unwilling to look more broadly. NZDF did not make any significant effort at the time to investigate the possibility of civilian casualties on the operation. In our view, it should have, as we discuss further in chapter 12.
- [165] Seventh, we believe the events in late June and July 2014 showed a surprising level of ineptitude and disorganisation within NZDF Headquarters. The Chief of Defence Force, Lt Gen Keating, briefed the Minister on 28 June on the basis of the material provided to him by his staff. That material did not include the executive summary, even though it was in a safe in NZDF Headquarters. Accordingly, the briefing repeated the erroneous position taken in the December 2010 ministerial briefing notes and NZDF's April 2011 public statement, to the effect that the Incident Assessment Team had concluded that there were no civilian casualties on Operation Burnham. On learning later that NZDF had the executive summary, Lt Gen Keating asked how it could be that he was not advised of it. The evidence shows that the executive summary was found essentially by chance. The enquiry which Lt Gen Keating ordered into how NZDF acquired it was ineffectual and failed to pursue obvious lines of investigation. It appears that Colonel Blackwell was not spoken to and did not volunteer any information. No written report was prepared for the Minister on the outcome. None of this inspires confidence in NZDF's processes at the time, and it does much to undermine the principle of civilian control of the military.

¹⁶⁴ See chapter 8 at paragraphs [74]–[75].

¹⁶⁵ Dr Mapp accepted in cross-examination that he should have spoken to someone about what Colonel Blackwell had told him: Evidence of Hon Dr Mapp, above n 25, at 1044 and 1063–1064.

¹⁶⁶ See, for example, Paul Radich QC *Opening Submissions for NZDF at September Hearing* Submission to Inquiry (16 September 2019) at [20].

¹⁶⁷ Evidence of Lt Gen (Ret) Sir Jerry Mateparae, above n 1, at 26.

- [166] Eighth, we accept that Lt Gen Keating took a range of steps following the publication of *Hit & Run* to find more information about Operation Burnham and its aftermath and to get that information into the public arena. As far as they went, these steps were commendable. However, we consider that the location mistakes made in the book were given more emphasis than they deserved. To some extent, this is understandable, given that the book made a range of serious allegations about the conduct of TF81 troops and the air assets that were unjustified. Despite this, it is important that an organisation such as NZDF approaches such matters dispassionately, based on the facts. On such an approach, it would have been obvious that the operation on which the book focused was Operation Burnham. It would also have been obvious that even though the book contained significant inaccuracies, there was much in it that was accurate, and NZDF should have acknowledged this. In addition, instead of attempting to explain away NZDF's earlier use of the term "unfounded" in the way it did, NZDF should have candidly acknowledged that it was wrong when it said the Incident Assessment Team had concluded that allegations of civilian casualties were unfounded.
- [167] Finally, there is the video showing what appears to be a wrapped body (we will refer to it as the funeral video). As we have said, NZDF recently provided an expert opinion which states that the wrapped body in the funeral video is of a length (168 cms) that indicates it is an adult. The Inquiry's expert reached a different view and considers that the length of the body is consistent with that of a child (130 cms). We make two points about this.
- (a) First, the Inquiry has seen no evidence that NZDF undertook this type of expert forensic analysis of the funeral video when it was received immediately after Operation Burnham, despite the fact that, to the naked eye, the wrapped corpse appears to be that of a child.
 - (b) Second, ultimately it does not matter for present purposes whether or not the funeral video does depict a dead child. What is important is that the Inquiry was informed by a number of witnesses that shortly after Operation Burnham, the NZPRT obtained various videos said to be related to the operation. Some obviously are related to it. The funeral video was provided at the same time and given a file name to the effect that it showed possible victims of Operation Burnham. It has been confirmed to us that the funeral video was, along with the other videos, passed on to TF81 personnel at TF81's base in Kabul, where it was viewed to determine its authenticity. Witnesses believed that NZDF had not been able to determine whether the video related to Operation Burnham and gave no indication that any specialist analysis had been undertaken to determine what was depicted or its size. All witnesses who recalled the video continued to believe that it showed the funeral of a child. We think it surprising that NZDF did not undertake some form of investigation itself, given the funeral video and the post-operation intelligence reports indicating the possibility of civilian casualties.
- [168] Although NZDF was able to provide us with the other videos sent to TF81, it did not provide a copy of the funeral video until, after specific questions from the Inquiry, NZDF found a copy of it in the NZPRT's files in storage. This raises an obvious question: why was NZDF unable to produce the funeral video from its systems when it had been able to produce the other videos provided to TF81 at the same time? In the circumstances, we consider the most likely explanation is that the funeral video was deleted or misfiled, most likely in Afghanistan. Whether this was a matter of inadvertence, poor record keeping or an attempt to hide potentially embarrassing evidence we cannot now determine.

- [169] To conclude, the issue which we have been addressing in chapters 8 and 9 is whether NZDF engaged in a “cover-up” in relation to the possibility of civilian casualties on Operation Burnham. A “cover-up” is an attempt to hide the truth about something that may be seen as blameworthy. Standing back and considering the events we have examined overall, we do not believe that there was a widespread conspiracy within the top echelons of NZDF to “cover up” the possibility of civilian casualties Operation Burnham, either in 2010 or subsequently. We consider it implausible that there was a coherent strategy of that type extending over a number of years within NZDF. We also consider that, had there been clear evidence of civilian casualties on Operation Burnham at the time, NZDF would have faced up to the consequences of that.
- [170] That said however, the evidence is clear that in the months immediately following the operation, the actions of some senior NZSAS personnel resulted in NZDF advancing what was a false narrative, namely that the Incident Assessment Team had concluded that there were no civilian casualties on Operation Burnham. This false narrative was advanced to the Chief of Defence Force, to the Prime Minister, to relevant ministers and eventually to the public. It was advanced even though some within NZDF either knew or suspected, or had strong reason to suspect, that the narrative was false. There was no proper scrutiny of it by senior NZSAS officers at the outset—contrary evidence was unjustifiably ignored or minimised. Even if there was not a deliberate attempt among a group of senior officers to suppress the truth, the cumulative effect of what they did (or failed to do) was precisely that—to suppress the truth.
- [171] In addition, having obtained the executive summary in 2011, those NZDF personnel who were aware of its contents, together with the then Minister, Dr Mapp, effectively ignored what it said. The executive summary was placed in a safe and forgotten about. No attempt was made to correct the public record at the time, either by the relevant NZDF personnel or the Minister. NZDF’s systems were such that when the issue of civilian casualties on Operation Burnham arose again in June 2014, the executive summary was at first overlooked and was then discovered only by chance, although that did not prevent the repetition of the false narrative, initially at least.
- [172] We accept that more was done in 2017, after the publication of *Hit & Run*. Even so, NZDF’s response was disappointing. NZDF was too defensive; it was too quick to seize upon errors in the book; it was unwilling to acknowledge the respects in which the book was accurate; and it was unwilling to acknowledge the full extent of its own errors over the years. Regrettably, NZDF’s response appears to have been affected by a degree of personal animosity towards the authors.
- [173] The failures which we have described in this chapter are not simply failures on the part of individuals; nor are they simply failures of organisational structure or systems. They are also failures of culture. NZDF is subject to the control of the minister, who in turn is accountable to Parliament. NZDF is also subject to the Official Information Act, with its emphasis on transparency within state organisations to the extent possible. On the basis of what we have seen in this Inquiry, it appears that the culture within NZDF was not fully accepting of the constraints and disciplines inherent in those fundamental principles. If it was, it is difficult to see how events such as we have described could have occurred.

- [174] Obviously, what we have described above is unacceptable in a system in which the military is under civilian control and where ministers are answerable to Parliament. There is an issue as to whether NZDF's culture, organisational structure and systems leave it vulnerable to repeating unsatisfactory behaviour of the type described. That depends substantially upon whether the steps taken by Lt Gen Keating and his successor, Air Marshal Short, to remedy matters are proving adequate and, importantly, whether ministers and the public can have confidence that they are proving adequate. We return to this in chapter 12, where we set out a range of recommendations designed to address some of the issues which arise from our analysis.

10

Operation Yamaha: detention policy and the law

Chapter 10

- [1] As discussed in chapter 3, Qari Miraj played a leading role in the ambush that resulted in the death of Lieutenant Tim O'Donnell. He was placed on the Joint Prioritised Effects List (JPEL) and was captured in a partnered operation involving Task Force 81 (TF81) and Afghan personnel on 16 January 2011 (Operation Yamaha). *Hit & Run* alleges that after he was captured, Miraj was assaulted by TF81 personnel as he was waiting in the back of a vehicle to be driven to a detention facility operated by the Afghan National Directorate of Security (NDS)¹ in Kabul.²
- [2] *Hit & Run* further alleges that while in detention at the NDS facility, Miraj was tortured and made a confession. It is alleged that New Zealand ought to have been aware of the practice of torture of those in NDS custody, and that due to the prohibition against torture, New Zealand should not have been involved with handing him over to a facility where he was tortured.³ The book alleges that the New Zealand Special Air Service (NZSAS) benefitted from Miraj's confession.⁴
- [3] In light of these allegations, cl 7.8 of the Inquiry's Terms of Reference requires us to examine:⁵
- Whether the 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.
- [4] As with other provisions in cl 7, cl 7.8 must be read in the context of cls 5 and 6 of the Terms of Reference. Clause 5 provides that the matter of public importance which the Inquiry is directed to consider is "the allegations of wrongdoing by NZDF forces in connection with Operation Burnham and related matters". Clause 6 provides that the Inquiry will examine the circumstances of Miraj's transfer and/or transportation to the NDS.
- [5] The direction in cl 7.8 to consider whether Miraj's treatment was "proper" in light of (among other matters) the *Evans* decision⁶ means that the Inquiry must consider the merits of New Zealand's policy relating to detention as implemented by the New Zealand Defence Force (NZDF).⁷ In this chapter, we will first describe New Zealand's detention policy at the relevant time. We will then put the policy in its legal context, to explain why it matters. Finally, we will discuss the government's reaction to the decision in *Evans* to see what, if any, impact it had on the policy prior to Operation Yamaha. For ease of reference, there is a timeline at the conclusion of chapter 11.

1 The NDS was Afghanistan's domestic and external intelligence agency. It conducted intelligence gathering, surveillance, arrests/detentions and prosecutions of those suspected of crimes against national security.

2 Nicky Hager and Jon Stephenson *Hit & Run: The New Zealand SAS in Afghanistan and the meaning of honour* (Potton & Burton, Nelson, 2017) at 84–85.

3 At 87–89.

4 At 89.

5 *Terms of Reference: Government Inquiry into Operation Burnham and related matters* (11 April 2018).

6 *R (oao Maya Evans) v Secretary of State for Defence* [2010] EWHC 1445. See discussion from paragraph [72] below.

7 The Crown argued for a more limited interpretation of the word "proper": see Dr Penelope Ridings and Ian Auld *Memorandum of Counsel for the Crown Agencies in response to Public Hearing Module 2 Submission to Inquiry* (13 June 2019) at [13]. We do not accept that the limited interpretation for which the Crown argued is what the Terms of Reference contemplated.

- [6] In Chapter 11 we will describe what happened on Operation Yamaha—its planning and execution. We will then briefly describe relevant developments in relation to the detention policy after Operation Yamaha, before concluding with our assessment in light of the facts of Operation Yamaha.

New Zealand's detention policy

- [7] To place New Zealand's policy on detention in its proper context, it is necessary to recall three points. First, following the collapse of the Taliban Government in late 2001, Afghanistan was a dysfunctional state. Torture and mistreatment were widespread in state facilities. An important element of the United Nations' response, especially through the International Security and Assistance Force (ISAF) and the United Nations Assistance Mission in Afghanistan (UNAMA), was to recognise that the responsibility for providing security and law and order throughout Afghanistan rested with the Afghan people. In practice, this was done by encouraging the development of Afghan institutions and agencies in a way that enhanced respect for the rule of law—including human rights norms in particular.
- [8] Obviously, change would be slow and many setbacks were likely. In 2011, UNAMA reported that of those detainees who said they had been tortured by the NDS, nearly all stated that they were abused during interrogations to obtain confessions, reflecting the fact that the Afghan criminal justice system was confession-based.⁸ For a number of years, other international experts, United Nations rapporteurs and international Non-Governmental Organisations had made similar observations about the risks associated with the confession-based criminal justice system, the treatment of detainees in Afghan facilities and the lack of effective oversight or investigations.⁹ In 2007, for example, the United Nations High Commissioner for Human Rights noted that there were frequent reports of torture and ill-treatment by the NDS.¹⁰ When the Security Council renewed ISAF's mandate in late 2007 by way of Resolution 1776, reconstruction and reform of the prison sector to improve respect for human rights and the rule of law was added as a key part of the mandate.¹¹ In January 2011, the United Nations High Commissioner noted concern about ISAF states' reliance on the NDS as the "*de facto* recipient" of detainees, given (among other things) reports of forced confessions.¹²

⁸ United Nations Assistance Mission in Afghanistan (UNAMA) *Treatment of Conflict-Related Detainees in Afghan Custody* (October 2011) at 2.

⁹ See, for example, reports by M Cherif Bassiouni (*Report of Cherif Bassiouni, independent expert on the situation of human rights in Afghanistan* UN Doc E/CN.4/2005/122 (11 March 2005)); Amnesty International (*Afghanistan: Detainees transferred to torture: ISAF complicity?* (13 November 2007)); the UN High Commissioner for Human Rights (*Compilation prepared by the Office of the High Commissioner for Human Rights, in accordance with paragraph 15(b) of the annex to human rights council resolution 5/1 – Afghanistan* UN Doc A/HRC/WG.6/5/AFG/2 (9 March 2009)); Afghanistan Independent Human Rights Commission (*The Situation of Detention Centres and Prisons in Afghanistan* (2009) and *Treatment of Conflict-Related Detainees in Afghan Custody* (2011)); and the Committee against Torture (*List of issues prior to the submission of the 2nd periodic report of Afghanistan* UN Doc CAT/C/AFG/Q/2 (21 July 2010)). This is not an exhaustive account of all reports or information on this issue.

¹⁰ *Report of the High Commissioner for Human Rights on the situation of human rights in Afghanistan and on the achievements of technical assistance in the field of human rights* UN Doc A/HRC/4/98 (5 March 2007) at [56] and [66].

¹¹ Heath Fisher "Overview of Engagement with Partners in Afghanistan to Detention Issues" (Public Hearing Module 2, 23 May 2019) at [8].

¹² *Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Afghanistan and on the achievements of technical assistance in the field of human rights* UN Doc A/HRC/16/67 (19 January 2011) at [43] and [46].

- [9] As the Crown acknowledged in submissions during Public Hearing Module 2,¹³ New Zealand was well aware in the mid-2000s that there were serious concerns about the treatment of individuals in Afghan detention facilities from reports such as those just referred to. Like other countries contributing forces to ISAF, the New Zealand Government appreciated that its forces would be operating in an environment where torture and mistreatment of detainees continued to occur, albeit perhaps with less frequency over time as conditions changed.
- [10] Second, as we noted in chapter 2, both the Security Council and ISAF had been encouraging countries contributing forces to ISAF to partner with local Afghan forces for some time.¹⁴ When the Government was asked to deploy the NZSAS to Afghanistan in 2009, it was to take over the role of Norwegian forces in mentoring and partnering with a specialist police unit, the Afghan Crisis Response Unit (CRU). Operating in partnership with Afghan personnel was an integral part of the 2009 NZSAS deployment.
- [11] Third, when Cabinet authorised the deployment in July 2009, it distinguished between two categories of detainee. This reflected the position ISAF had adopted in its standard operating procedures some years earlier.¹⁵ The first category comprised people captured by NZSAS personnel, and the second category comprised people captured by Afghan forces in the presence of NZSAS or other ISAF personnel—as generally occurred during operations conducted jointly by the NZSAS and the CRU (partnered operations).¹⁶ The Government saw New Zealand’s responsibilities to each group as being different, as we explain below.
- [12] These elements were confirmed in Operational Directive 001, issued by the TF81¹⁷ Senior National Officer in September 2009.¹⁸ It noted that NZDF had been directed to provide a Special Operations taskforce for a period of 12 to 18 months, which would enhance the reputation of New Zealand in carrying out its operations.¹⁹ Partnering with local Afghan forces to provide security to the Afghan people was noted as the area in which TF81 would have the greatest effect.²⁰ TF81’s role was to plan and assist in the conduct of operations, including by providing the information necessary for arrest warrants to be issued. The Directive drew a distinction between detention by the CRU and the detention of individuals by TF81 personnel.²¹

Individuals captured by NZDF forces

- [13] If an individual was captured by TF81 personnel operating on their own, or with troops from another ISAF state where TF81 was the lead force, a range of protective provisions would apply

¹³ Fisher, above n 11.

¹⁴ See, for example, SC Res 1776 (2007), which encouraged ISAF member forces “to train, mentor and empower the Afghan National Security Forces, in particular the Afghan National Police” and stressed the importance of “increasing the effective functionality, professionalism and accountability of the Afghan security sector”.

¹⁵ ISAF SOP 362, promulgated in 2006.

¹⁶ 10 August 2009 Cabinet Decision Minute – Afghanistan 2009: Deployment of NZSAS (10 August 2009) (Inquiry doc 01/06); 3 July 2009 Cabinet Paper Cover Sheet – Afghanistan: 2009 Deployment of the NZSAS (Operation Watea) (3 July 2009) (Inquiry doc 01/03), annex 3.

¹⁷ The NZSAS contingent in Afghanistan on Operation Watea was initially designated Task Force 81 (TF81). This task force designator changed on 24 March 2011 (see Post Operation Report SNO Op Watea (3 May 2011) (Inquiry doc 11/14) at [2]). After that date, it was known as Task Force 954. To avoid confusion, we use the term “TF81” throughout since that was the designator for most of the period with which we are concerned.

¹⁸ TF81 (Rotation1) Operational directive 001 (September 2009) (Inquiry doc 05/09).

¹⁹ At [1], referring to CDF Operational Directive 21-2009 (Inquiry doc 05/03).

²⁰ At [9].

²¹ See, for example, Inquiry doc 05/09, above n 18, at 6, 8, 20, 22, 24–26 and enclosure 3 at [1].

to the transfer of that person to Afghan custody. New Zealand accepted that its international obligations in relation to the torture and mistreatment of detainees applied and that it was obliged to take steps to fulfil these obligations, including by making arrangements for monitoring a detainee's treatment in custody.²²

- [14] We were advised that in 2006 New Zealand obtained verbal assurances from senior officials in the Afghan Government that detainees transferred to Afghan custody by New Zealand forces would be treated humanely, in accordance with International Humanitarian Law and International Human Rights Law.²³ The assurances also addressed the issue of the death penalty. Following the North Atlantic Treaty Organization (NATO)'s urging, they were finalised in a written arrangement in 2009, which was signed by NZDF and the Afghanistan Ministry of Foreign Affairs.²⁴ The annex to the arrangement contains a complementary Military Technical Arrangement between the Government of New Zealand and the Government of the Islamic Republic of Afghanistan.
- [15] The Arrangement sets out the principles and procedures to govern transfers in Afghanistan from NZDF to the Afghan authorities. Both sides agreed to observe the applicable principles of international law in the transfer and treatment of such persons.²⁵ As to detention visits, there was provision for representatives from the Afghanistan Independent Human Rights Commission, the International Committee of the Red Cross (ICRC) and NZDF to have full access to persons detained by NZDF and transferred to Afghan authorities.²⁶ NZDF undertook to notify the other agencies where a person had been transferred. The Afghan authorities accepted record-keeping and notification obligations.²⁷ The Arrangement between Afghanistan and New Zealand, as well as internal NZDF Directives, operated alongside ISAF's standard operating procedures on the handling of detainees.
- [16] Under the detention guidance noted by Cabinet, persons detained by NZDF personnel were not to be transferred or handed over to Afghan authorities or to other ISAF coalition forces without the prior approval of the Chief of Defence Force or the Commander Joint Forces New Zealand.²⁸

Individuals captured on partnered operations

- [17] If an individual was captured during a partnered operation involving TF81 and Afghan forces, the approach was that Afghan personnel would arrest the person, generally by executing an Afghan

22 We note that some states consider the existence of effective assurances and monitoring programmes are one factor they may take into account when assessing whether a person faces a real risk of torture. The Committee against Torture considers that assurances and monitoring arrangements do not, by themselves, relieve states of their *non-refoulement* obligation: see Committee against Torture *Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland* CAT/C/GBR/CO/5 (24 June 2013) at [18]–[19] and Committee against Torture *General comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22* CAT/C/GC/4 (4 September 2018) at [20].

23 Fisher, above n 11, at [15].

24 Arrangement between Afghanistan MFA and NZDF concerning the Transfer of Persons between the NZDF and Afghan Authorities (12 August 2009) (Inquiry doc 05/32). "Arrangements" are, essentially, agreed between two or more countries and are sometimes described as "less than treaty level instruments". They are not strictly legally enforceable, although they do set out the moral and political commitments and practical expectations of each side.

25 Inquiry doc 05/32, above n 24, at [2].

26 At [4].

27 For discussion of the equivalent Australia/Afghanistan arrangement, see Paul A Cronin "Australian Detention Operations in Afghanistan: Practices and Challenges" in Gregory Rose and Bruce Oswald *Detention of Non-State Actors Engaged in Hostilities: The Future Law* (Brill Nijhoff, Leiden, 2016).

28 Inquiry doc 01/03, above n 16, annex 3 at [9].

arrest warrant, unless they were not reasonably available do so.²⁹ The operation was considered an “Afghan-led” law enforcement operation in which the arrested person was detained by Afghan officials. Accordingly, the provisions on transfer and monitoring of detainees that applied where NZDF personnel made a detention in a non-partnered operation did not apply. This was the case even if NZDF had (with the exception of signing and executing the arrest warrant) been largely responsible (in a practical sense) for the entire operation—initiating it, planning it and carrying it out, even to the point of drawing up the warrant.

- [18] As is reflected in the Crown Agencies’ submissions,³⁰ New Zealand’s policy was that its obligation not to hand over detainees to another state if there were substantial grounds to believe the detainees faced a real risk of torture (*non-refoulement* obligation)³¹ did not apply to individuals arrested by Afghan officials on partnered operations. This was because, unlike those detained by TF81 personnel, they never came within New Zealand’s “jurisdiction”. Since these individuals were never in New Zealand’s jurisdiction, TF81 personnel did not “transfer” them into Afghanistan’s jurisdiction—they were always within it. As a consequence, New Zealand had no legal power to intervene and any attempt to do so would have been a breach of Afghanistan’s sovereignty. However, the Crown Agencies did accept that New Zealand was subject to an obligation to ensure that any assistance provided to Afghan authorities did not amount to aiding or assisting any intentionally wrongful act.³²
- [19] The practical effect of New Zealand’s detention policy was significant. Most of the operations in which TF81 personnel were involved during Operation Wātea were partnered operations during which Afghan authorities made arrests. So the effect of the New Zealand policy was that New Zealand did not accept any responsibility for the treatment in detention of most of the people TF81 personnel were involved in capturing. We were told that during Operation Wātea TF81 detained only one person itself (compared with the nearly 200 persons captured on partnered operations). It is worth noting that, up until April 2010, ISAF standard operating procedures for detainee handling did not apply to people detained on partnered operations. However, it was recognised that detention was a national issue, so that states could lodge national caveats, or pursue bilateral arrangements,³³ to ensure compliance with their own international legal obligations as they saw them or with national policy positions. The ISAF procedures also did not restrict states, such as New Zealand, from adopting a policy that would afford the same (or similar) protections to people detained during partnered operations as were applied to those detained by a state’s forces acting on their own. We return to this in chapter 11.
- [20] Before we move on to outline the significance of the detention policy in terms of the applicable law, we should briefly address the topic of mentoring.

Mentoring

- [21] The concept of “mentoring” is a broad one, covering a wide range of possible approaches. The ultimate objective of ISAF forces mentoring local police or army units in Afghanistan was to

²⁹ Inquiry doc 01/03, above n 16, annex 3 at [1].

³⁰ Paul Rishworth QC and Ian Auld *Memorandum of Counsel for Crown Agencies* Submission to Inquiry (16 August 2019) at [11]–[13].

³¹ We discuss *non-refoulement* obligations at paragraphs [36]–[37].

³² Rishworth and Auld *Memorandum*, above n 30, at [15].

³³ NTM NZDF Operations – Afghanistan (31 August 2011) (Inquiry doc 05/11) at [9]. Bilateral arrangements could, for example, extend certain protections or processes (including monitoring or other mechanisms) to detainees captured in partnered operations.

develop their capability by raising their level of knowledge, developing their technical and operational skills and experience and enhancing their appreciation of procedural norms and human rights considerations. Obviously, for any mentoring to be effective, the CRU had to have access to the right type of equipment, which was by no means a given. On Operation Burnham, for example, the CRU members did not have night vision goggles.

[22] The nature and intensity of the mentoring required by an ISAF partner depended on the characteristics of the group being mentored and the nature of the particular operation being undertaken:

- (a) Mentored groups might comprise people who were essentially raw recruits (many illiterate) with little in the way of adequate equipment or relevant skills and experience (even basic skills such as map reading), through to groups at the other end of the spectrum who were reasonably well equipped and had relevant skills and experience which they were seeking to improve.
- (b) Operations might differ markedly in terms of focus and complexity. Active insurgent leaders or fighters were of interest from an armed conflict perspective and from a domestic law enforcement perspective. Even though operations to capture them were likely to serve both armed conflict and law enforcement objectives, some operations might be essentially routine law enforcement operations while other operations with more of an armed conflict focus were likely to be significantly more complex and challenging.

[23] Because the nature and style of the mentoring undertaken had to respond to the needs of the particular group in the particular operational context, many variations in approach were possible. At one end of the spectrum, local forces could be taken on an operation but given no or very little organisational or operational responsibility—essentially they would be observers. At the other end of the spectrum, the local forces might take the principal responsibility for organising and undertaking an operation, but with some guidance from their mentors along the way—they would be primary actors, with the mentors observing and providing advice/oversight.

[24] In a minute in May 2011, the Senior National Officer summarised the capability that the CRU had reached in the following way:³⁴

CRU is now capable of conducting unilateral operations of low complexity. Recent acquisitions of [redacted], Russian AK47s and [redacted] have enabled a recent capability leap. Since then CRU has demonstrated a consistent ability to move [redacted] to the target, [redacted] cordon, clear the target and conduct exploitation. While there is still room for refinement, this demonstrates a pleasing progress towards the full spectrum of unit functions. The focus will now reorientate to developing CRU capability on complex unilateral operations.

[25] Later in the minute, the Senior National Officer commented on the impact of a reduction in the size of TF81 on its mentoring role with the CRU. Having noted that the reduction presented a number of challenges and opportunities, he said:³⁵

The emphasis of the CRU relationship will now move away from partnering/mentoring toward a true mentoring/observing relationship. This will force the CRU to take more responsibility for its day to day function and the conduct of its operations. Such an approach will have its challenges and not be without setbacks.

³⁴ Inquiry doc 11/14, above n 17, at [15].

³⁵ At [26].

In concluding his report, the Senior National Officer said that “[t]he period covered by this report has seen clear capability leaps by CRU towards an ability to conduct complex unilateral operations and respond effectively to the insurgent threats within Afghanistan”.³⁶

- [26] Two points emerge from this. First, a distinction is drawn between “partnering/mentoring” and “true mentoring/observing”, which reflects what we have said about the breadth of the notion of “mentoring”. The second is that even after approximately 18 months of intense mentoring by TF81 personnel, and despite the progress they had made, the CRU was only capable of conducting operations of “low complexity” on its own, although their capability was developing. This point was also confirmed in other evidence considered by the Inquiry.
- [27] Apart from issues relating to the equipment, knowledge, skills and experience of Afghan partner forces, two further issues in relation to partnered operations were significant:
- (a) As was generally the case with ISAF’s Special Operations Forces, most of TF81’s work was intelligence-driven. Much, probably most, of that intelligence could not be shared with Afghan partner forces for security reasons. Over time, TF81 personnel attempted to get around this difficulty by using the intelligence they had acquired to develop legally admissible evidence that could be used within the Afghan criminal justice system—as a basis for arrest warrants, prosecutions and so on.
 - (b) TF81 personnel tended to provide information about impending operations to the CRU or other relevant Afghan partner forces at a late stage to avoid the possibility of leaks, such as the particular target being tipped off. Allegiances within Afghan government forces were not always (or only) to the central government.
- [28] The reality that partnered operations could involve very different arrangements, depending on the characteristics of the local partner and the nature of the particular operation, raises the important question of whether the New Zealand policy in relation to detention on partnered operations took sufficient account of the particular role of the partner force in the particular operation. We will address this in greater detail in chapter 11.

The legal setting

- [29] We turn now to the second of the topics identified in paragraph [5]; namely, the significance of the detention policy implemented by NZDF—why it matters in terms of New Zealand’s international obligations in relation to the torture or mistreatment of detainees. We give a brief overview of the law relating to torture and mistreatment of detainees. Most of what we describe is not disputed. Two issues are contentious, however. They are:
- (a) Whether and, if so, when, a person detained on a partnered operation falls within New Zealand’s “jurisdiction” for the purpose of New Zealand’s obligations in relation to torture.
 - (b) On what basis one state can be held complicit in another state’s breach of its obligations in relation to torture.

³⁶ Inquiry doc 11/14, above n 17, at [32].

- [30] Complex legal and operational issues arise when one state delivers people, or assists in the delivery of people, to agencies or places where detainees may be tortured and those places are located in, or controlled by, another state. The prohibition against torture is one of the most important rules in the international legal order and it gives rise to a number of fundamental obligations. A problem sometimes encountered in these circumstances is that torture may occur despite national laws and government efforts to eradicate the practice—that is, when a state is genuinely committed to reform but lacks sufficient practical control over its agencies at the local level.³⁷ This creates difficult challenges, to which other states and international actors must be alert when engaging with, or assisting, a state where torture is known to occur.
- [31] The law of torture contains a number of different elements, derives from various legal sources and has spawned a vast literature. We will not attempt to traverse the law in detail, but rather we set out below a brief outline of its key features and what it requires in practical terms. To do this, we address three essential issues:
- (a) the sources of law—where it is found and how it is described in key instruments and relevant guidance;
 - (b) the content and status of the law—what it requires states to do, and the importance of the rules internationally;
 - (c) the application and consequences of the law—to whom it applies, where, and what happens when breaches occur.

Sources, content and status of the law on torture

- [32] The law obliges states to prevent and respond to torture, as well as to cruel, inhuman or degrading treatment or punishment. This law is found at local, regional and international levels, and appears in criminal, humanitarian and human rights law treaties. In addition to treaties, the law on torture can be found in customary international law as well as general international law. The expectations of states with respect to torture and its prevention are extensive. The prohibition of torture sits in the top level of the hierarchy of international legal rules. It reflects the global conscience and has the status of international constitutional law.³⁸

Treaties

- [33] In terms of treaties, the most well-known subject-specific treaty is the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (the Convention

³⁷ The Committee against Torture, for example, has recognised the responsibility of states in instances of abuse in privately operated facilities, particularly where a state has failed to exercise due diligence to prevent torture by those actors: conveniently summarised in Rachel Murray and others *The Optional Protocol to the Convention against Torture* (Oxford University Press, Oxford, 2011) at 71.

³⁸ We use the term international constitutional law in the same sense as it is used by Thomas Kleinlein and Anne Peters, “International Constitutional Law” (12 May 2017) Oxford Bibliographies <www.oxfordbibliographies.com>; “The notion ‘international constitutional law’ refers to norms of public international law with a constitutional character or function. Thus understood, international constitutional law can be divided into three broad subcategories: (1) fundamental norms which serve a constitutional function for the international legal system at large, (2) norms which serve as constitutions of international organizations or regimes, and (3) norms which have taken over or reinforce constitutional functions of domestic law.” See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 43 at [161] (*Bosnian Genocide* case); and *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Rep 422, at [68] and [99].

against Torture).³⁹ The Convention against Torture is a global convention, the provisions of which demonstrate the repugnance with which the international community views torture. New Zealand and Afghanistan are both parties to the Convention and are bound by its terms.

- [34] The Convention prohibits torture and requires states to criminalise torture in their domestic laws. The definition prohibits the following conduct:⁴⁰

... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, where such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

The definition is broad: it is not limited to physical suffering; it covers torture committed for a variety of purposes; and captures the conduct not only of those who commit torture directly, but also those who consent to it or who acquiesce in it (that is, who turn a blind eye or otherwise fail to act).

- [35] Acts of torture, as defined in the Convention, must be criminalised in domestic law.⁴¹ So, too, must attempts to commit torture and complicity.⁴² Sentences or penalties for commission, attempt and complicity must reflect the gravity of the offences.⁴³ If there are reasonable grounds to believe torture or ill-treatment has occurred, states must investigate promptly and impartially.⁴⁴ The obligation to investigate does not depend on a complaint being made.⁴⁵ The prohibition on torture is absolute: torture cannot be justified by any exceptional circumstances (war, threat of war, internal political instability or public emergencies). States must also take a range of effective legislative, administrative, judicial and other measures to prevent torture in their jurisdiction.
- [36] In addition to the prohibition on torture and other obligations, a keystone of the Convention—which is relevant to a number of modern cross-border and international situations—is the obligation of *non-refoulement*. A state must not expel, extradite, or return (*refouler*) a person to another state if there are substantial grounds to believe that the person returned would be subject to torture.⁴⁶ The rule is described in slightly different ways in different treaties, but it is ultimately focused on returns that take place “in any manner whatsoever”.⁴⁷ At its heart, the rule is about not exposing an individual to a situation of risk. The duty is, therefore, primarily concerned with

39 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987). New Zealand signed the Convention on 14 January 1986 and ratified it on 10 December 1989. Afghanistan signed on 4 February 1985 and ratified on 1 April 1987.

40 Art 1.

41 Art 4(1).

42 Art 4(1).

43 Art 4(2).

44 Arts 12 and 16.

45 *Blanco Abad v Spain* (1998) CAT Communication No 59/1996 (14 May 1998) at [8.6]; *Ltaief v Tunisia* (2003) CAT Communication No 189/2001 (14 November 2003) at [10.6]. Article 13 of the Convention provides that states must establish a process so people who wish to make complaints are able to do so.

46 Convention against Torture, above n 39, art 3(1).

47 See the Convention relating to the Status of Refugees 189 UNTS 150 (opened for signature 28 July 1951, entered into force 22 April 1954), art 33(1).

the effects of state conduct rather than its form.⁴⁸ When assessing that risk, a state can take into account, among other things, whether “gross, flagrant or mass violations of human rights” occur in the receiving country.⁴⁹

[37] We highlight four points about the *non-refoulement* obligation:

- (a) First, the “gross, flagrant, or mass violations” consideration applies to violations of human rights, not only to torture. To assess the torture risk, a sending state can and should look at a country’s overall human rights record as well as the character, gravity and scale of detainee mistreatment in that country. In evaluating these factors, it is important to look not only at the number of allegations made or proven. It is well known that torture is often under-reported and, in some cases, evidence may be hard to obtain or verify. Qualitative features (including patterns of behaviour by officials or common themes in complaints) may be more useful than numbers alone.
- (b) Second, the threshold of “substantial grounds to believe” may be reached even when torture is not officially sanctioned or part of a policy—torture may occur as a result of, or despite, state policies. Genuine public or private statements about commitment to change should be welcomed, as should steps taken towards reform. It may be the case, however, that despite best efforts, torture continues to be a problem. When assessing risk in these contexts, an appropriate degree of caution is necessary, especially when allegations may be made or where the issues to be addressed will take time to resolve.
- (c) Third, while the risk of torture must be more than a mere possibility (the risk must be “real”), it does not need to be shown to be probable or certain. The rule is preventive and, where doubt exists, a state should err on the side of caution. A preventive approach can cause resource, relationship or other challenges for states. Despite these challenges, the significance of torture and the imperative nature of its prevention calls for a correspondingly high level of effort and effective measures.
- (d) Fourth, and importantly, as far as we are aware it has not been suggested that individuals need to be in a state’s legal custody for the obligation to be triggered. As scholars in this field explain, treaty and UN Charter bodies have not generally focused on the type of transfer: if a person is in a state’s legal *or physical* custody, *non-refoulement* can apply.⁵⁰ Depending on the circumstances, relatively brief periods of custody, legal or physical, may be capable of engaging a state’s legal obligations. The absence of an exhaustive list of transfer scenarios is understandable given *non-refoulement*’s preventive nature and the fact that transfers occur in a wide range of settings.⁵¹ Some transfers are complex and may involve a number of actors working together. As written, *non-refoulement* under the Convention against Torture

48 James C Hathaway *The Rights of Refugees under International Law* (Cambridge University Press, Cambridge, 2005) at 318 (as to *refoulement* in refugee law) and (on *refoulement* more widely under customary international law) Sir Elihu Lauterpacht and Daniel Bethlehem “The scope and content of the principle of *non-refoulement*: Opinion” in Erika Feller, Volker Türk and Frances Nicholson (eds) *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press, Cambridge, 2003 (2005 reprint)) at 159.

49 Convention against Torture, above n 39, art 3(2).

50 Nigel Rodley and Matt Pollard *The Treatment of Prisoners under International Law* (3rd ed, Oxford University Press, Oxford, 2009) at 172–173.

51 Manfred Nowak and Elizabeth McArthur *The United Nations Convention against Torture: A Commentary* (2008) at 195–196).

covers “*all measures* by which a person is physically transferred to another state”,⁵² and United Nations organs, such as the General Assembly, have referred to the obligation not to expel, return (*refouler*), extradite, or in any other way transfer a person.⁵³ As seen above, New Zealand’s detention policy accepted that New Zealand’s *non-refoulement* obligations applied when NZDF personnel captured a suspected insurgent in Afghanistan and wished to hand that person over to Afghan or other authorities, but not when NZDF personnel were involved in a partnered operation during which Afghan authorities made an arrest.

- [38] The core obligations (that is, the prohibition on committing torture, the *non-refoulement* obligation and the obligation to prevent) do not exist in neatly defined “silos”; they are interdependent and mutually reinforcing. As well as deriving from multiple sources of law, the content of the obligations can overlap. Returning or transferring a person despite a real risk of torture, for example, is at once a breach of *non-refoulement*, may amount to co-commission of torture or complicity in torture, and clearly falls short of the obligation to take all necessary measures to prevent. The connection between these three obligations is readily apparent in law enforcement, military and counter-terrorism settings, and has been explained by the United Nations Special Rapporteur on Torture, as well as other international experts.⁵⁴ We return to them when we assess the New Zealand approach.
- [39] In 2004, the United Nations adopted the Optional Protocol to the Convention against Torture (OPCAT). It requires member states to establish a system of regular, independent inspection of detention facilities at the local level, as well as permitting in-country visits by the United Nations. New Zealand has been a party to this treaty since 2007 and has developed a detailed framework for monitoring the treatment of people in detention.⁵⁵ Afghanistan became a party in 2018.
- [40] The prohibition against torture is also found in several other international human rights treaties (such as arts 7 and 9 of the International Covenant on Civil and Political Rights (ICCPR) and equivalent provisions in the Universal Declaration of Human Rights 1948). Regional treaties such as the European Convention on Human Rights mirror this international law in large part and a rich body of case law has developed over the years in relation to the prohibition of torture and related obligations.⁵⁶ Non-treaty documents developed by the United Nations, states and sometimes international organisations (“soft law” instruments) are also relevant.⁵⁷ Although not binding, they often contain important standards and practical guidance about how states can or should fulfil their international obligations and how torture can be prevented in practice.

52 J Herman Burgers and Hans Danelius *The UN Convention against Torture—A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Martinus Nijhof, Dordrecht, Boston, London, 1988) at 126 (emphasis added); and Lauterpacht and Bethlehem (above n 48, at 163) on the scope of *non-refoulement* under customary international law and its focus on the effect (compared to the form) of conduct.

53 See, for example, *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* GA Res 74/143 at [7]; and Rodley and Pollard, above n 50, at 173 (referring also to the UN Human Rights Council).

54 See, for example, Report of the Special Rapporteur on torture UN Doc A/HRC/37/50 (26 February 2018) at [39]; and *The approach of the Subcommittee on Prevention of Torture to the concept of prevention of torture* UN Doc CAT/OP/12/6 (30 December 2010) at [1]–[3].

55 Natalie Pierce “Implementing Human Rights in Closed Environments: The OPCAT Framework and the New Zealand Experience” in Naylor, Debeljak, and Mackay (eds) *Human Rights in Closed Environments* (Federation Press, Annandale, NSW, 2014).

56 At 168; Rodley and Pollard, above n 50, at chapter 4.

57 These include the Standard Minimum Rules for the Treatment of Prisoners (1957, 1977 and 2016); the Code of Conduct for Law Enforcement Officials (1979); and the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2001).

- [41] Additionally, International Humanitarian Law prohibits torture and requires preventive steps to be taken. For a non-international armed conflict of the type in which New Zealand was engaged in Afghanistan, Common Article 3 and Additional Protocol II to the Geneva Conventions are relevant and applied. Common Article 3 expressly prohibits violence to life and person (including murder, mutilation, cruel treatment and torture) and outrages upon personal dignity, in particular humiliating and degrading treatment. Common Article 3 also requires “minimum standards for detention”.
- [42] In his expert evidence to the Inquiry, Professor Emeritus Sir Kenneth Keith QC emphasised these provisions. He said that Common Article 1 “requires the State parties in all circumstances not only to respect the Conventions but also to ensure respect for them”.⁵⁸ He went on to say:⁵⁹

[The obligations undertaken in the Conventions] are unilateral obligations owed by each and every State party to all others or really to the people who are to be protected; the principle of humanity is at stake. The ICRC Commentary to the article states two propositions, among others, relating to the obligation that interests protected by the conventions are of such fundamental importance to the human person that every State party has a legal interest in their observance, wherever a conflict may take place and wherever its victims may be; and that they do everything reasonably within their power to ensure that the provisions are respected universally – by other States and non-state parties.

Relevantly, the duty to “ensure respect” applies to the prohibition against torture or mistreatment and other obligations that arise from Common Article 3.⁶⁰

- [43] New Zealand has ratified all of these Conventions and Afghanistan is also a party. Further guidance on detention issues in military settings, which can be read alongside other international guidance on detention generally, is contained in the 2012 Copenhagen Principles and Guidelines.⁶¹ New Zealand participated in the development of these Guidelines.
- [44] Finally, New Zealand has updated its domestic law to give effect to many of the provisions contained in the international treaties to which it is a party. So, for example, s 9 of the New Zealand Bill of Rights Act 1990 provides: “Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.” The Crimes of Torture Act 1989 makes torture a criminal offence, which is punishable by up to 14 years’ imprisonment. A person who commits torture is liable under the Act, as is a person who “does or omits an act for the purpose of aiding any person to commit an act of torture”.⁶² In addition to being a crime in its own right under the Convention against Torture, torture can be prosecuted as a war crime, an act

⁵⁸ Rt Hon Sir Kenneth Keith “International Humanitarian Law and the Law of Armed Conflict” (Public Hearing Module 3, 29 July 2019) at 13. We note that NZDF’s *Interim Law of Armed Conflict Manual* dated 26 November 1992 noted the obligations under Common Article 3: at [123.4] and [18.04]. This underscores an important point, namely that military manuals are important repositories of law in this area. The current NZDF manual, *The Law of Armed Conflict* (2017), is available online and deals at some length with these issues: NZDF *Manual of Armed Forces Law: Vol 4, Law of Armed Conflict* (7 August 2017) <www.nzdf.mil.nz>. See generally, Justice Kenneth J Keith “Rights and Responsibilities: Protecting the Victims of Armed Conflict” (1999) 48 Duke LJ 1081.

⁵⁹ Rt Hon Sir Kenneth Keith, above n 58, at 13.

⁶⁰ See, for example, Knut Dörmann and Jose Serralvo “Common Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations” (2015) 96 Int Rev Red Cross 705; Jelena Pejic “The protective scope of Common Article 3: more than meets the eye” (2011) 93 Int Rev Red Cross 189; ICRC *Convention (III) relative to the Treatment of Prisoners of War: Commentary of 2020* (ICRC, Geneva, 2020) at [158].

⁶¹ The Copenhagen Process on the Handling of Detainees in International Military Operations *The Copenhagen Process: Principles and Guidelines* (19 October 2012).

⁶² Crimes of Torture Act 1989, s 3(1)(b).

of genocide, or a crime against humanity (or a combination). In New Zealand, the International Crimes and International Criminal Court Act 2000 criminalises torture as part of genocide, war crimes or crimes against humanity and provides for its prosecution in New Zealand.⁶³ New Zealand is a party to the Genocide Convention 1948, which recognises acts which may amount to torture as acts of genocide,⁶⁴ as well as the Rome Statute of the International Criminal Court. Also relevant in this context are the Geneva Conventions Act 1958 and the Armed Forces Discipline Act 1971.

Customary international law

- [45] A further source of the law on torture is customary international law. Unlike treaties, which apply only to those states that ratify them, customary international law binds all states regardless of their treaty membership.⁶⁵ Custom develops gradually, over time. For custom to become recognised as “law”, it must (a) result from a large and consistent pattern of state practice and (b) the practice of states must be informed by their belief that they are legally obliged to act in that manner. Custom sometimes reflects the written law, and may develop beyond it, to fill gaps in the law when unique issues not previously imagined arise. The prohibition against torture is part of customary law, as is the rule of *non-refoulement* and the obligation to prevent. It is important to remember that customary international law does not require absolute uniformity in the practice of all states; nor does the objection by a minority of states necessarily undermine it. What matters is that the practice is widespread in the international community and that it is based on a correct and genuine view that international law obliges states to act in that manner.

Peremptory norms

- [46] As we noted in chapter 6,⁶⁶ some of the central rules of International Humanitarian Law applicable to non-international armed conflicts are recognised as *jus cogens*⁶⁷ or peremptory norms. The widespread recognition of the evils arising from torture has resulted in the prohibition of torture being recognised as such a norm.⁶⁸ Because peremptory norms are the most important rules of international law, they may be described as having a constitutional character or function.⁶⁹ They sit at the apex of the hierarchy of international norms and, as such, rank above treaties and customary international law.⁷⁰ They also bind states that are not parties to treaties covering similar topics.⁷¹
- [47] As they represent the most fundamental standards of the international community, no departure from peremptory norms is permitted. They cannot be overridden by treaties.⁷² They inform the

⁶³ International Crimes and International Criminal Court Act 2000, ss 9, 10, 11; Rome Statute of the International Criminal Court 1998, arts 6, 7 and 8.

⁶⁴ See, for example, Genocide Convention 1948, art II(b) (causing serious bodily or mental harm to members of the group).

⁶⁵ Customary law is also part of the law of New Zealand and does not need to be separately incorporated.

⁶⁶ Chapter 6 at [19].

⁶⁷ The term means “compelling law”. Thomas Weatherall *Jus Cogens: International Law and Social Contract* (Cambridge University Press, Cambridge, 2015) at 3. The same rules are found in International Human Rights Law and international criminal law and have the same status.

⁶⁸ Thomas Weatherall *Jus Cogens: International Law and Social Contract* (Cambridge University Press, Cambridge, 2015) at 3. *Prosecutor v Furundžija* (Judgment) CTY Trial Chamber, IT-95-17/1-T, 10 December 1998 at [148]–[151].

⁶⁹ Weatherall, above n 68, at 71–86 (on *jus cogens* and morality and human dignity) and at 448–450 (on constitutional quality).

⁷⁰ Statute of the International Court of Justice 33 UNTS 993 (San Francisco, 24 October 1945), art 38(1).

⁷¹ The practical burdens that the international law on torture imposes on both military and intelligence agencies operations abroad is an important theme in the 2019 report of the Inspector-General of Intelligence and Security. The provision of adequate safeguards to avoid legal and reputational damage to New Zealand is vital: Inspector-General of Intelligence and Security *Inquiry into possible New Zealand intelligence and security agencies’ engagement with the CIA detention and interrogation programme 2001–2009* (31 July 2019).

⁷² Articles 53 and 64 of the Vienna Convention of the Law of Treaties.

interpretation of treaties—states are presumed to have intended to comply with peremptory norms and a court will be slow to arrive at the conclusion that a treaty was designed to be applied in a contrary manner.

- [48] Beyond the impact on treaties, peremptory norms give rise to what are known as obligations *erga omnes*, which have been described as “obligations owed towards all”.⁷³ States therefore owe these obligations to the international community as a whole.⁷⁴ All states have an interest in upholding *jus cogens* and discharging these obligations—a breach anywhere is a concern to states everywhere. What is required of states depends on the type of norm. For norms in the field of human rights, such as torture, the most commonly cited obligations are prevention and effective response. These obligations involve criminalising the prohibited conduct; taking effective measures to prevent its occurrence; undertaking prompt, impartial and effective investigation of alleged breaches; prosecuting alleged perpetrators or extraditing them where another state is seeking to prosecute them; not granting amnesties or immunities for torture; and not applying statutes of limitation to proceedings for torture.⁷⁵ *Non-refoulement* has been described as an *erga omnes* obligation flowing from the prohibition of torture.⁷⁶ Given the act of returning someone to torture risk may also amount to direct or indirect participation in torture and failing to take available steps to prevent it, some consider the rule to have risen to a peremptory norm in its own right.⁷⁷
- [49] Further, in terms of enforcement, breaches of peremptory norms can give rise to individual responsibility and state responsibility. States are subject to a stricter regime of responsibility than for other acts that have not reached the level of peremptory norms. Where a breach occurs, or is occurring, all states are duty bound to cooperate to bring to an end the breach (through both individual and collective action), to not recognise situations resulting from the breach, and to not render aid or assistance in maintaining the situation created by the breach.⁷⁸ Not assisting in maintaining the breach includes, for example, the duty to “reject the fruits of torture” (for example, the use of confessions and evidence obtained through torture).⁷⁹

⁷³ *Prosecutor v Furundžija*, above n 68, at [151]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)*, (*Preliminary Objections*) [1996] 2 ICJ Rep 595 at [31].

⁷⁴ *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain)* (Second Phase) [1970] ICJ Rep 3 at [33]. See also *Belgium v Senegal*, above n 38, at [68] and [69].

⁷⁵ See, for example, *Belgium v Senegal*, above n 38, at [68]; M Cherif Bassiouni “International Crimes: The *Ratione Materiae* of International Criminal Law” in M Cherif Bassiouni (ed) *International Criminal Law* (3rd ed, Martinus Nijhoff Publishers, Leiden, 2008), Vol I at 173; and Thomas Weatherall, above n 68, at 355–363. Obligations *erga omnes* are not limited to matters of standing or jurisdiction; nor is their content so unclear as to render them meaningless in practice. Taking all necessary and lawful measures to prevent torture—particularly in situations where a state is free to decide whether, or how, to engage with another state—is an obvious example of this.

⁷⁶ See, for example, *Ramzy v The Netherlands*, ECHR 25424/05 (Written Comments by Amnesty International, the Association for the Prevention of Torture, Human Rights Watch, and Others, 22 November 2005) at [11]. As Pierce explains (above n 55, at 168–172), the peremptory prohibition of torture calls for a range of preventive efforts, which are relevant to both treaty and general international law. At the very least, to the extent that *non-refoulement* is coextensive with the *jus cogens* prohibition of torture and is one of the more effective steps a state can take to forestall its commission, it may be considered to have *erga omnes* qualities. See also Weatherall (above n 68, from 355) (noting generally that prevention of violations is an aspect of performing obligations *erga omnes*).

⁷⁷ See, for example, *The Prosecutor v Katanga* (*Decision on the application for the interim release of detained Witnesses DRC- D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350*) ICC Trial Chamber II, ICC-01/04-01/07, 1 October 2013 at [30]; Jean Allain “The *jus cogens* Nature of non-refoulement” (2001) 13(4) *IJRL* 533; *Report of the Executive Committee for the Programme of the United Nations High Commissioner for Refugees on the work of its thirty-third session* UN Doc A/37/12/Add.1 (1982) at [46] and [70](1)(b); Lauterpacht and Bethlehem, above n 48, at 151–152.

⁷⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 at [159].

⁷⁹ Convention against Torture, above n 39, art 15; *A, Amnesty International (intervening) and Commonwealth Lawyers Association (intervening) v Secretary of State for the Home Department* [2005] UKHL 71, [2006] 1 All ER 575 at [34].

Summary

- [50] To summarise, the law on torture comes from various legal sources and contains numerous obligations. For present purposes, the core obligations fall into three broad categories: preventive obligations, conduct obligations and response obligations. States need to do all they can to prevent torture, not commit it or be complicit in it, not return or transfer people to places where they face a real risk of torture, and respond swiftly and effectively if torture may have, or has, occurred. The obligations apply in peacetime and in conflict, and apply to the state and its officials when they act in an official capacity abroad. States are expected to be vigilant in preventing and responding to torture, to know when to act and when to refrain from acting or assisting, and to be aware of how their actions or omissions may enable breaches by others and adjust their approach accordingly.
- [51] In some settings, prevention may mean that a state needs to seek and obtain specific and effective assurances and undertake regular and effective detention monitoring. In some cases, it will require not transferring persons or having in place alternative options for detention, as part of a wider conditional assistance policy that provides for the varying, amendment, suspension or termination of assistance where human rights breaches are suspected, alleged or detected. A policy of this sort needs to be in place before military or similar international deployments, so officers know how to, and are able to, make correct and consistent decisions to protect people from harm. It should also address how allegations of torture or ill-treatment are received, recorded, reported and investigated; with clear protocols to ensure investigations are prompt and impartial and remedial measures are effective.
- [52] Capacity building and encouraging compliance with the law complement, but do not replace, the need for other efforts by a state. This is not easy work, but the level of effort reflects the seriousness of the potential consequences. As the International Criminal Tribunal for the Former Yugoslavia confirmed in one of its seminal cases on this subject:⁸⁰

States are obliged not only to prohibit and punish torture, but also to forestall its occurrence: it is insufficient merely to intervene after the infliction of torture, when the physical and moral integrity of human beings has already been irremediably harmed. Consequently, States are bound to put in place all those measures that may pre-empt the perpetration of torture.

A state's responsibility for breaches of torture and mistreatment obligations towards detainees

- [53] A state may be responsible for breaching its obligations in relation to torture or mistreatment of detainees either directly or by being complicit in the activities of another state that tortures or mistreats detainees.⁸¹ Accordingly, we address briefly the circumstances in which a state may incur responsibility:
- (a) directly, when its armed forces operate in the territory of a foreign state to support that state against an armed insurgency;
 - (b) based on complicity in the wrongdoing of another state.

⁸⁰ *Prosecutor v Furundžija*, above n 69, at [148].

⁸¹ Individuals may, of course, be criminally responsible for international crimes such as torture, either as principals or accomplices. That is not a topic that we need to address here, however.

A state's obligations when operating abroad

[54] An issue we are required to consider is the extent to which New Zealand's obligations in relation to the detention and transfer of people who face a real risk of torture are engaged when New Zealand operates abroad. As is apparent from New Zealand's detention policy, the Crown has accepted that New Zealand's *non-refoulement* obligations applied when NZDF forces in Afghanistan captured suspected insurgents and wished to transfer them to the custody of Afghan authorities.⁸² In submissions, the Crown Agencies acknowledged that:⁸³

- (a) Different provisions of the Convention against Torture are subject to different jurisdictional requirements. Article 3, which contains the *non-refoulement* obligation, is not subject to any geographical limitation.
- (b) Although art 2(1) of the ICCPR requires that state parties "undertake to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant",⁸⁴ the concept of jurisdiction has been interpreted as applying extraterritorially where it can be said that a contracting state has "jurisdiction" over either place or people.⁸⁵ The decisive criterion for determining "jurisdiction" in this context is whether the place or person comes within the effective control and authority of the state.⁸⁶ Effective control may relate to a place or to a particular person.

This meant that New Zealand was required to make suitable arrangements with Afghanistan in relation to suspected insurgents detained by TF81 personnel so as to give effect to its obligations.⁸⁷ As we have indicated, New Zealand did put arrangements in place.

[55] On the other hand, the Crown argued that New Zealand did not have "jurisdiction" over suspected insurgents who were captured in Afghanistan in the course of partnered operations where Afghan personnel executed arrest warrants against the suspects. Such persons were, it was argued, never detained by TF81 personnel and were therefore never within New Zealand's jurisdiction; rather they were detained by Afghan authorities pursuant to Afghan arrest warrants and were always within Afghanistan's jurisdiction. TF81 personnel simply assisted Afghan authorities in the operation of their criminal justice process. Because Afghanistan is a sovereign nation, New Zealand had no ability to interfere with the domestic affairs of another state, including in

82 NZDF's arrangement with Afghanistan provided that "The NZDF is responsible for maintaining and safeguarding persons apprehended by it and will treat these persons in accordance with applicable domestic law and international law" (Inquiry doc 05/32, above n 24, at [2]). The detention guidance noted by Cabinet in 2009 required, among other things, that permission be obtained from the Commander Joint Forces New Zealand or Chief of Defence Force before transferring a person detained by New Zealand Forces to Afghan authorities (Inquiry doc 01/03, above n 16, annex 3 at [9]). See also Heath Fisher, above n 11, at [24] (referring to legal advice provided by NZDF and Crown Law in 2010, which confirmed that "non-refoulement obligations under international law would apply in full in respect of any person detained by the NZDF") and Dr Penelope Ridings "International legal issues relating to detention" (Public Hearing Module 2, 23 May 2019) at [14] ("The obligation of non-refoulement would prohibit a foreign or multinational coalition force that has detained a person from transferring that detainee to another authority where there is a substantial belief that the detainee may be tortured").

83 Ridings and Auld, above n 7, at [36]–[50]. See also Ridings, above n 82, at [2] and [18]–[19]. In addition, similar obligations arise from other sources, such as customary international law.

84 Emphasis added.

85 The Crown submitted that "the circumstances in which a person outside of a State's territory is within its jurisdiction remains unsettled in international law" and that the scope of "personal" extraterritorial jurisdiction remains controversial (Ridings and Auld, above n 7, at [44]).

86 Rishworth and Auld *Memorandum*, above n 30, at [12].

87 Ridings, above n 82, at [14]–[16].

relation to judicial proceedings.⁸⁸ The level of support provided by foreign forces could not affect this position.

- [56] As we noted in chapter 6,⁸⁹ the extraterritorial application of human rights obligations is a difficult issue. We have carefully considered advice on this topic and have received written and oral evidence, including evidence from Professor Dapo Akande. We have also received extensive and helpful submissions from both the Crown and non-Crown core participants. While the “effective control” test seems to be widely accepted, what is contentious is its scope, for example, whether the capacity to wield lethal force against an individual is in itself sufficient to constitute “effective control”.
- [57] The issue of extraterritorial application has arisen in a variety of contexts, most frequently under the European Convention on Human Rights. Article 1 of the Convention provides that “The High Contracting Parties shall secure *to everyone within their jurisdiction* the rights and freedoms defined in Section I of this Convention” (emphasis added). The European Court of Human Rights took an expansive approach to jurisdiction under art 1 in *Al-Skeini v United Kingdom*, observing that while jurisdiction under the Convention is primarily territorial,⁹⁰ it may apply extraterritorially in certain circumstances, including where a state exercises “physical power and control” over an individual.⁹¹ In the United Kingdom, the Court of Appeal of England and Wales in *Al-Saadoon v Secretary of State for Defence* interpreted *Al-Skeini* as requiring something more than just the use of force against an individual, finding that some prior element of control over the individual is necessary.⁹² Even so, the Court of Appeal accepted that what *Al-Skeini* described as the “state agent and control” exception⁹³ (that is, jurisdiction arising from a state’s control over a particular person) may apply to cases which “do not involve detention but where, nevertheless, the situation is so closely linked to the exercise of authority and control of the state as to bring it within its jurisdiction for this purpose”.⁹⁴
- [58] United Nations human rights treaty bodies and special mandate holders have provided guidance on the application of global human rights treaties when member states operate abroad. The Committee

⁸⁸ Ridings, above n 82, at [20]–[22]; Brigadier Lisa Ferris “Detention in the Afghanistan Theatre” (Public Hearing Module 2, 23 May 2019) at [20]–[21].

⁸⁹ See chapter 6 at [13]–[15].

⁹⁰ *Al Skeini v United Kingdom* (2011) 53 EHRR 18 (ECHR) at [131].

⁹¹ At [136].

⁹² *Al-Saadoon v Secretary of State for Defence* [2016] EWCA Civ 811. The case concerned the activities of the United Kingdom’s armed forces in Iraq, and whether the United Kingdom’s obligations under the European Convention on Human Rights applied extraterritorially in that context. The High Court had found, relying on *Al-Skeini*, that any use of force against a person amounted to an exercise of “physical power and control” so as to engage the state’s obligations under the Convention. The Court of Appeal overturned that finding. Lloyd Jones LJ, with whom the other members of the Court agreed, stated (at [69]) that the Court in *Al-Skeini* “required a greater degree of power and control than that represented by the use of lethal or potentially lethal force alone. In other words, I believe that the intention of the Strasbourg court was to require that there be an element of control of the individual prior to the use of lethal force.”

⁹³ This is the principle, recognised by the Court in *Al Skeini* (at [137]), that “whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under art 1 to secure to that individual the rights and freedoms under s 1 of the Convention that are relevant to the situation of that individual”. The Court identified three situations in which the state and agent control exception might apply (at [134]–[136]): first, when diplomatic or consular agents of a state who are present in a foreign territory exert authority and control over others; second, when a state acting in a foreign territory exercises all or some of the public powers normally exercised by the Government of that territory, through that Government’s consent, invitation or acquiescence; and third, in certain circumstances where a state’s agents operating outside its territory use force against an individual (for example, where they take an individual into custody).

⁹⁴ At [71].

against Torture has explained that the obligation of *non-refoulement* applies extraterritorially.⁹⁵ The Special Rapporteur on Torture has said that the prohibition of torture is peremptory and non-derogable, that it “cannot be territorially limited” and that “any jurisdictional references found in the Convention against Torture cannot be read to restrict or limit States’ obligations to respect all individuals’ rights to be free from torture and ill-treatment, anywhere in the world”.⁹⁶ Given non-commission, *non-refoulement* and prevention are part and parcel of the prohibition on torture, at least these three obligations (and likely others) can be said to apply when a state operates abroad. The real issues are how the obligations apply given the state is acting abroad and how any overlapping or conflicting obligations are to be addressed.

- [59] The Crown submitted that while the Committee against Torture appears to have suggested that the obligation to prevent torture is a peremptory norm,⁹⁷ this does not affect or displace the territorial limit of the treaty obligation to prevent torture. We have focused primarily on the peremptory prohibition of torture and its consequences. Prevention may at least be regarded as a consequence of the *jus cogens* prohibition and something which is legally and practically tied to its fulfilment. Prevention exists, in different forms and described in different ways, in treaty, customary, and general international law. The elevation of rules to *jus cogens*, and the content and scope of corresponding obligations, is informed by, but may transcend, the confines of particular treaty provisions. Rules and obligations at this level of the international hierarchy of norms are not static; they continue to evolve in light of the global expectation and practice of effective repression of conduct that shocks the global conscience.
- [60] In this sense, the Special Rapporteur provides useful observations about the relationship between torture’s *jus cogens* status and the way in which the rights and obligations in the Convention (including prevention) apply without territorial limitation.⁹⁸ Clearly, how a state gives effect to these obligations may differ to how they are applied domestically, and extraterritorial application also requires states to act in conformity with international law. Where a state acts in an official capacity and exercises its jurisdiction (as effective control and authority over people, places or situations) abroad, it carries a range of obligations.⁹⁹ International prevention requires concerted efforts, both general and specific, to effectively avert torture.
- [61] We should note a further point. As we have said, Sir Kenneth Keith gave evidence about the combined effect of Common Articles 1 and 3 of the Geneva Conventions, which is that states are required to “ensure respect” to the best of their ability of the prohibition on torture and mistreatment

95 Committee against Torture *General Comment No 4 (2017) on the implementation of article 3 of the Convention in the context of article 22* UN Doc CAT/C/GC/4 (4 September 2018) at [10].

96 Special Rapporteur on Torture *Torture and other cruel, inhuman or degrading treatment or punishment* UN Doc A/70/303 (7 August 2015) at [27] (emphasis added).

97 See, for example, Committee against Torture *General Comment 2: Implementation of Article 2 by States Parties* UN Doc CAT/C/GC/2 (24 January 2008) at [1].

98 We note briefly that the Special Rapporteur’s observations bear some similarities to those of the International Court of Justice (that is, that, owing to the principles underlying the Genocide Convention and the cooperation needed to end genocide, the rights and obligations of the Convention are rights and obligations *erga omnes*): *Bosnia v Yugoslavia (Preliminary Objections)*, above n 73, at [31] (noted in *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of Congo v Rwanda) (Jurisdiction and Admissibility)* [2006] ICJ Rep 6 at [64]).

99 The Subcommittee on the Prevention of Torture has noted the status of torture under general international law, adding that while the concept of prevention is something which cannot be exhaustively defined in the abstract, a range of measures are available to states: Subcommittee on Prevention of Torture *Fifth Annual Report of the Subcommittee on Prevention of Torture* UN Doc CAT/C/48/3 (19 March 2012) at [105]. This observation is relevant to prevention when treaty obligations are applied abroad, as well as prevention in other sources of law. When a state has effective authority and control over people, places or situations abroad—including situations where a state’s conduct brings about reasonably foreseeable effects and where the state has the ability to exercise some influence on an outcome—the importance of prevention as an obligation is clear.

of detainees, and the requirement for minimum standards of treatment. These obligations apply wherever the state is operating—at home or abroad—and apply to the treatment of detainees in the context of a non-international armed conflict.¹⁰⁰ The obligations are engaged independently of any concept of “jurisdiction”.

- [62] We acknowledge, however, that, in giving effect to obligations when operating abroad, states must act in a manner that is consistent with state sovereignty and in accordance with international law. Sovereign states may commit acts of torture despite the multiple prohibitions against it. Where that happens, international law contemplates that other states will work together to ensure the offending states comply with these fundamental and universal rules, and that assisting states will comply with their own obligations when doing so. Obviously, this can be a difficult and delicate process, but states can achieve this in a manner that respects sovereignty as far as is appropriate, without wavering from clear and objective human rights standards. We return to this in chapter 11.
- [63] Counsel for Mr Stephenson argued that joint state responsibility could arise in the context of partnered operations, relying on art 47(1) of the International Law Commission’s Draft Articles on the Responsibility of States for Internationally Wrongful Acts.¹⁰¹ The argument was that the circumstances of a partnered deliberate detention operation might be such that it is difficult to say that one of the states involved is responsible for a detention; rather, it might be more accurate to say that both states are responsible for it. Counsel referred to the 1960 commentary of the ICRC on art 12 of the Third Geneva Convention, which allocates responsibility for the treatment of prisoners of war in international armed conflicts. That commentary recognised that there may be difficulties in determining which particular state among several captured particular prisoners. In those circumstances, it said that all states involved should be responsible.¹⁰² The argument was that a similar principle could apply in the present context.¹⁰³
- [64] We finish this section by saying that, for the purposes of this Inquiry, we do not need to set out the precise formula for the attribution of responsibility in complex multinational settings, although we address in chapter 11 what we see as available as a matter of legal principle and practical application of jurisdictional concepts in these settings. The assessment is an intensely factual one, depending on the nature and extent of any control and authority in the particular factual situations at issue. We have, in a sense, a starting point in the position accepted by the Crown Agencies: that when NZDF captured a suspected insurgent, New Zealand’s *non-refoulement* and

¹⁰⁰ See paragraph [42].

¹⁰¹ Sam Humphrey *Submissions of Counsel for Jon Stephenson in Reply following Public Hearing 3* Submission to Inquiry (16 August 2019) at [17]–[31].

¹⁰² ICRC *Convention (III) relative to the Treatment of Prisoners of War: Commentary of 1960* (ICRC, Geneva, 1960) at 135–136. We note that on 16 June 2020, the ICRC launched the updated commentary to the Third Geneva Convention in relation to the treatment of the prisoners of war: see footnote 103 below.

¹⁰³ The ICRC’s revised 2020 commentary notes that for certain conduct joint responsibility of two or more states may arise under international law, although for the purposes of International Humanitarian Law one state will be considered the detaining authority in the context of an international armed conflict (ICRC, above n 60, at [1522]). Concepts of joint, shared or concurrent responsibility (in relation to the same, similar or different obligations) may be framed and may well develop in different ways in the law enforcement and human rights paradigm to the active hostilities paradigm. On responsibility in international law generally, see James Crawford *The International Law Commission’s Articles on State Responsibility: Introduction, Texts and Commentaries* (Cambridge University Press, Cambridge, 2005) at 273–275 (on art 47 of the Draft Articles); and Niels Frenzen “Extraterritorial Refugee Protection” in André Nollkaemper and Ilias Plakokefalos (eds) *The Practice of Shared Responsibility in International Law* (Cambridge University Press, Cambridge, 2017) 506 at 509–512 (on shared responsibility where two states exercise concurrent control over a person in *refoulement* settings) and Marten Zwanenburg “North Atlantic Treaty Organization-Led Operations” in André Nollkaemper and Ilias Plakokefalos (eds) *The Practice of Shared Responsibility in International Law* (Cambridge University Press, Cambridge, 2017) 639.

other obligations were engaged. The question for us will be whether the circumstances of Qari Miraj's capture are such as to engage the relevant obligations.

Complicity

- [65] Like the law in relation to extraterritorial jurisdiction, some aspects of the law on complicity¹⁰⁴ are controversial, giving rise to different views. An important question in this context is what mental element must be established. A range of possibilities exist: knowledge, constructive knowledge,¹⁰⁵ wilful blindness, recklessness, purpose, intention or a combination of these. It is necessary to consider the different formulations for complicity at the international level, and to understand what particular facts or circumstances an assisting state must know or understand before complicity arises.
- [66] The Crown Agencies drew attention to the commentary to art 16 of the International Law Commission's Draft Articles on State Responsibility dealing with aiding or assisting, which expresses the view that the assistance must be a necessary element in the wrongful act and the assisting state must act with a view to facilitating that wrongful act. Accordingly, the Crown Agencies submitted, an assisting state must act with a view to facilitating (that is, with the *purpose or intention* of facilitating) the wrongful act.¹⁰⁶ By contrast, in his evidence, Sir Kenneth Keith disagreed with the commentary and expressed the view that the customary law underlying art 16 did not require the element of necessity or that the aid or assistance be given with a view to facilitating the commission of the wrongful act—knowledge of the wrongdoing was, in his opinion, sufficient.¹⁰⁷ In an opinion which we discuss later in this chapter, the Solicitor-General noted the possibility that constructive knowledge might be sufficient to establish liability for complicity.¹⁰⁸
- [67] As will be apparent, there is a range of views as to which standard applies, or ought to apply, to state complicity.¹⁰⁹ We will not attempt to resolve the competing views, as much depends on the particular context. While the Draft Articles are a useful starting point, they do not displace other, more specific regimes (such as treaties) that contain complicity provisions and which are capable of application in extraterritorial settings.¹¹⁰ The Draft Articles can, therefore, be read alongside or be interpreted in light of more specific treaty rules.¹¹¹

¹⁰⁴ "Complicity" is a form of legal liability that attaches to those who aid or assist a wrongdoer.

¹⁰⁵ Where a person does not have actual knowledge of a fact but would have known of it had they exercised reasonable care, that person is said to have constructive knowledge of the fact.

¹⁰⁶ Paul Rishworth QC and Ian Auld "Crown Agencies' Presentation on Applicable International Legal Frameworks" (Public Hearing Module 3, 29 July 2019 at [100]. However, the Crown Agencies also seemed to accept that full knowledge that the assistance given will facilitate the wrongful act would suffice: see Rishworth and Auld *Memorandum*, above n 30, at [21]–[26].

¹⁰⁷ Rt Hon Sir Kenneth Keith, above n 58, at 16. We also note the analysis of knowledge by eminent scholars in the separate but related field of customary international criminal law: US Supreme Court *Presbyterian Church of Sudan et al v Talisman Energy Inc* (No 09-1262), Amicus Curiae of International Law Scholars, 30 April 2010.

¹⁰⁸ See below at paragraph [95]. See also Dr Penelope Ridings "International Legal Issues Relating to Detention" (23 May 2019) at [26].

¹⁰⁹ Miles Jackson *Complicity in International Law* (Oxford University Press, Oxford, 2015) at 160; Vladyslav Lanovoy *Complicity and its Limits in the Law of International Responsibility* (Hart Publishing, Oxford, London, 2016) at 102–103.

¹¹⁰ Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries [2001] vol II, pt 1 YILC 13 at [4](a).

¹¹¹ Joint Committee on Human Rights Allegations of UK Complicity in Torture (2008-09) HL paper 152 HC 230 at [35].

- [68] The most relevant example in this case is the Convention against Torture.¹¹² The Special Rapporteur on Torture has explained that individual and state complicity can result from “acts that amount to instigation, superior order and instruction, consent, acquiescence and concealment”.¹¹³ As to purpose/intention, having noted that some domestic courts have concluded that complicity at international law required direct encouragement of acts of torture, the Special Rapporteur explained that complicity to torture “must be governed by a different standard”, due to the status of torture under international law and the obligation to prevent.¹¹⁴ As a result, “[t]he responsibility of a State is objective and results from a policy or practice of acquiescing in torture [committed by others]”.¹¹⁵ Accordingly, assistance or cooperation with a country that is known, or ought to be known, to use torture in a systematic or widespread manner is “turning a blind eye to what goes on” and gives rise to complicity.¹¹⁶
- [69] The Crown submitted that the Special Rapporteur’s view does not reflect customary international law. We see merit in the Special Rapporteur’s approach, particularly given the Special Rapporteur’s role as a leading United Nations expert on the content and scope of torture obligations under international law. At the same time, we do not think it necessary to express a concluded view about this as ultimately our conclusions do not require it. We note that, at a minimum, the Crown Agencies and Counsel for Mr Stephenson agreed that wilful blindness may enable an inference to be drawn about an assisting party’s mental state and, where wilful blindness is made out, complicity can arise.¹¹⁷ Ultimately, however, it may be more straightforward to analyse particular factual situations in terms of a potential breach of an obligation to prevent torture and *non-refoulement*, rather than in terms of complicity. This does not diminish the importance of complicity in this area of law, nor of the importance of ensuring conduct and policies do not give rise to complicit conduct. We leave it open as to whether or not complicity is engaged on the facts as laid out in chapter 11.

The development of the detention policy

- [70] Clause 7.8 of the Terms of Reference requires us to consider, among other things, the decision in *Evans* in 2010. To do that, we need to set out what the case relevantly held—and how NZDF and other New Zealand agencies addressed it. We note that a number of New Zealand government agencies spent much time considering detention-related issues, particularly after *Evans*. The policy applicable to detention in partnered operations involved input and advice from NZDF, the Ministry of Foreign Affairs and Trade (MFAT) and Crown Law. In addition, there was a high degree of ministerial interest in the issue—agencies provided numerous briefings about it,

¹¹² The Crown also drew attention to the Rome Statute. While useful, the Statute contains a number of gaps and innovations. It also does not affect existing or developing customary international criminal law, or the jurisprudence on breaches of subject-matter treaties.

¹¹³ *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, Juan E. Méndez UN Doc A/HRC/25/60 (10 April 2014) at [48].

¹¹⁴ At [51]–[52].

¹¹⁵ At [52]. See also Jackson, above n 109, at 162 on wilful blindness as an extension of knowledge, the inability of states to avoid responsibility by failing to make enquiries, and primary rules (such as *non-refoulement*) which impose a due diligence standard on the provision of aid or assistance to other States.

¹¹⁶ At [53]–[54]. The Rapporteur’s observations in this report concern intelligence sharing and cooperation in counter-terrorism operations. They are relevant to our assessment of the propriety of the New Zealand policy concerning the transfer of partnered operations detainees.

¹¹⁷ Submission of Paul Rishworth QC, Transcript of Proceedings, Public Hearing Module 3 (29 July 2019) at 82. See also Rishworth and Auld “Crown Agencies’ Presentation”, above n 107, at [102].

primarily to the Minister of Defence, Hon Dr Wayne Mapp, and the Minister of Foreign Affairs, Hon Mr Murray McCully—as well as parliamentary interest, as evidenced by questions in the House and select committee proceedings. There was also media interest.

- [71] In April 2010, ISAF introduced a Directive that imposed additional responsibilities on ISAF forces involved in partnered operations during which Afghan forces detained suspected insurgents.¹¹⁸ An important requirement was that ISAF forces would provide information to ISAF about “detention events” by Afghan partners, including the names of those detained. ISAF would record this and provide the information to two humanitarian agencies. This led to a question from theatre about whether the Directive’s requirements, coupled with the fact that TF81 personnel collected biometric data from those detained on partnered operations for ISAF’s purposes, would mean that New Zealand would have some responsibility for those detained. Following consideration, the Commander Joint Forces New Zealand responded that the additional responsibilities imposed by the Directive did not mean that the relevant suspects were “detained” by TF81 personnel.¹¹⁹

The *Evans* case

- [72] While the issue of detainees, and the question of New Zealand’s obligations in partnered operations, had been considered at early stages of the deployment,¹²⁰ a trigger for much of the work carried out by NZDF and other Crown Agencies on detention in partnered operations was the decision of the High Court of England and Wales (Richards LJ and Cranston J) in the *Evans* case, delivered on 25 June 2010. The United Kingdom armed forces had a policy that people they detained in Afghanistan would be transferred to Afghan authorities within 96 hours or released, but would not be transferred where there was a real risk at the time of transfer that they would suffer torture or serious mistreatment. This policy reflected ISAF’s detainee transfer policy and was not under challenge in the proceedings. Rather, the applicant’s case, brought by way of judicial review, was that those transferred by United Kingdom forces into Afghan custody were in practice at real risk of torture or serious mistreatment, so that the transfers were in breach of the United Kingdom’s policy and were unlawful.
- [73] The Court began by noting that United Kingdom armed forces operating in Afghanistan had authority to capture or kill insurgents and that the power to capture extended to a power to detain, at least temporarily. Equally, the Afghan Government had an interest in insurgents, in the sense that they were likely to have committed criminal offences. Prosecuting such individuals successfully was an important part of the strategy for securing the rule of law and enhancing security.¹²¹ The transfer policy reflected these dual armed conflict / law enforcement interests in insurgents and set out how ISAF-captured detainees were to be managed (although the Court noted that this did not prevent bilateral arrangements to be concluded with Afghan authorities).¹²² The Court also noted

¹¹⁸ This Directive, the ISAF Detention Operations and Notification Directive, is discussed in Brigadier Riordan’s opinion, which is discussed below from paragraph [83]: see Detention Detainee Arrangements Afghanistan (10 September 2010) (Inquiry doc 06/10) at 7.

¹¹⁹ Email from JFNZ.COMJFNZ to WAATEA.SNO (21 May 2010, 5.32am) (Inquiry doc 5/21).

¹²⁰ “Afghan Nationals in Afghan Custody: Options for Follow-up by New Zealand” (16 April 2010) at [12], in email from [redacted] (ISED) to [redacted] and others “RE: Afghanistan: Arrest of Suspected Terrorists” (16 April 2010, 4.39pm) (Inquiry doc 12/06). Officials had considered the nature and extent of New Zealand obligations and options in other partnered operations. They advised that “[t]he arrest by Afghan forces [was] the ideal scenario for mitigating detainee issues”. They also noted that assuming responsibility for partnered operations detainees could leave New Zealand with long-term implications (at [17]). Officials ultimately cautioned against pursuing bilateral assurances on this issue.

¹²¹ *R (oao Maya Evans) v Secretary of State for Defence*, above n 6, at [17]–[18].

¹²² At [19].

that ISAF standard operating procedures provided that the NDS was the preferable body for the reception of ISAF detainees, as this would ensure common processing and tracking of detainees following transfer.¹²³

- [74] Having considered the accounts of mistreatment of detainees and the measures in place under the United Kingdom policy,¹²⁴ the Court canvassed the evidence showing that the United Kingdom was aware of the various reports of torture and mistreatment of detainees by Afghan agencies, discussed the arrangements put in place between the United Kingdom and Afghanistan on the issue of detainee transfers, and considered the United Kingdom's monitoring efforts. Ultimately, the Court held that transfers to NDS 17 in Kabul would be in breach of the policy and unlawful. It said that a moratorium that the United Kingdom was observing in relation to transfers to that facility should remain in place. However, the Court concluded that transfers to two other NDS facilities (located elsewhere in Afghanistan) could continue, subject to improvements in monitoring. It was essential, the Court confirmed, to implement "an effective set of specific safeguards" if detainees were to be transferred without a real risk of torture.
- [75] The case did not deal with detentions on partnered operations. Nevertheless, we consider that it is relevant to such detentions, in particular because the Court noted that:
- (a) evidence, especially international reports between 2005 and 2010, indicated "widespread and serious ill-treatment of detainees, including ill-treatment by the NDS in particular, with continuing grounds for concern despite improvements over time";¹²⁵
 - (b) torture in Afghan facilities was not merely an historical issue because the reports about the condition of detainees in Afghanistan displayed "a substantial degree of consistency over time";¹²⁶
 - (c) reports indicated that torture was used to obtain confessions, which were important to obtaining convictions;¹²⁷
 - (d) it would be wrong to discount the volume of complaints about torture in Afghan detention facilities, the significance attached to them by reputable human rights agencies and the lack of transparency on the part of the NDS;¹²⁸
 - (e) the available material was sufficient to justify the conclusion that transferees were at a real risk of mistreatment in detention.¹²⁹
- [76] We pause here to reiterate that, on most operations, TF81 partnered with the CRU. The CRU was a specialist police unit and had no power to prosecute offences. Accordingly, under Afghan law, the CRU could only detain a person they had arrested for 72 hours, after which they had to either hand over the detainee to a prosecutor for prosecution or release the person. We understand that the CRU had in practice been required to release some of those arrested because time expired. In

¹²³ At [43]. Apparently, the NDS facilities in Kabul had the best record-keeping systems and were accessible to Non-Governmental Organisations such as the ICRC.

¹²⁴ At [49]–[75].

¹²⁵ At [287].

¹²⁶ At [288].

¹²⁷ At [53], [253] and [291].

¹²⁸ At [290].

¹²⁹ At [292].

addition, some of those the CRU transferred to Afghan prosecution authorities were later released because there was insufficient admissible evidence to justify a prosecution.¹³⁰ In light of these difficulties, TF81 sometimes wished to involve the NDS on operations against high-value targets to make arrests, as NDS personnel were, in general, better trained, more competent and better able to handle high-value targets.¹³¹ Moreover, the NDS were able to prosecute certain offences. As we describe in chapter 11, NDS personnel, along with Afghan National Police personnel, participated in the operation to capture and detain Qari Miraj. He was not taken to NDS 17, but to another NDS facility in Kabul, NDS 90, which was capable of holding high-value detainees suspected of serious offences. (NDS 17 and NDS 90 were in the same compound and detainees were transferred between the two facilities from time to time.)

- [77] The *Evans* case raised immediate questions for New Zealand. Steps were taken to find out what, if anything, should be done in response to it. Parliament's Foreign Affairs, Defence and Trade Select Committee considered New Zealand's work in Afghanistan. The then Director of Defence Legal Services, Brigadier Kevin Riordan, briefed the Chief of Defence Force.¹³² His advice was that arrest warrants were issued by Afghan authorities, and that New Zealand had no legal power to conduct the arrests or to interfere with the Afghan judicial system.¹³³ While Brigadier Riordan acknowledged that the CRU could transfer people to the NDS and that New Zealand did not have specific oversight after that point,¹³⁴ he explained that the ICRC had access to detainees, and would likely inform New Zealand of any general concerns about detention conditions.¹³⁵
- [78] Detention issues continued to engage media attention¹³⁶ and ministers responded to further questions in the House.¹³⁷ On 16 August 2010, Dr Mapp was interviewed by *Radio New Zealand*.¹³⁸ Following questions on the appropriateness of the distinction between detainee categories, he said that one could not rule out the possibility that detainees had been tortured and he was seeking further reports from the Chief of Defence Force and the Director of Defence Legal Services.¹³⁹ Around the same time, media reports referred to an Official Information Act response from NZDF to the *Sunday Star Times* stating that NZSAS personnel had been "in the vicinity" when persons were arrested by Afghan forces, but that NZSAS members had not detained anyone or assisted in detentions by Afghan forces.¹⁴⁰ Mr Key accepted NZDF's position, stating, "If Jerry Mateparae's advice is that they're not involved in the arrests, they're not involved in the arrests".¹⁴¹

¹³⁰ This reflected the fact that many partnered operations were intelligence-driven and information obtained from intelligence activities might not have been capable of disclosure or been inadmissible in court. As a result, at some point during the deployment TF81 personnel took the approach of attempting to turn intelligence into admissible evidence.

¹³¹ The nature of the relationship between New Zealand agencies and the NDS is described in detail in the report of the Inspector-General of Intelligence and Security's (IGIS) Inquiry: see IGIS *Report of Inquiry into the role of the GCSB and the NZSIS in relation to certain specific events in Afghanistan* (June 2020). It is not clear to us whether ministers were fully advised of the nature of the relationship or its implications.

¹³² Email from Kevin Riordan to [redacted] "RE: AFGHANISTAN" (undated, printed 29 Jun 2010) (Inquiry doc 06/09).

¹³³ At dot point 2.

¹³⁴ At dot point 5.

¹³⁵ Inquiry doc 06/09, above n 132.

¹³⁶ Jon Stephenson "Prisoners being delivered to brutal Afghan secret police" (15 August 2011) *Sunday Star Times* <www.stuff.co.nz/sunday-star-times>.

¹³⁷ (17 August 2010) 665 NZPD 13119.

¹³⁸ Morning Report "Mapp: SAS not guilty of war crimes, operation a 'fiasco'" (16 August 2010) *Radio New Zealand* <www.rnz.co.nz>.

¹³⁹ Morning Report, above n 138.

¹⁴⁰ Rory MacKinnon "Deadline: On NZ's 'Assistance' In Afghanistan" (20 August 2010) *Scoop* <www.scoop.co.nz>; Jon Stephenson "Prisoners being delivered to brutal Afghan secret police" (15 August 2010) *Stuff* <www.stuff.co.nz>; Rory MacKinnon "No SAS Link To Afghan Arrests, Torture – PM" (16 August 2010) *Scoop* <www.scoop.co.nz>.

¹⁴¹ MacKinnon "No SAS Link To Afghan Arrests, Torture – PM", above n 140.

- [79] Dr Mapp and Mr McCully instructed officials to provide advice on this issue. MFAT considered that the risk of legal challenge could be minimised (but not eliminated) by—so far as possible—continuing to ensure that Afghan authorities were responsible for arrests/detentions, rather than New Zealand forces. They also noted that *Evans* did not expressly deal with partnered operations. On 18 August 2010, MFAT submitted a briefing to Mr McCully, for referral to Dr Mapp and the Prime Minister.¹⁴² They noted procedural improvements that were being developed and said that New Zealand’s legal obligations “only extend to individuals detained by New Zealand forces”.¹⁴³
- [80] As noted in chapter 3,¹⁴⁴ Dr Mapp and the Chief of Defence Force visited Afghanistan from 18 to 22 August 2010.¹⁴⁵ During that visit, Dr Mapp met with Afghan counterparts to discuss his concerns about the treatment of detainees by the NDS. He considered that even if TF81 was not the detaining authority on partnered operations, New Zealand had a moral, and arguably a legal, responsibility to be seen to have taken reasonable steps to ascertain that detainees’ human rights were respected while in detention.¹⁴⁶
- [81] It appears that Dr Mapp was encouraged by what he was told, which was that conditions in NDS facilities had improved substantially. Dr Mapp also met with two local representatives of a reputable independent organisation to discuss detention issues. Dr Mapp described the discussions as “robust”. He explained TF81’s partnered operations as he understood them. A contemporaneous note prepared by a New Zealand official records that one of the representatives of the organisation told Dr Mapp that if New Zealand had taken a substantive role in partnered operations, such as planning an operation or supporting an arrest, it incurred at least some obligations towards ensuring the humane treatment of those detained. From the note, it appears that New Zealand understood that the representative’s observations did not suggest that New Zealand incurred the full range of relevant legal obligations. However, in a subsequent conversation with an NZDF officer, the other representative of the organisation who had been at the meeting said that, in fact, the first representative had expressed the view that if TF81 personnel took biometric data from someone detained by Afghan personnel, the detainee would be in New Zealand’s custody for the period of the processing and would be “transferred” back to Afghan authority when the processing was completed. On 23 August, Dr Mapp annotated the MFAT briefing document of 18 August with a note that a detailed opinion from a senior lawyer at Crown Law was required.¹⁴⁷
- [82] After Dr Mapp’s visit, it was decided that New Zealand would join an embassy working group on detainees and would engage with the NDS on detention issues, through New Zealand’s Ambassador to Afghanistan.¹⁴⁸ The Ambassador did not take immediate steps however, as a deployed New Zealand Security Intelligence Service (NZSIS) officer in Kabul warned this approach could damage the relationship with the NDS.¹⁴⁹ Instead, on 15 September the NZSIS officer met with NDS personnel and reported they were “cooperative and friendly” and willing

¹⁴² 5283530_OP BURNHAM_Afghanistan Defences_ UK High Court Judgement possible Implications for NZ (MinDef copy) (18 August 2010) (Inquiry doc 06/08).

¹⁴³ Inquiry doc 06/08, above n 142, at [4].

¹⁴⁴ Chapter 3 at [43].

¹⁴⁵ Dr Mapp reported back to Cabinet on his visit: 10 September 2010 Cabinet Paper – Report on Overseas Travel Hon Dr Wayne Mapp (10 September 2010) (Inquiry doc 01/08). He also discussed his visit in his evidence: Evidence of Hon Dr Wayne Mapp, Transcript of Proceedings, Public Hearing Module 2 (23 May 2019) at 52–53.

¹⁴⁶ Cable re Visit of Minister of Defence and CDF to Afghanistan 18 022 August [2010] – Detainees (Inquiry doc 05/36).

¹⁴⁷ Inquiry doc 06/08, above n 142, at [1].

¹⁴⁸ Inquiry doc 05/36, above n 146, at [21]. There were, as well, other international engagements on detention issues; see Cable re ISAF Conference on Afghanistan Detainees – Meeting Report (9 October 2010) (Inquiry doc 05/37).

¹⁴⁹ MFAT Approach to NDS DG (2 September 2010) (Inquiry doc 11/35).

to consider questions from New Zealand.¹⁵⁰ The NDS also said they were prepared to show the officer their Detention Centre. In the end, time passed and MFAT provided no follow-up questions to be put to the NDS. The NZSIS officer met with NDS personnel again in early November and, following that meeting, asked the Ambassador whether New Zealand had any questions for the NDS. The Ambassador said that it “might be best to let sleeping dogs lie on that issue”.¹⁵¹ At that stage, the officer still intended to visit the NDS Detention Centre, although it is not clear to us whether that visit in fact occurred.

NZDF’s legal advice

[83] In September 2010, Brigadier Riordan finalised his formal legal opinion on the question of whether the support given by NZDF personnel in partnered operations meant that New Zealand and/or members of NZDF were complicit in any subsequent torture of detainees.¹⁵² In the opinion, Brigadier Riordan addressed the question of principle whether, given the human rights record of the NDS, the mere fact that a person was left in its control gave rise to a real risk that they would suffer torture or mistreatment, with the result that New Zealand would face legal risk. Given that New Zealand’s international obligations were engaged, Brigadier Riordan recommended that his opinion be passed to the Solicitor-General for review.

[84] In his opinion, Brigadier Riordan acknowledged that “a small number” of persons arrested by the CRU in partnered operations had been transferred to the NDS facility in Kabul. He noted that while operations involving direct combat against insurgents were conducted under the Law of Armed Conflict, much of the NZSAS’s role in Kabul was in support of law enforcement tasks rather than armed conflict activities. He went on to emphasise the NZSAS’s mentoring role in relation to the CRU and said:

NZSAS members do not take a leading role in the active part of the operation themselves although they will sometimes be in close support, provide certain technical capabilities, and assist with the recording of names and other personal information of those detained.

[85] Later in the opinion, Brigadier Riordan discussed the ISAF Detention Operations and Notification Directive dated 13 April 2010,¹⁵³ which he described as the first ISAF document to address detentions effected by Afghan forces in ISAF-partnered operations. He noted that the NZSAS had complied with this Directive and had supplied ISAF with information relating to all CRU detentions “in which they have been involved or have been in their vicinity”.

[86] Brigadier Riordan then discussed the law relating to torture, the obligation of *non-refoulement* and the concept of complicity under international and national law. He also stated that conditions in NDS detention facilities had improved substantially. Ultimately, Brigadier Riordan advised that he did not consider that NZDF’s involvement in partnered operations was sufficient to amount to complicity in any subsequent torture of a detainee.

¹⁵⁰ Meeting with NDS on Detainee Iss ... (15 September 2010) (Inquiry doc 11/37) at [2]. See also email from [redacted] to [redacted] “RE: NDS/Detainees” (15 September 2010, 9.46pm) (Inquiry doc 11/32).

¹⁵¹ Meeting with NDS of 2 November 2010 (5 November 2010) (Inquiry doc 11/33) at [3].

¹⁵² Inquiry doc 06/10, above n 118. In his opinion, Brigadier Riordan referred frequently to what he described as “Ref A”, which is a report on the 18–22 August visit of the Minister of Defence and the Chief of Defence Force to Afghanistan: see Inquiry doc 05/36, above n 146.

¹⁵³ See paragraph [71] above.

- [87] Brigadier Riordan did, however, discuss the view that there was a moral (and arguably a legal) duty to take reasonable steps to ascertain that the human rights of persons detained in partnered activities were respected. Having noted that the “most robust and legally justifiable measure” would be to conduct inspections and monitoring, Brigadier Riordan discussed how that might be carried out, acknowledging that before anything could be done, it would be necessary to negotiate a suitable arrangement with the Afghan Government.¹⁵⁴ If inspection and monitoring was not possible, he suggested a more limited alternative, which involved an enhanced regime of providing information in relation to persons detained on partnered operations, together with further mentoring and support directed at enhancing the rule of law.
- [88] MFAT received the opinion and noted that it pointed to a possible moral imperative to carry out or explore options for detention monitoring and that this would have implications for MFAT.¹⁵⁵
- [89] In a briefing to the Minister on 16 September 2010,¹⁵⁶ the Chief of Defence Force confirmed that the legal advice he had received said that the partnering arrangements between NZDF and the CRU did not amount to complicity in torture. He also advised that no New Zealander had any role in the decision to transfer detainees to the NDS;¹⁵⁷ that New Zealand had no obligation, right or physical ability to monitor detainees transferred by the CRU to the NDS;¹⁵⁸ and that to assert a right to do so would amount to an infringement of Afghan sovereignty.¹⁵⁹
- [90] The Chief of Defence Force also noted that a further important and complex aspect was the existence of a moral imperative for New Zealand to take steps to ascertain that the human rights of persons arrested by the CRU were protected and to decide how this should be done. He requested further advice on potential measures, including prisoner monitoring. He advised that monitoring detainees from partnered operations would require separate arrangements and the difficulty of negotiating the necessary measures “should not be underestimated.” He recommended that the Minister engage with the Minister of Foreign Affairs to secure his views. He noted at the same time that Brigadier Riordan’s legal advice had been sent to the Solicitor-General for confirmation.

The Solicitor-General’s legal opinion

- [91] On 2 November 2010 the Solicitor-General provided a detailed opinion on New Zealand’s obligations in respect of persons detained in multinational operations.¹⁶⁰ The essential feature of the Solicitor-General’s opinion was to confirm the view of NZDF and MFAT that the “two category” approach to the legal obligations in respect of detainees was appropriate. Persons detained by NZDF personnel could only be transferred to Afghan authorities if they did not face a real risk of torture in Afghan custody; moreover, any detainees transferred would have to be subject to a monitoring regime. By contrast, New Zealand’s *non-refoulement* and related obligations did not apply to persons arrested by Afghan personnel in Afghan-partnered operations. As a consequence, New Zealand had no duty or right to monitor such people. In essence, the message was “the

¹⁵⁴ We think his note on follow-up measures is correct. We address the issue of negotiated arrangements and effective follow up / monitoring further in chapter 11.

¹⁵⁵ Email from [redacted] to [redacted] “Detainees: NZDF opinion” (27 September 2010, 2.10pm) (Inquiry doc 11/23).

¹⁵⁶ Note to Minister 414 Detainee Arrangements – Afghanistan (16 September 2010) (Inquiry doc 03/01).

¹⁵⁷ At [2](c).

¹⁵⁸ At [2](e).

¹⁵⁹ At [2](f).

¹⁶⁰ Solicitor-General “Obligations in respect of persons detained during multinational operations (DFO037/283)” (2 November 2010) in Note to Minister 484 Detainee Arrangements – Afghanistan (9 November 2010) (Inquiry doc 03/02) from 3.

current circumstances of New Zealand “partnering” operations in Afghanistan do not give rise to liability either through individual or state complicity in torture or through breach of the duty of *non-refoulement* of people at risk of torture.”¹⁶¹

- [92] The Solicitor-General considered the point discussed in Brigadier Riordan’s opinion that there was a moral, if not a legal, duty to take reasonable steps to ascertain that the human rights of persons detained on partnered operations were respected. He examined the possible bases for such a duty. First, the Solicitor-General accepted that there was a duty of non-complicity, the effect of which was that New Zealand had to ensure that it did not provide assistance to Afghan personnel where it was known, or ought to be known, that the assistance provided “sufficiently direct support” for acts of torture by Afghan authorities.¹⁶² As New Zealand’s involvement in partnered operations was less direct than it was where NZDF personnel captured people, the duty of non-complicity arose at a systemic level.¹⁶³ It required New Zealand to take steps to deter torture by Afghan authorities, gather information about the practices of Afghan personnel and institutions, and, if circumstances changed, restrict or withdraw its cooperation until matters were remedied.
- [93] Second, the Solicitor-General recognised that the circumstances of some partnered operations might be such as to engage the law of non-international armed conflict and its associated obligations.¹⁶⁴ He noted that the duty applicable to international armed conflict to ensure respect for Law of Armed Conflict standards appeared to apply also in non-international armed conflicts as a rule of customary international law. He described the content of the obligation as being to exert influence, to the degree possible, to stop violations of International Humanitarian Law, which might include steps such as applying diplomatic pressure or withdrawing cooperation or assistance.
- [94] Third, the Solicitor-General noted that the possibility of developments in relation to the obligation to prevent torture, along the lines of the “obligation to prevent” under the Genocide Convention as interpreted by the International Court of Justice in the *Bosnian Genocide* case.¹⁶⁵ He also drew attention to the Committee against Torture’s view that states that become aware of alleged acts of torture committed by others in the course of joint operations are obliged to report and seek investigations of those allegations.¹⁶⁶
- [95] The upshot was that the Solicitor-General concluded that New Zealand could, in providing assistance to Afghan personnel in law enforcement operations, become complicit at international law in any subsequent torture or mistreatment by Afghan authorities of people detained in partnered operations if New Zealand personnel became aware, or ought to have become aware through normal diligence (that is, if they had constructive knowledge), of an intention to torture detainees. He said that, to avoid the potential for complicity, it was necessary to:
- (a) maintain agreements with Afghan authorities that human rights protections would be observed;
 - (b) continue to obtain credible assurances from Afghan authorities that such protections were met in practice;

¹⁶¹ At [2.1.1] and [2.1.2].

¹⁶² At [40].

¹⁶³ At [41]–[42].

¹⁶⁴ At [43]–[49].

¹⁶⁵ At [50]–[52], referring to the *Bosnian Genocide* case, above n 38, at [429]–[432].

¹⁶⁶ At [54].

- (c) undertake concerted information-gathering by New Zealand personnel on Afghan practices; and
- (d) withdraw or restrict cooperation from relevant Afghan partner forces if New Zealand personnel became aware that detainees taken by Afghan forces in partnered operations with New Zealand forces had been tortured, until that risk could be addressed.

- [96] Significantly, and contrary to Brigadier Riordan’s approach, Crown Law advised that to undertake detention monitoring in relation to individual detainees from partnered operations would expose New Zealand to legal risk if torture were alleged or discovered during visits. This was because the Solicitor-General considered that there was no legal obligation to undertake individual monitoring and it posed practical problems, particularly because NZDF had no legal power to intervene to protect detainees if it did learn that something was amiss.
- [97] When consulted on the final draft, MFAT preferred the Crown Law view to that of Brigadier Riordan. While Crown Law took a narrower view of New Zealand’s obligations than Brigadier Riordan in key respects, MFAT nevertheless noted that the resource implications of a general obligation to gather information would need to be considered.¹⁶⁷
- [98] Before we move on to describe Operation Yamaha and subsequent relevant developments in chapter 11, we note that the brief overview of the law set out earlier in this chapter highlights the fundamental nature of the prohibition of torture and mistreatment of detainees and the associated requirement for minimum standards of treatment of detainees. Its fundamental nature is such that states should not take a minimalist approach towards the interpretation and application of their obligations. Where doubt exists as to the full scope of an obligation, or the relationship between obligations, states should adopt the approach (whether as a matter of law or policy) which affords the greatest protection to the individual (a *pro homine* approach).
- [99] We also note that Sir Kenneth Keith’s point about states having an obligation under Common Article 1 to “ensure respect” for the prohibitions and obligations contained in Common Article 3 is, in effect, recognised in the opinions of Brigadier Riordan and the Solicitor-General:
- (a) Brigadier Riordan considered that New Zealand had a moral (and arguably a legal) duty to take reasonable steps to ascertain that the human rights of persons detained in partnered activities were respected. As noted at paragraph [90], the Chief of Defence Force raised this issue with the Minister of Defence, seeking further guidance.
 - (b) The Solicitor-General referred to a “duty of non-complicity” in respect of partnered operations, which arose at a systemic level and required New Zealand to gather information about the practices of Afghan personnel and institutions in relation to detention and respond if problems were discovered.

Further, as the foregoing outline of the law shows, the preventive obligations arising from Common Articles 1 and 3 overlap with preventive obligations contained in other sources of law.

¹⁶⁷ Email from [redacted] to [redacted] “RE: Afghan detainees: NZDF and Crown Law opinions” (18 October 2010, 5.20pm) (Inquiry doc 06/11).

11

Operation Yamaha: description and assessment

Chapter 11

- [1] In this chapter we outline what happened on Operation Yamaha. We address the allegations that Qari Miraj was assaulted by New Zealand Special Air Service (NZSAS) personnel shortly after he was captured, and was tortured while in the custody of the Afghan National Directorate of Security (NDS) to make a confession. We then give a brief description of relevant developments in relation to New Zealand's detention policy after Operation Yamaha, before undertaking our assessment in light of the Terms of Reference.

Operation Yamaha: the facts

- [2] The following account of what happened on Operation Yamaha is based on the oral and documentary evidence available to us. In terms of the lead-up to the operation, it incorporates findings from the Inspector-General of Intelligence and Security's (IGIS) Inquiry.¹
- [3] There was high-level New Zealand Government interest in the activities and whereabouts of the insurgents involved in the 3 August 2010 attack on the New Zealand Provincial Reconstruction Team (NZPRT) in Bamyan province in which Lieutenant Tim O'Donnell was killed. Government Communications Security Bureau (GCSB) personnel in Wellington worked with New Zealand Defence Force (NZDF) personnel in Afghanistan and the deployed New Zealand Security and Intelligence Service (NZSIS) staff to identify specific members of the group involved in the attack as their priority "High Value Targets".² One of these was Qari Miraj, a well-known insurgent operating out of Baghlan province.
- [4] Miraj had been trained in the construction of improvised explosive devices (IEDs) and had a number of insurgent fighters under his command.³ He was considered to have been responsible for the deaths of Afghan security personnel in Tala wa Barfak and was a leading member of the group that carried out the 3 August 2010 attack.⁴ He was the person who had likely exploded the IED that destroyed the vehicle in which Lieutenant O'Donnell was travelling.⁵ Miraj was sought by Afghan authorities, and Task Force 81 (TF81) had been looking to capture him for some time. Miraj was a dynamic target, in the sense that he was often on the move.
- [5] Operation Yamaha was one of four deliberate detention operations⁶ over the period of the Operation Wātea deployment to detain the high-risk insurgents identified as having planned or conducted attacks against the NZPRT. Two of the other deliberate detention operations were Operation Burnham and Operation Nova.⁷ The purpose of Operation Yamaha was to disrupt the insurgent network based in the Tala wa Barfak district of Baghlan province, which was planning

1 Inspector-General of Intelligence and Security (IGIS) *Report of Inquiry into the role of the GCSB and the NZSIS in relation to certain specific events in Afghanistan* (June 2020).

2 See IGIS, above n 1, at [55]–[57].

3 Intel Summary Sheet Qari Miraj (Inquiry doc 10/05); Qari Miraj-Obj Yamaha (Inquiry doc 10/09).

4 DSO-CDF Brief Op Watea 18 Jan [2011] (18 January 2011) (Inquiry doc 10/06) at 12.

5 Qari MIRAJ Storyboard OP TRENTHAM TBC 3 Sep 2010 (3 September 2010) (Inquiry doc 10/13) at 2.

6 As we explained in chapter 3 at footnote 59, a deliberate detention operation is a type of operation conducted by ISAF Special Operations Forces to detain a target.

7 Summary of NZ Special Operations Forces Support to the NZPRT in Afghanistan (Inquiry doc 08/26) at [7].

attacks against the NZPRT, Afghan forces and local people in Bamyān province.⁸ The evidence does not indicate that the operation was motivated by a desire for revenge.

- [6] In August 2010, shortly before Operation Burnham, Miraj was placed on the Joint Prioritised Effects List (JPEL), with TF81 listed as the lead agency.⁹ In September 2010, the Commander of the NZPRT contacted TF81 to express his concern about the threat posed by Miraj and to ask TF81 to consider mounting an operation against him. TF81 did undertake some preliminary planning in September 2010 for an operation to capture Miraj in a village in Tala wa Barfak where he had a compound, but ultimately that operation did not go ahead.¹⁰ Obviously, that was an operation which, like Operation Burnham, would have required the Chief of Defence Force's consent as it was outside Kabul and its surrounding districts. We also note that TF81 learnt in mid-September 2010 that Miraj had just passed through Kabul, probably going either to or from Pakistan, but too late to attempt to capture him.
- [7] Moving forward to Operation Yamaha in January 2011, we have described the planning process for the International Security Assistance Force (ISAF) operations in which TF81 was involved with Afghan partners in the context of Operation Burnham and will not repeat that discussion here.¹¹ The planning process for Operation Yamaha was somewhat attenuated. On Saturday 15 January 2011, the NZPRT received information that helped to identify and locate Miraj in Kabul. This information was passed on to TF81, which carried out a range of checks before mounting a "short notice" operation.¹²
- [8] Shortly before the time of his expected arrival, TF81 obtained approval from ISAF and from the Afghan Government for a night-time deliberate detention operation to capture him.¹³ Arrangements were made to deal with deconfliction issues,¹⁴ and to arrange for the availability of an airborne surveillance asset. TF81's usual Afghan partner was the Afghan Crisis Response Unit (CRU). We heard evidence that the CRU was not available for this operation, but Afghan National Directorate of Security (NDS) personnel were involved, along with some Afghan National Police (ANP). In particular, the NDS provided an investigator and a prosecutor equipped with a warrant for Miraj's arrest.¹⁵ The IGIS's report indicates that the deployed NZSIS staff managed TF81's relationship with the NDS,¹⁶ both generally and in relation to this operation. It records that an NZSIS officer's view on the NDS as a partner was that "it was a reliable and dependable partner with a professional prosecution system".¹⁷
- [9] Initially the plan was to conduct a roadside detention at a location where there were no civilians around. However, that changed at the last moment when it became clear that Miraj would be staying the night in Kabul, and the plan became to enter a building and capture Miraj there. There

⁸ Inquiry doc 10/06, above n 4, at 12 [slide dated 16 January 2011].

⁹ 2010-08-16 MINDEF & CDF Brief TF81 Command Brief (August 2010) (Inquiry doc 06/05) at 28.

¹⁰ Inquiry doc 10/13, above n 5.

¹¹ See chapter 3, especially at [24]–[30] and [52]–[57].

¹² IGIS, above n 1, at [59].

¹³ One planning document (which remains classified) is of interest first, because it described the proposed operation as "ANSF [Afghan Security Forces] led" and second, because it contained contradictory indications as to who would detain Miraj.

¹⁴ That is, ensuring that there were no other operations planned in the area at the same time.

¹⁵ We are unsure who prepared the warrant in this case. As we understand it, the general practice was for TF81 personnel to prepare them.

¹⁶ IGIS, above n 1, at [60], referencing MFAT Approach to NDS DG (2 September 2010) (Inquiry doc 11/35).

¹⁷ IGIS, above n 1, at [60]. As we explain in more detail below, some United Nations and other international reports report a different perspective of NDS and its prosecution system.

was no time to issue formal orders. They were written in a note book. But the rules of engagement applied, which, of course, limited the use of force.

- [10] Soon after midnight on 16 January 2011,¹⁸ some TF81 support personnel went from TF81's base camp to the compound where Miraj was thought to be staying. A covert cordon was deployed to the area. About two hours later, TF81 ground forces and support personnel left TF81's base camp to go to the staging area at Kabul International Airport, where they met the personnel who had located the compound. They were at the staging area for around one and a half hours, during which time the Ground Force Commander completed his planning (including risk assessment and operational plan) and conveyed his orders to the troops and back to base camp. The Afghan partner forces arrived and, shortly after 4am, TF81 and Afghan partner forces moved to the general area of the compound.
- [11] On arrival in the general area, the New Zealand and Afghan forces moved in on foot and some TF81 personnel set up a cordon near the compound. NZDF documents from the time record that once the cordon was set, ANP and NDS personnel conducted a "soft knock" at the compound.¹⁹ When there was no response, TF81 personnel entered the compound by going in over the outside wall (a "covert manual entry"). They searched the compound, apparently in conjunction with the NDS personnel, although they did not conduct a tactical site exploitation (that is, the gathering of critical information and material from the site).
- [12] While the compound was occupied, it turned out that Miraj was not there. It was then realised that he was in fact in a building on the other side of the road. That building was a mosque, which non-Afghan forces could not enter due to cultural sensitivities. Accordingly, TF81 personnel established a cordon at the mosque and ANP and NDS personnel conducted a "soft knock" entry. Once they had entered the mosque, they found Miraj and four companions, all of whom surrendered peacefully. One of those with Miraj was another high value target.²⁰ While in the mosque, ANP and NDS personnel conducted a tactical site exploitation.
- [13] There were no arrest warrants for Miraj's four companions, and we understand that two of them were ultimately released at the scene. It is not clear to us whether Afghan personnel formally arrested Miraj inside the mosque or whether that occurred outside on the road. In any event, Miraj was quickly identified by TF81 personnel, as he had a distinctive appearance and they had photographs of him. TF81 personnel began to process the five men. This involved "plasti-cuffing" them, searching them for weapons and such like, and removing items such as mobile phones so that data could be stripped from them. While several witnesses thought some biometric processing (such as taking fingerprints and retina scans) was carried out on the road outside the mosque, the weight of the evidence was that it was carried out later at the NDS facility before TF81 personnel handed the detainees over to NDS personnel there. Given that evidence and the fact that the nature of the road-side locale made taking biometric data difficult, we think it probable that the biometric processing was carried out at the NDS facility by TF81 personnel.
- [14] Once the road-side processing was completed, three of five men brought out of the mosque were transported to an NDS facility in Kabul, known as NDS 90. Some TF81 personnel were involved in this, although most did not go to the facility but returned to base camp. Miraj was placed in a

¹⁸ 110115-ISAF-SOF-NSITF 81 OP RAHBARI OBJ YAMAHA OPSUM (16 January 2011) (Inquiry doc 06/04).

¹⁹ Op Watea R3 Storyboards (9 March 2011) (Inquiry Doc 11/28) at 2 [slide dated 16 January 2011].

²⁰ Inquiry doc 10/06, above n 4, at 12.

TF81 vehicle by TF81 personnel and was transported to the NDS facility where he and the other men were to be detained initially. It is possible that an Afghan national associated with TF81 accompanied the TF81 personnel in the vehicle but, on the evidence we heard, no one from the NDS or the ANP did. Miraj was seated in the middle of the back seat; it is probable that he was wearing plasti-cuffs, a blindfold and ear muffs. We understand that it was unusual for a person detained in a partnered operation to be taken to a detention facility by TF81 personnel in a TF81 vehicle—usually, detainees were transported in CRU or NDS vehicles.

- [15] Upon arriving at the NDS facility, the men were escorted into a large lit-up room. TF81 personnel searched them again and a TF81 photographer took photographs of items seized and of the three men. As noted, the biometric processing was undertaken by TF81 personnel at this point, albeit, we were told, under the “supervision” of NDS personnel. As we understand it, TF81 personnel took the equipment for taking the biometric data on the operation and only they could operate it; further, the information gathered was for TF81/ISAF’s purposes; accordingly, it is not clear to us in what sense the NDS supervised (as opposed to observed) the process. A TF81 doctor assessed the men, albeit based on general appearance rather than a detailed medical examination. We heard evidence that at some stage, most likely as the detainees were being taken from the vehicles at the NDS facility, an NDS member spoke to one of the arrested men in Pashtun, which caused him to become visibly scared and very compliant.
- [16] During this process, NDS staff came out and spoke to Afghan prosecutors who were with the group. It appears the handover process occurred relatively quickly. It is not clear what discussions there were, nor is it clear from the documents whether New Zealand had any way of tracking where Miraj was in the Afghan custodial system after he had been delivered to it.
- [17] As we discuss in more detail later in this chapter, following the publication of *Hit & Run* in March 2017, the Chief of Defence Force ordered the military police to conduct an investigation into the circumstances of Miraj’s arrest and detention.²¹ A number of those interviewed described the practice of either hooding or blindfolding detainees, as well as the use of ear muffs and plasti-cuffs. Interviewees differed as to whether detainees’ hands were generally tied in the front or behind. While the Ground Force Commander for Operation Yamaha could not recall who placed Miraj in plasti-cuffs or whether he was hooded or blindfolded, he explained that the general use of restraints and blindfolds was to ensure that detainees were not able to obtain information that could later be used against New Zealand interests. In his interview with Mr Jon Stephenson, Miraj said that a cover had been placed over his head. In submissions, the Crown Agencies said TF81 used blindfolds, not hoods. Regardless of the specific method, it is clear that Miraj’s eyes were covered for the journey to the NDS facility.
- [18] The operation at the mosque was relatively short, taking something between 30 minutes and one hour (from the time of entry to the completion of the tactical site exploitation).²² NZDF records show that the time from TF81’s initial deployment to the staging area at the airport to the time Miraj was located and detained was just over an hour and a half.²³ The overall operation, from TF81’s initial deployment to withdrawal from the mosque site, was two and a half hours.²⁴

²¹ NZDF MP Incident Report III Treatment of a Detainee (May 2017) (Inquiry doc 11/24).

²² Inquiry doc 06/04, above n 18, at [5].

²³ Inquiry doc 06/04, above n 18.

²⁴ Inquiry doc 06/04, above n 18.

Was Qari Miraj assaulted by TF81 personnel?

- [19] In the course of this operation no shots were fired and there were no civilian casualties.²⁵ However, *Hit & Run* alleges that after Miraj had been placed in the vehicle and was waiting to be driven off, a member of TF81 reached into the back seat and started to shake him violently and then punched him repeatedly in the ribs and stomach and sometimes in the face. The book says that other TF81 members saw what was happening but did not intervene and that the attack was motivated by anger and a desire for vengeance.²⁶
- [20] Following the publication of *Hit & Run* in 2017, Crown Law provided advice to the Attorney-General on the investigation options in relation to the allegations of mistreatment of Miraj. It is unnecessary to go into the details of that advice. It is sufficient to say that before charges could be laid, NZDF commanding officers had to determine that they considered the allegations to be “well founded”.²⁷ To assist with that determination, the New Zealand Military Police began an investigation in May 2017. The Inquiry has had access to all the evidence collected during that investigation. All but one of the New Zealand soldiers present at the scene were interviewed²⁸ and, according to the investigation, no evidence of mistreatment was found.²⁹
- [21] In a briefing to the Minister of Defence dated 11 October 2017, the Chief of Defence Force recommended that the Minister note that the allegation of mistreatment of Miraj by TF81 personnel had been investigated and that no evidence was discovered that supported the allegations.³⁰ The briefing stated that Miraj was detained; TF81 personnel searched him outside the building in which he was detained; after transportation to the NDS facility by TF81 he was again searched by TF81 personnel, photographed, and examined by TF81 medical personnel. According to this briefing, “[n]either the photos nor the medical examination revealed any signs of ill-treatment”.³¹
- [22] In light of its Terms of Reference, the Inquiry has itself conducted a further investigation into this issue, including by interviewing witnesses who were present and analysing contemporaneous documentary material. The Inquiry was also given access to transcripts of three interviews which Mr Stephenson conducted with Miraj in 2017, after the publication of *Hit & Run*. The interviews were conducted over the telephone and through an interpreter. During the interviews, Miraj acknowledged that he was an insurgent and said he had led the attack on the NZPRT patrol on 3 August 2010 in which Lieutenant O’Donnell was killed. In relation to his capture, Miraj said that after he was brought out of the mosque, he was hooded and left standing outside in the cold (the operation took place in the middle of winter). He claimed that he was punched by foreign forces, apparently before he was transported to the NDS facility.
- [23] The Inquiry faced some difficulty in investigating this claim. First, as a result of the passage of time, personnel involved in the operation had difficulty recalling the detail of the operation.

²⁵ Inquiry doc 10/06, above n 4, at 12. This was also reflected in the evidence we heard. As we understand it, there is no suggestion that any civilian casualties occurred on the operation.

²⁶ Nicky Hager and Jon Stephenson *Hit & Run: The New Zealand SAS in Afghanistan and the meaning of honour* (Potton & Burton, Nelson, 2017) at 84–85.

²⁷ Armed Forces Discipline Act 1971, s 102(1).

²⁸ NZDF MP Final Report III Treatment of a Detainee v.3 (6 September 2017) (Inquiry doc 11/27) at [3]. This document records that the final witness, now a civilian, was unavailable to be interviewed.

²⁹ Preliminary Investigation into Allegation of Detainee Mistreatment (11 October 2017) (Inquiry doc 10/01) at [1].

³⁰ Inquiry doc 10/01, above n 29, at [4].

³¹ At [2].

This meant, for example, that the Inquiry's endeavours to ascertain precisely which personnel were in which vehicles was only partly successful.³²

- [24] Second, most of those who gave evidence said that because the alleyway outside the mosque was narrow and dark and the vehicles were lined up there, there was little room and it was difficult to see what was happening other than in their immediate vicinity. Those in positions of responsibility said that they had not seen any indication of inappropriate behaviour during the operation. However, one said he had heard some gossip that Miraj had been punched—that some of the team were joking about it back at base. This soldier gave evidence which suggests that he spoke to the relevant person (person X) afterwards and person X said he had given Miraj a “bit of a touch up”. There was some suggestion that person X was known for making things up. In a separate conversation with another team member, the soldier joked that “it was probably [person X] that got punched (rather than the other way around).” It appears the soldier took no further action.
- [25] Despite the difficulties in investigating aspects of the allegations, however, the Inquiry has, after careful consideration, been able reach conclusions based on the evidence it heard. The Inquiry received credible evidence from several sources (other than Miraj) to the effect that Miraj was punched, either once or several times, in the ribs or stomach as he was being placed into one of the three TF81 vehicles that went to the NDS facility. According to one witness, he did not complain too much because he was a “tough guy”. We also heard evidence from a number of witnesses about a persistent rumour that emerged soon after the operation that a particular TF81 member had punched Miraj. Some witnesses said that Miraj was “displaying a bit of attitude” when being placed into the vehicle, but the preponderance of the evidence was that he acted throughout in a low-key and compliant way.
- [26] The medical officer who briefly examined Miraj could not recall speaking to him or the other men but did recall that Miraj was not displaying any obvious signs of injury or discomfort. The TF81 photographer described Miraj as quite relaxed. He said that Miraj “sort of found it humorous at times”.
- [27] Finally, we note that person X, the individual who was alleged to have punched Miraj, was identified by witnesses and we put the allegations to him. He denied them vigorously.
- [28] In the result, we are satisfied on the basis of the evidence that Miraj could only have been assaulted as he was being placed into the vehicle and was not assaulted while seated in the vehicle prior to departure to the NDS facility. On balance, we consider that Miraj was struck, either once or several times, in the ribs or stomach as he was being placed into the vehicle and while he was restrained and blindfolded. There is some difference, therefore, between the assault described to us and that described in *Hit & Run*, which is a more serious assault.
- [29] It may not have been apparent to other TF81 personnel (that is, those who were not present when Miraj was being placed into the vehicle) that he had been assaulted given the confined space in the alleyway, the number of people captured and the need to deal with them all. We understand that Miraj did not complain at the time to TF81 personnel or to the Afghan national who was

³² This is one reason that inquiries into allegations of this type should be conducted promptly.

present.³³ He also showed no obvious ill effects when he was observed by the TF81 doctor and photographed immediately before being handed over to the NDS at the NDS facility.

- [30] There should have been some follow-up of this incident at the time, even though it was not a serious assault. The use of some force against a detainee may be justified in some situations, for example, to ensure a recalcitrant detainee enters a vehicle. But absent that, any assault of a detainee, whatever its severity, is unacceptable, especially when the detainee is restrained and blindfolded and poses no threat to the troops concerned. In addition to the requirements of operational policies and codes of conduct, there is a legal obligation to treat detainees appropriately, as we explained in chapter 10. In particular, Common Article 3 to the Geneva Conventions, which applies in non-international armed conflicts, requires that detainees be treated humanely and provides examples of prohibited acts. It prohibits a range of conduct and is not confined to the most serious forms of violence.
- [31] Prompt, thorough and impartial examination of detainee mistreatment (whether alleged or suspected) is an important part of fulfilling applicable legal obligations. It is also important from a practical perspective: a person's recollection of events is more likely to be fresh; people are more likely to give detailed descriptions of what they saw or heard; and there is a greater chance that other evidence or information can be gathered to inform an appropriate decision on next steps. Finally, prompt action signals the seriousness of detainee treatment issues and the expected standards of conduct and discipline in military settings.

What happened to Qari Miraj after he was transported to NDS?

- [32] *Hit & Run* alleges that Miraj was tortured in Afghan custody and made a confession, from which NZDF benefitted.³⁴ This is against the background of NDS's reputation with regard to the treatment of detainees, particularly at certain facilities and in obtaining confessions, as we will discuss later in this chapter.
- [33] The Inquiry examined why on this occasion the target of the operation was taken to an NDS facility. The evidence on this from those on the ground was somewhat vague. One explanation, for example, was that TF81 personnel did not know specifically where Miraj was to be taken, while others described that they learnt where they were going part way through the operation. However, we were advised by senior officers that it was TF81 who largely decided which Afghan force element would be responsible for the arrest and detention of particular suspects.³⁵ On occasion, those arrested and detained by the CRU had been released within a day or two of their capture, in circumstances where their release did not appear to be justified. Obviously, with high value targets, such an outcome was thought to be undesirable. The IGIS's report indicates that the deployed NZSIS staff facilitated the involvement of the NDS on this occasion.
- [34] The Inquiry questioned the officers responsible for planning and carrying out the operation. They do not appear to have given much consideration to the risks of torture in the NDS facility to which Miraj was taken. They advised that they had information to suggest the particular facility

³³ Obviously, detainees in Miraj's position may be reluctant or unable realistically to complain. They are, of course, under no obligation to do so.

³⁴ At 88–89.

³⁵ This was dependent on the partner agency's consent, of course. We also understand that on some occasions Afghan agencies would approach NZDF with potential operations to partner on, although this is not the case in any of the operations being addressed by the Inquiry.

was safe. Hon Dr Wayne Mapp gave evidence that some of the contemporaneous documentation identified this facility as ISAF's "facility of choice" for operations of this nature.³⁶ That said, there was general awareness among some TF81 personnel that the NDS had a reputation for mistreatment of detainees.

- [35] In his interviews with Mr Stephenson, Miraj said he was tortured by the NDS when he was in detention—he was deprived of sleep, left cold in the middle of winter, beaten and given electric shocks. He said that NDS personnel were trying to make him confess to things he did not do (although he acknowledged that he was an insurgent and had been involved in particular actions against coalition and Afghan forces). Maulawi Neimatullah was also interviewed by Mr Stephenson about six months before Miraj's first interview. He said that Miraj had been tortured while in prison, referring to sleep deprivation and electric shocks, and said that "they" had paid a substantial bribe to obtain his release (Miraj said he was released after being imprisoned for three years and eight months).
- [36] The Inquiry has seen other independent evidence that supports Miraj's claim that he was tortured. On 26 January 2011, following ongoing liaison with the NDS on the progress of their investigation into Miraj,³⁷ the NZSIS formally received a copy of Miraj's confession. The NZSIS disseminated the confession to a number of New Zealand agencies in a 31 January 2011 intelligence report.³⁸ Later, on 25 February 2011, officials in New Zealand learnt of allegations that Miraj had been tortured. An assessment was made by Headquarters Joint Forces New Zealand that while there was probably an element of truth to the allegations, they were just as likely to have been deliberately contrived to influence the local population. In early March 2011, officials outside NZDF filed the information in a general oversight file for possible later legal review. We note that after assessing the report of the allegations and hearing evidence as to its context the IGIS was satisfied that "on its face there was good reason to assess it may well be true".³⁹ The allegations do not appear to have been brought to the attention of ministers.
- [37] Like the IGIS, we consider that officials should have treated the allegations that Miraj had been tortured in NDS custody as being credible and requiring further enquiry.⁴⁰ In assessing whether there was sufficient information to indicate that the allegations might well have been true, the specific circumstances relating to Miraj's case had to be considered, as did the general context in which the allegations were made.
- [38] In terms of case-specific circumstances, the following are relevant: the timing of the alleged conduct; the methods allegedly used; the circumstances, tenor and content of the later reporting and the likelihood of fabrication in that context; and observations made by New Zealand officers

³⁶ Evidence of Dr Wayne Mapp, Transcript of Proceedings, Public Hearing Module 2 (23 May 2019) at 55; see also (3 May 2011) 672 NZPD 18248.

³⁷ The NZSIS were advised that Miraj had made a confession on 18 January 2011 and expected to receive a debriefing report from the NDS at some stage.

³⁸ AFGHANISTAN: CONFESSION STATEMENT OF TALAWI BARFAK DISTRICT, BAGHLAN PROVINCE INSURGENT LEADER QARI MIRAJ; ADMITS TO LEADING 3 AUGUST 2010 AMBUSH AGAINST NEW ZEALAND PROVINCIAL RECONSTRUCTION TEAM CONVOY (31 January 2011), in email from [redacted] to [redacted] "OPINTREP 002/11 – Qari Mirajuddin Allegedly [sic] Tortured" (2 March 2011, 9.31am) (Inquiry doc 12/08) from 5.

³⁹ IGIS, above n 1, at [70].

⁴⁰ Even if there was a suspicion that the allegation might be false (or, at the very least, that it was not a complete account of what occurred), officials ought to have erred on the side of caution and undertaken effective follow up to establish what happened. Instead, the possibility of a false allegation led to the allegation being dismissed, in a relatively short space of time and without any meaningful enquiries being made.

on the likely veracity or otherwise of the information. This case-specific evidence must be critically assessed against the most reputable international (United Nations and other) reports on the nature of treatment in NDS custody over the relevant period, as well as the wider international literature and guidance, which provides clear and useful information on the methods and patterns of torture in law enforcement and counter-terrorism or other high-security contexts. Taking these factors into account, we consider that there was strong evidence that Miraj was tortured, and that when they learnt of the allegations, New Zealand authorities should have made further inquiries and drawn the matter to ministers' attention.

- [39] Finally in this context, we note that when in late 2010 NZDF requested that the Government extend the NZSAS deployment to Afghanistan by 12 months, it addressed the question of detainee policy in the paper to the Prime Minister and the Ministers of Finance, Foreign Affairs and Defence (who were Ministers with Power to Act).⁴¹ The paper confirmed that NZDF would continue to apply the existing policy on detainees, which was summarised in an annexure to the paper. The detainee policy annexure contained the following statement:⁴²

In the event of the NZSAS becoming aware of any evidence of detainee mistreatment by the ANSF [Afghan National Security Forces], the NZSAS will be required to report in the first instance to CDF immediately and the matter raised with GIROA [Government of the Islamic Republic of Afghanistan] as appropriate. If effective measures are not taken to rectify the problem this may require a cessation, on a temporary or permanent basis, of operations with the ANSF.

While, as we noted at paragraph [36], Headquarters Joint Forces New Zealand was aware of the allegations, we have seen nothing to indicate that the Chief of Defence Force was advised of them or that they were raised with the Afghan Government.

- [40] The facts relating to the operation in which Miraj was captured are relatively simple and straight forward. The difficulties that arise revolve principally around the risks of torture to which he was exposed as a result of the agency and facility to which he was transferred. We return to this later in this chapter.

Developments in relation to detention policy following Operation Yamaha

- [41] Following Qari Miraj's capture in mid-January 2011, the issue of detainee treatment in Afghanistan, and the role of the NZSAS in detention operations, continued to occupy attention. Given that our Terms of Reference focus on the policy and its application to Qari Miraj, we will not canvass all subsequent events in detail. Rather, we mention aspects that we consider to be relevant to the issues we are considering, our principal focus being on the United Nations Assistance Mission in Afghanistan (UNAMA) report, released in October 2011.
- [42] These subsequent developments are relevant to the issue of whether the transport and/or transfer of Miraj to the NDS in January 2011 was "proper" for several reasons:
- (a) First, the UNAMA report dealt with detention conditions in Afghan facilities from October 2010 onwards, including the period when Miraj was captured and taken into detention. The

⁴¹ Extension of NZSAS Deployment to Afghanistan-Op Watea (Inquiry doc 10/33).

⁴² At 11.

report identified significant detainee mistreatment issues at some NDS detention facilities, including NDS 90, over this period.

- (b) Second, the report's findings had a significant impact and led to changes to ISAF's approach to detentions on partnered operations.
- (c) Finally, despite these developments, and the fact that NZDF and New Zealand agencies had earlier learnt of the allegations that Miraj had been tortured in NDS custody, New Zealand made no attempt to raise the matter with Afghan authorities or to investigate it further.

- [43] In late April 2011, in response to parliamentary questions from Keith Locke MP about how many times the NZSAS had been "in the vicinity" when Afghan prisoners had been taken in joint operations, Dr Mapp advised that 35 individuals had been taken.⁴³
- [44] In May, there was further media publicity about the issue.⁴⁴ Dr Mapp's concerns remained and he asked NZDF to provide a further briefing. On 31 August 2011, the Chief of Defence Force advised that the model of the CRU being responsible for effecting arrests was essential for "cultural, operational and developmental reasons, as well as legal ones".⁴⁵ No further elaboration was given on the legal reasons referred to. The tenor of the briefing also suggested a growing concern on the part of NZDF about the reputational impact of this topic. The briefing emphasised that NZDF personnel "do a vital job in a difficult and dangerous environment, often at risk to their own lives."⁴⁶ In the Chief of Defence Force's view, allegations "that by so-doing they may be complicit in one of the most serious crimes are potentially damaging to the morale and mana of the members of the NZDF operating in this demanding theatre if not adequately addressed".⁴⁷ He advised that a small number of those detained by the CRU could be transferred to NDS, but reiterated earlier advice that NZDF was not responsible for transfer decisions;⁴⁸ cited ISAF SOP 362 (which did not apply to partnered operations);⁴⁹ and stated that NDS was the "detainee arrangement of choice" and that ISAF directed troops to make use of their facilities.⁵⁰ As for the future, he advised the Minister that most of New Zealand's future operations would require some form of collaboration.⁵¹
- [45] In September 2011, ISAF revised its approach to persons detained in partnered operations (which reflected the "two categories of detainee" approach) in anticipation of UNAMA's report.⁵² The forthcoming report focused on the treatment of detainees regardless of how they came to be in Afghan custody (that is, whether they were captured in a wholly ISAF operation or in a partnered operation). Due to the nature of the material, we are unable to describe ISAF's revised approach in much detail, although a couple of relevant points are worth noting. First, the concept of detention was widened to include partnered operations. Second, in addition to the steps ISAF would undertake (for example, training, inspections and a temporary suspension of transfers to certain facilities,

43 (28 April 2011) Parliamentary Question 3022 (2011) Keith Locke to the Minister of Defence; (28 April 2011) Parliamentary Question 3023 (2011) Keith Locke to the Minister of Defence; (28 April 2011) Parliamentary Question 3033 (2011) Keith Locke to the Minister of Defence.

44 Jon Stephenson "Eyes Wide Shut: The Government's Guilty Secrets in Afghanistan" *Metro* (New Zealand, May 2011).

45 NTM NZDF Operations – Afghanistan (31 August 2011) (Inquiry doc 05/11) at [7].

46 At [2].

47 At [2].

48 At [8].

49 At [9].

50 At [15].

51 At [3].

52 Quentin Sommerville "NATO Halts Afghan Prisoner Transfer After Torture Fears" *BBC News* (online ed, 6 September 2011) <www.bbc.co.uk>.

including NDS 90 where Miraj had been taken),⁵³ there was an expectation that states would also review their own policies in light of the changes and implement a range of additional measures to protect detainees captured on partnered operations from abuse, both before and after transfer.

- [46] On 10 October 2011, UNAMA released its report.⁵⁴ By way of background, a year earlier in October 2010, in response to complaints the organisation had received from communities within Afghanistan and others, UNAMA instigated a detention observation programme focusing on detainees held for offences related to the armed conflict in Afghanistan. This involved visiting facilities and interviewing a number of conflict-related detainees between October 2010 and August 2011. For this report, UNAMA explained that a detainee was considered to be “conflict-related” if they were charged with crimes against the state under Afghan criminal law, or with relevant terrorism offences. UNAMA interviewed detainees who had been captured in operations where ISAF forces acted alone, as well as operations in which ISAF forces acted jointly with local Afghan forces.⁵⁵ The report provided the results of this observation programme. UNAMA had been granted access to all NDS detention facilities except two, one of which was NDS 90 in Kabul (where Miraj was taken). However, by interviewing detainees who had spent time at these two facilities, UNAMA was able to gather information about conditions in them.⁵⁶
- [47] Of the 28 individuals interviewed about NDS 90, 26 reported torture, which included beating, suspension, twisting or wrenching of genitals and, in some cases, the use of electric shocks. All abuse was reported as having occurred during the interrogation process.⁵⁷ UNAMA interviewed 126 detainees about treatment in 17 further facilities not covered in the UNAMA report, including NDS 17 in Kabul. Of these, 25 per cent alleged they had been tortured. UNAMA required further time to establish the credibility of these allegations and, at the time of the release of its report, continued to investigate the accounts provided.⁵⁸ In response to the suggestion by some governments and others that detainees make false allegations “as a form of anti-Government propaganda”, UNAMA addressed how it ruled this out when assessing the veracity the accounts provided during interviews with detainees.⁵⁹
- [48] In relation to the matters that were verified through the observation programme, UNAMA concluded:⁶⁰

UNAMA’s detention observation found compelling evidence that 125 detainees (46 percent) of the 273 detainees interviewed who had been in NDS detention experienced interrogation techniques at the hands of NDS officials that constituted torture, and that torture is practiced systematically in a number of NDS detention facilities throughout Afghanistan. Nearly all detainees tortured by NDS officials reported the abuse took place during interrogations and was aimed at obtaining a confession or information. In almost every case, NDS officials

53 UNAMA *Treatment of Conflict-Related Detainees in Afghan Custody* (UNAMA and United Nations Office of the High Commissioner for Human Rights, October 2011) at 5 and footnote 27.

54 Email from KABUL to MEA and BAMİYAN “FORMAL MESSAGE 20111018: RELEASE OF UNAMA REPORT” (19 October 2011, 5.42am) (Inquiry doc 11/44) UNAMA, above n 53, at 13.

55 UNAMA, above n 51, at v – vi.

56 At 18.

57 At 18.

58 At 35.

59 At vii – viii.

60 At 2. One year later, UNAMA reported that patterns of conduct suggested systematic torture at two NDS facilities, one of which was NDS 90 in Kabul. It also reported on “sufficiently reliable and credible cases of torture” at ten other facilities, including NDS 17 in Kabul: UNAMA, *Treatment of Conflict Related Detainees in Afghan Custody: One Year On* (UNAMA and United Nations Office of the High Commissioner of Human Rights 2013), at 9 – 10.

stopped the use of torture once detainees confessed to the crime of which they were accused or provided the requested information.

- [49] This was despite the fact that the Afghan Constitution explicitly prohibited the use of torture “even for discovering the truth from another individual who is under investigation, arrest, detention or has been convicted to be punished”.⁶¹ The use of torture was also a criminal offence under the Afghan Penal Code.⁶² UNAMA found that five facilities, which included NDS 90, systematically tortured detainees for the purpose of obtaining a confession.⁶³ UNAMA investigators interviewed 89 detainees who reported the involvement of international forces (either alone or partnering with Afghan forces) in their capture and transfer to the custody of either NDS or the Afghan National Police (ANP). In relation to 19 of these, UNAMA found compelling evidence of torture while in NDS or ANP custody.⁶⁴
- [50] Among other things, UNAMA recommended that troop-contributing states: suspend transfers to NDS and ANP facilities where credible allegations of torture existed; review monitoring practices at each NDS facility where detainees are transferred and revise as necessary to ensure detainees are not transferred to a risk of torture; review transfer policies to ensure adequate safeguards; use their joint operations, funding arrangements, the transition process, intelligence liaison relationships and other means to stop the use of torture; and build capacity through mentoring and training of NDS and ANP on the legal and human rights of detainees and on effective interrogation methods and forensics.⁶⁵
- [51] A few weeks before the release of the report, the then Director of Defence Legal Services, Brigadier Kevin Riordan, provided advice on a draft which had been provided to NZDF. He noted that the allegations in the report were regarded as credible, but emphasised that NDS 17 had only a few allegations in respect of it and that partnering arrangements with CRU would not change. Others who were considering UNAMA’s report had noted that, although not officially sanctioned or directed, the report appeared to have uncovered torture on a large scale. Officials appear to have paid little attention to NDS 90. While NDS 17 may have been front-of-mind given the assessment in *Evans*, NDS 90 equally warranted attention: UNAMA had addressed NDS 90 in its report and ISAF had taken specific steps as a result. NDS 90 was located in Kabul and was one of the facilities where detainees captured in TF81/Afghan operations were transferred, including Miraj.
- [52] Dr Mapp sought advice from officials. In particular, he noted that the report seemed to require specific action from New Zealand and asked his Press Secretary to find out exactly what New Zealand was doing. NZDF advised that no-one captured by New Zealand was in NDS custody but did not mention partnered operations. NZDF said that its policies on transferring detainees had been reviewed and were considered robust and appropriate to deal with the concerns in the UNAMA report. No further information was provided about the basis for this assessment.
- [53] According to NZDF, the “headline point” was that most of UNAMA’s recommendations were to

⁶¹ Constitution of Afghanistan, art 29 (cited in UNAMA, above n 53, at 53).

⁶² Afghan Penal Code, art 275 (cited in UNAMA, above n 53, at 53).

⁶³ UNAMA, above n 53, at 3. A “systematic” practice or use of torture involved an institutional policy or use of torture.

⁶⁴ At 4.

⁶⁵ At 52.

increase training and mentoring.⁶⁶ NZDF emphasised that UNAMA had not made a complicity finding and, in fact, recommended more mentoring and training.⁶⁷ It repeated earlier advice that New Zealand had no resources or legal power to monitor detainees and stated that, to the best of its ability to ensure, NZDF was confident no CRU detainee had been mistreated or handed over to prohibited facilities. Among other things, the advice was silent on those transferred directly to NDS 90 (such as Qari Miraj), and on those the CRU transferred to the NDS.⁶⁸

- [54] Documents available to the Inquiry show that around this time, Brigadier Riordan recommended that New Zealand approach the Afghan Government to express concern about what was revealed in the UNAMA report and to seek assurances not only that people captured on partnered operations in the future would not be tortured but also that those captured in the past with New Zealand assistance had not been tortured. No action was taken, however, apparently on the basis of the Solicitor-General's advice.
- [55] On 11 October 2011, agencies also prepared written advice for the Minister of Defence and Prime Minister that ISAF was managing the situation and New Zealand had only captured one detainee. Separately, NZDF also advised, as it had done in an earlier briefing to the Minister of Defence,⁶⁹ that only a small number of persons arrested by the CRU are transferred to the NDS in Kabul. NZDF figures from that period provide a different picture.⁷⁰ Of 160 total operations, 74 resulted in detention of 193 individuals. In 58 of those operations, 150 individuals were taken into Ministry of the Interior custody (it is not clear where they were sent thereafter). On 15 operations, 42 individuals were taken into NDS custody. By these figures, just over one fifth (21.8 per cent) of all detainees taken in partnered operations were sent to an NDS facility. It is also possible that some of the 153 persons transferred to Ministry of the Interior custody may have been later transferred to the NDS.
- [56] Later in October, the Chief of Defence Force provided further briefings to the Minister of Defence.⁷¹ These briefings emphasised that torture was not systematic in all facilities; it was not a *de facto* policy; and NDS had cooperated with UNAMA.⁷² They also advised that, since the completion of the UNAMA report, no one arrested during CRU operations had been taken to prohibited facilities.⁷³ This advice did not address whether persons transferred before this date, such as Miraj, had been transferred to prohibited facilities nor did it mention that UNAMA had been prevented from accessing NDS 90.⁷⁴

66 The Ambassador in Kabul, in a later email, emphasised that UNAMA had endorsed greater engagement and cooperation: see email from [redacted] (KBL) to [redacted] (ISED) "RE: scan version of reports- combined." (20 October 2011, 5.29am) (Inquiry doc 11/45). Apparently, after becoming aware of the UNAMA report, New Zealand officials in Kabul ensured they knew where persons arrested by the CRU were being detained and to whom they were handed over.

67 As we understand it, UNAMA's mandate did not involve making determinations of individual or state liability, so framing the advice in this way carried some risk that it could be interpreted as confirmation by the UN that New Zealand's policy was in full conformity with applicable international law.

68 If the numbers available to the Inquiry are accurate, at least 20 per cent of those captured on partnered operations over the course of Operation Wātea were taken directly to NDS facilities. The figure may be higher because we have no information about how many of those arrested by the CRU were transferred to NDS custody.

69 Inquiry doc 05/11, above n 45, at [8].

70 UNCLASSIFIED Op Waatea Operations Summary – Numerical Totals (27 October 2011) (Inquiry doc 12/14).

71 NTM Detainee Treatment – Afghanistan (18 October 2011) (Inquiry doc 05/12); NTM Detainee Treatment – Afghanistan (20 October 2011) (Inquiry doc 05/13).

72 Inquiry doc 05/12, above n 71, at [3]. But compare Inquiry doc 11/17 (email from [redacted] (KBL) to [redacted] (ISED) and others "RE: UNAMA Report on detainees" (8 September 2011, 4.46am) (Inquiry doc 11/17) and email from [redacted] (ISED) to [redacted] "RE: UNAMA Report on detainees" (8 September 2011, 09.32) (Inquiry doc 11/17).

73 At [5].

74 Inquiry doc 05/12, above n 71.

- [57] The Minister of Defence publicly released the NZDF briefings to him of 31 August and 20 October 2011.⁷⁵ Before this, officials identified potential questions and apparent inconsistencies between the advice and what was in the public domain on NDS. One official, for example, observed that the fact of the *Evans* decision implied New Zealand “either know there is a risk of torture or it is reasonable to assume we know but the CRU we mentor still continues to use the facility.”⁷⁶ After publication, officials discussed with ministers the possibility of seeking assurances from Afghanistan about how persons captured during partnered operations had been treated.⁷⁷ It does not appear that officials recommended monitoring but the instruction to seek assurances was given, although it is not clear if these assurances were in fact sought or obtained.⁷⁸
- [58] On 21 October 2011, the Chief of Defence Force issued an all-staff email, in which he advised that NZDF complied with United Nations and international standards for detainee transfers.⁷⁹ He emphasised that torture was not institutionalised in all facilities and UNAMA had advised that countries “must continue” to partner with local authorities. He said that he regarded it as his duty to protect staff from being implicated in any breach simply through carrying out their roles, which they did in a difficult and dangerous environment. While the Chief of Defence Force no doubt wanted to maintain staff morale, some of the key messages in this email were inaccurate and others ought to have been more carefully considered.
- [59] Officials briefed the Minister of Defence on what ISAF was doing in response to the UNAMA report. These briefings, however, did not inform relevant ministers of the specific expectations of units involved in partnered operations, nor that persons detained in previous partnered operations (such as Miraj) had been taken to facilities to which transfers had been suspended as a result of the UNAMA report.⁸⁰ It does not appear that the relevant ISAF material was provided to the Minister.
- [60] In late November 2011, shortly after the release of the UNAMA report and ISAF’s updated approach to partnered operations, New Zealand was informed of fresh allegations of torture made by detainees in NDS facilities. New Zealand also learnt that NDS 17 (the facility assessed in *Evans*) and NDS 90 (the facility to which Qari Miraj had been transferred) were located on the same compound and that detainees were sometimes transferred between facilities during the investigation phase. This information was significant in terms of assessing the risk of torture to persons transferred into Afghan custody and NZDF staff raised concerns internally with NZDF in Wellington about the legal risks associated with continuing transfers to NDS facilities. Very shortly after the initial reporting, however, New Zealand was advised that the allegations as to treatment could not be substantiated and there was no evidence of systematic transfer of detainees between facilities. New Zealand officials appear to have accepted this assessment without further

75 5283511_OP BURNHAM_ 2011 Minister of Defence Release on Detainees in Afghanistan (22 October 2011) (Inquiry doc 06/13).

76 Email from [redacted] (Inet) to [redacted] (ISED) “RE: scan version of reports- combined.” (19 October 2011, 10.18am) (Inquiry doc 11/48).

77 Email from [redacted] (ISED) to [redacted] (Inet) and [redacted] (Inet) “MFAT issues meeting: NZ response to UNAMA Report on Detainees” (19 October 2011, 3.08pm) (Inquiry doc 11/51); email from [redacted] (ISED) to [redacted] and others “UNAMA Report: NZ Response” (17 October 2011, 10.12am) (Inquiry doc 12/05).

78 Email from ISED to KABUL “RE: FORMAL MESSAGE: 20111018: RELEASE OF UNAMA DETAINEE REPORT” (11 November 2011, 4.32pm) (Inquiry doc 11/47).

79 Email on behalf of Office of Chief of Defence Force to all at NZDF “Message from CDF: NZDF operations in Afghanistan meet UN and international standards for the transfer of detainees” (21 October 2011, 3.15pm) (Inquiry doc 11/46).

80 The relevant ISAF material was deposited into a safe in the Office of the Chief of Defence Force on 7 September 2011, the same day as the Incident Assessment Team’s Executive Summary: See Extract from OCFD Directorate of Coordination register “S115 Suspension of Detainee Transfers” (7 September 2011) *Inquiry Bundle for Public Hearing Module 4 Resumed* (Public Hearing Module 4, 15 October 2019) at 44.

meaningful follow-up. It also appears that the Minister of Defence was never briefed about this—that is, the fact that serious allegations had been made, the initial feedback on the allegations and ISAF’s final assessment of the evidence, and on the possibility of transfers between facilities.

- [61] We draw attention to two points arising in this sequence of events. The first is that UNAMA commenced its investigation in October 2010, in response to complaints it had received about the situation in Afghan detention facilities. UNAMA came to similar conclusions as the Court in *Evans* had, namely that there was a significant and continuing problem with the mistreatment of detainees in some NDS facilities.⁸¹ In our view, the Court’s judgment in *Evans* should have alerted New Zealand to the fact that there was a significant and continuing problem with what was occurring in Afghan detention facilities that required an active response. This, after all, was the effect of the legal advice given by Brigadier Riordan and the Solicitor-General following the decision.
- [62] We acknowledge that Dr Mapp had discussions with Afghan counterparts about detention issues during his visit to Afghanistan in late August 2010, and was encouraged by what he was told. We also acknowledge that he participated in international discussions about the issue and was generally concerned about it. As well, we accept that New Zealand officials engaged with the officials of other ISAF partners on detention issues, and to some extent with Afghan officials. But little effective action seems to have been taken after the receipt of the legal advice, which made it plain that more active and effective engagement with the issue was required. This is despite the fact that the Chief of Defence Force raised the matter specifically with the Minister in his briefing note of 16 September 2010.⁸²
- [63] The second point is that once UNAMA’s findings became available, ISAF did reconsider and revise its position in relation to detentions on partnered operations. New Zealand officials also took some steps, but they were modest and, in some cases, would not have provided meaningful or effective protection to individuals from real or immediate risk of torture.⁸³ Our impression from reading the documents is that officials were reluctant to depart from the view they had expressed earlier in 2010 that there had been “substantial improvement” in conditions of detention in Afghan facilities.

Assessment

- [64] We now give our assessment of New Zealand’s detention policy in relation to persons detained during partnered operations and its application to the capture and detention of Qari Miraj. We do so under the following headings:
- (a) A negotiated arrangement?
 - (b) New Zealand’s detention policy for partnered operations examined.
 - (c) How should Qari Miraj’s capture and subsequent detention be analysed?

⁸¹ The Court in *Evans* examined international reports issued between 2005 and early 2010.

⁸² Note to Minister 414 Detainee Arrangements – Afghanistan (16 September 2010) (Inquiry doc 03/01)

⁸³ As noted at [57], an instruction was given to obtain assurances, but it is not clear that it was ever acted upon. It is also unclear if it provided effective protection against transfers to facilities where UNAMA had found credible evidence of systematic torture.

We also address New Zealand's failure to take steps after learning of the allegations concerning Miraj's torture.

A negotiated arrangement?

- [65] As the Crown Agencies acknowledged in submissions, New Zealand could, had it so wished, have attempted to enter into an arrangement with Afghanistan in relation to people arrested by Afghan personnel in partnered operations, as it had done in respect of those detained by NZDF directly and transferred to Afghan authorities. The arrangement that New Zealand entered into with Afghanistan in the latter context was an acknowledgment that the persons captured were under the "effective control" of New Zealand forces, so that New Zealand had "jurisdiction" over them, from which certain legal obligations flowed. The arrangement placed constraints on the way Afghanistan could deal with people transferred to its custody by NZDF personnel, and provided monitoring and similar mechanisms designed to give New Zealand the ability to check that Afghanistan was meeting its commitments.⁸⁴ However, that curtailment was not an unjustified interference with Afghanistan's sovereignty because it was something to which Afghanistan agreed following negotiations. In other words, the "curtailment" resulted from an exercise of sovereignty.
- [66] There was no reason of principle that prevented New Zealand from pursuing a similar arrangement with Afghanistan in relation to those who were arrested by Afghan personnel during partnered operations, as Brigadier Riordan noted in his opinion after the *Evans* decision was delivered. Such an arrangement could have been presented to Afghanistan as a requirement for New Zealand's participation in partnered operations, just as New Zealand had required a written arrangement in relation to direct detentions and subsequent transfers to Afghan custody. It would then have been up to Afghanistan, in the exercise of its sovereignty, to have decided whether it was prepared to enter into such an arrangement. Afghanistan would, of course, have been free to decide that it did not wish to enter into any such arrangement. If it declined to do so, New Zealand would then have had to decide about the legal and other implications of that, including whether, or how, to proceed with the partnering arrangement with the CRU. The Crown Agencies submitted that this had the potential to undermine New Zealand's engagement in Afghanistan in furtherance of the Security Council resolutions, although Security Council resolutions do not, of course, relieve states from meeting their international obligations.
- [67] As is reflected in the Solicitor-General's advice, any arrangement with Afghanistan in relation to persons detained on partnered operations need not have contained the same elements as the arrangement in relation to persons detained directly by NZDF, so long as the ultimate purpose of the policy (effective protection of individuals from the risk of torture) could be maintained. Besides training and mentoring, an arrangement could have involved a conditional assistance policy, in which assistance was varied, amended, suspended or terminated if there were indicators of abuse in relevant Afghan detention facilities; some form of monitoring of conditions in

⁸⁴ We acknowledge the inherent challenges in detecting, responding to, and preventing torture through the use of assurances and detention monitoring regimes. We note the observations that have been made by UN experts over a number of years about their propriety in terms of states' international legal obligations. However, some states (including New Zealand) consider that assurances and detention monitoring (ie, conducting independent inspections to verify treatment) can assist in meeting some obligations in relation to torture. The Committee against Torture has recently considered this issue: UN Committee Against Torture *General Comment No 4 (2017) on the implementation of article 3 of the Convention in the context of article 22* UN Doc CAT/C/CG/4 (4 September 2018). New Zealand presented submissions during the deliberation process for this General Comment.

particular detention facilities; and so on. In short, an arrangement involving something less onerous than monitoring of each individual detainee might well have been appropriate, at least for most detainees, as long as it was, overall, effective.⁸⁵

- [68] While the Crown Agencies acknowledged that New Zealand could have attempted to negotiate some sort of arrangement with Afghanistan in relation to the treatment of detainees arrested in partnered operations, it said that doing so would have proved difficult. That may be correct; but having already negotiated an arrangement with Afghanistan in respect of one category of detainee, it may have been possible to negotiate another arrangement more readily. An ambitiously crafted arrangement might also have included provision for New Zealand to provide more hands-on training and capacity-building of Afghan officials to enhance human rights compliance. Given that NZDF was in theatre for the purpose of giving effect to the UN Security Council mandate, an arrangement which directly addressed detention issues may, if implemented well, have been beneficial to the longer-term objectives of that mandate. In any event, there was no attempt to negotiate any form of arrangement—indeed, the option was specifically rejected.
- [69] The contemporaneous documents indicate that the option was rejected for two main reasons. The first was that New Zealand agencies considered that there was no legal obligation to enter into such an arrangement; the second was a concern about the resources required.
- [70] Putting to one side for the moment the question whether there was a legal obligation, we reiterate that both Brigadier Riordan and the Solicitor-General considered that there may well be at least a moral obligation on New Zealand to take some steps in relation to those arrested by Afghan authorities on partnered operations, although they did not agree on precisely what those steps should be.⁸⁶ Brigadier Riordan had in mind a formal arrangement with Afghanistan, with the ability to monitor the treatment of individual detainees and so on. The Solicitor-General counselled against setting up a monitoring programme for individual detainees,⁸⁷ but agreed that steps were required, such as seeking formal and operational assurances, gathering information about circumstances within Afghan detention facilities and, if it became apparent that torture was occurring, taking steps in response.⁸⁸ But the point for present purposes is that both recognised that there was a moral dimension to this issue going beyond the strictly legal one.⁸⁹ Although the contemporaneous documents indicate that other agencies such as MFAT were prepared to acknowledge this, the issue of resources seems to have been a factor early on in the deployment and was a significant factor throughout.⁹⁰
- [71] We are troubled that the option of seeking some form of arrangement with Afghanistan about the treatment of detainees captured on partnered operations was rejected. New Zealand deployed forces to Afghanistan in 2009 in the knowledge that, despite the heavy commitment of military and humanitarian resources to Afghanistan since September 2001, torture and other mistreatment

⁸⁵ OCPAT (which can be applied to military and high security detention settings) and associated literature provides assistance in understanding what effective prevention entails in different operational settings. In addition, and as we describe further below, in some instances there may have been a requirement for a more individualised arrangement.

⁸⁶ Detention Detainee Arrangements Afghanistan (10 September 2010) (Inquiry doc 06/10), at [57]–[63]; Solicitor-General “Obligations in respect of persons detained during multinational operations (DFO037/283)” (2 November 2010) at [3], in Note to Minister 484 Detainee Arrangements – Afghanistan (9 November 2010) (Inquiry doc 03/02) from 4.

⁸⁷ Solicitor-General, above n 86, at [69].

⁸⁸ At [42].

⁸⁹ At [39]; Inquiry doc 06/10, above n 86, at 65.

⁹⁰ See, for example, email from [redacted] ISED to [redacted] and others “RE: Afghan detainees: NZDF and Crown Law opinions” (18 October 2010, 5.20pm) (Inquiry doc 06/11). Other documents support this but they remain classified.

still occurred in Afghan institutions. As we noted earlier,⁹¹ officials were aware of the international reports concerning conditions in Afghan facilities. New Zealand was careful to make appropriate arrangements in relation to persons it detained directly, yet took the view in its detention policy that an arrest by Afghan authorities on partnered operations effectively insulated it from significant obligations in relation to torture or other mistreatment of detainees.

- [72] We consider that New Zealand had at least a strong moral obligation to provide its support to Afghanistan in a way that ensured, to the extent possible, that its actions did not contribute to people being tortured or mistreated in detention. We see this as reflecting the fundamental nature of the prohibition on torture under international law and its associated obligations, and New Zealand's long-standing commitment to international human rights norms. This gains additional support from the legal obligation which Sir Kenneth Keith highlighted in Common Article 1 of the Geneva Conventions of "ensuring respect" "in all circumstances" for the obligations towards detainees flowing from Common Article 3,⁹² to which we return below, as well as from the other sources of preventive obligations discussed in chapter 10.
- [73] It must be remembered that Afghanistan's criminal justice system, inherited from the Soviet regime, was a confession-based system. As both the judgment in *Evans* and the later UNAMA report indicated, most torture occurred within a short time of suspects being detained and was aimed at obtaining confessions. "High value" detainees from whom valuable intelligence might be obtained were likely to face greater risks than ordinary criminal suspects. Consequently, the risk of torture existed in both law enforcement and armed conflict settings. Given that an important role of NZSAS personnel in Afghanistan was to mentor the CRU, a specialist police unit, as it performed law enforcement functions, we consider New Zealand could and should have recognised the reality of the risk of torture as a result of operations in which its forces were involved by making appropriate arrangements with Afghanistan in relation to people arrested by Afghan authorities on partnered operations.
- [74] In their submissions, the Crown Agencies noted that numerous other countries which contributed forces to ISAF adopted the same policy as New Zealand towards detainees on partnered operations, as did ISAF itself. The Crown Agencies submitted that this constituted evidence of states' practice, which is relevant to determining the scope of obligations under customary international law and the interpretation of obligations under international treaty law.
- [75] However, we do not know how many states engaged in partnering arrangements with Afghan forces, what the nature of those partnering arrangements were or how they were implemented in practice; for example, we do not know what the precise role of other states' forces on partnered operations was. We are also unable to review the detention arrangements of all countries which contributed to ISAF. Consequently, we are not in a position to fully assess the basis of this claim.⁹³ But even if (a) it were true and (b) we assume that arrangements in a particular non-

⁹¹ Chapter 10 at [9].

⁹² See chapter 10 at [42].

⁹³ ISAF recognised that states were free to adopt their own policies in relation to detention, including by seeking bilateral arrangements to fulfil their own national approach to international legal obligations. Accordingly, a state was free to adopt a stricter policy in relation to detentions on partnered operations, as we understand some states did, for example, Canada. We also note that state practice alone is not sufficient – it must arise as a result of *opinion juris* – that is, a belief that distinguishing between detainee categories and, moreover, not extending similar protections to both groups was or is a result of a legal obligation to refrain from taking such steps (and not, for example, a result of practical expediency or capacity, political will, or other non-legal consideration). It is not at all clear to us, based on the available evidence, that this is the case here.

international armed conflict could be treated as decisive in terms of states' practice, questions about New Zealand's position would remain. New Zealand has tended to view itself as being at the forefront in matters of international human rights and has in the past adopted values- and rights-based stances in advance of other comparable states. The positions adopted by other states should not necessarily determine the scope of the obligations that New Zealand sees as governing its conduct, or the way in which it discharges those obligations. This became particularly acute after the Solicitor-General and others raised the possibility that there were relevant legal obligations. That suggested that a precautionary approach should be adopted, one which afforded the greatest level of protection to individuals and which reflected the humanitarian principles underlying this area of law. In any event, it would, in our view, be unfortunate if New Zealand lost its commitment to independent thinking on important issues of human rights such as the prohibition on torture and the effective prevention of it.

- [76] To conclude, we think it disappointing that New Zealand chose not to attempt to enter into an arrangement with Afghanistan about the treatment of persons detained by Afghan authorities on partnered operations given the information available to it about conditions in Afghan detention facilities, which was subsequently confirmed by *Evans* in 2010 and the UNAMA report in 2011. Throughout the Operation Wātea deployment, there was information available that, despite some progress, torture was still prevalent in Afghan detention facilities, particularly NDS facilities. This information, together with the information about the confession-based nature of the Afghan criminal justice system, should have led New Zealand to appreciate that there was a real risk that some of those arrested by Afghan personnel on partnered operations would be detained in facilities where they could well be subjected to torture. Even if not legally obliged to do so, we consider that New Zealand should have recognised and addressed this in some form of over-arching arrangement.
- [77] It is clear from the contemporaneous documents that the resource implications of taking more active steps in relation to those detained on partnered operations were given significant weight. This feature was also raised by Counsel for the Crown Agencies in submissions,⁹⁴ by NZDF⁹⁵ and by Dr Mapp⁹⁶ as a justification for New Zealand's approach. We think it unattractive that considerations of that type should be given significant weight (or worse, be determinative) in a context such as this, especially given New Zealand's oft-stated commitment to being a good international citizen. If there are strong obligations of this sort, surely New Zealand should either put itself in a position to meet them or not engage in the enterprise in the first place—all the more so, of course, when the obligations are legal ones.

New Zealand detention policy for partnered operations examined

- [78] We now come to the detail of the policy. We begin by recording the obligations in relation to torture that the Crown Agencies acknowledged applied to New Zealand forces in partnered operations:
- (a) First, the Crown Agencies accepted NZDF personnel were obliged to treat people humanely during interactions. They could not commit torture themselves or acquiesce in Afghan

⁹⁴ Paul Rishworth QC, Transcript of Proceedings, Public Hearing Module 3 (29 July 2019) at 71 and 76; Paul Rishworth QC and Ian Auld *Memorandum of Counsel for the Crown Agencies* Submission to Inquiry (16 August 2019) at [42].

⁹⁵ Evidence of Brigadier Lisa Ferris, Transcript of Proceedings, Public Hearing Module 3 (30 July 2019) at 220; Evidence of Colonel Rian McKinstry, Transcript of Proceedings, Public Hearing Module 4 (17 September 2019) at 195; and Evidence of Air Marshal Kevin Short, Transcript of Proceedings, Public Hearing Module 4 (18 October 2019) at 1163.

⁹⁶ Evidence of Hon Dr Mapp, above n 36, at 62.

personnel torturing people. The Crown Agencies also accepted that the training and mentoring provided by NZDF personnel to Afghan personnel should encourage respect for International Humanitarian Law and International Human Rights Law.

- (b) Second, NZDF personnel had to avoid becoming complicit in torture.
- (c) Third, there could be factual situations where a person captured in a partnered operation came under New Zealand's jurisdiction so that *non-refoulement* obligations could apply. This depended on the nature and extent of New Zealand's involvement in particular operations. If in an operation NZSAS personnel were not in fact providing support to Afghan authorities in a law enforcement context but were acting for their own purposes and Afghan authorities were "merely co-opted", it might be appropriate to classify the operation as an NZSAS operation with Afghan authorities effectively acting simply as agents of the NZSAS. In addition, the Crown Agencies accepted that there might be instances where, although the intention was for Afghan authorities to conduct an arrest, an operation could turn from a "law enforcement" to an "active hostilities" operation, during which the NZSAS detained a person under the authority provided by the relevant Security Council resolutions and International Humanitarian Law.

As will be apparent, then, the Crown Agencies did not accept that New Zealand had *non-refoulement* obligations in relation to detentions on partnered operations in the ordinary course, but did accept that the particular facts of operations matter, so that in some circumstances New Zealand might have such obligations.

- [79] According to the Crown Agencies, the critical question for determining on which side of the line an operation falls is whether it "could properly be considered to have been conducted in order for the Afghan authorities to exercise their law enforcement function, and whether the participation of the NZSAS can properly be said to have been directed at supporting this". Consequently, as long as the purpose of the involvement of the NZSAS in an operation was to provide support to the Afghan authorities to effect an arrest and their participation can be seen as supporting this, it would not matter that the operation was initiated, planned and substantially conducted by NZSAS personnel or that it could accurately be described as "New Zealand-led"; nor would it matter that the warrant issued and executed by Afghan authorities had been prepared by NZSAS personnel. The fact that:

- (a) it was intended that Afghan officials would execute an arrest warrant; and
- (b) Afghan officials did that;

would mean that New Zealand would bear no responsibility if mistreatment occurred in detention, even where that was a real risk at the time of capture: in effect, that was none of New Zealand's business.⁹⁷

- [80] As we see it, the position adopted by the Crown Agencies is based on the premise that there was a sharp distinction between armed conflict and law enforcement operations. However, as

⁹⁷ This assumes that none of the exceptions identified by the Crown Agencies applies: that is, it assumes that Afghan personnel have not been "co-opted" to TF81's purposes and that TF81 personnel have not acquiesced in, or been complicit in, the later mistreatment. Crown Agencies objected to the characterisation in the text, but we consider that it accurately states the practical effect of the policy as initially explained by the Crown Agencies and as applied.

we noted in chapter 7, this distinction is problematic.⁹⁸ As the Court in *Evans* recognised,⁹⁹ detention operations had both armed conflict and law enforcement dimensions. The insurgency in Afghanistan presented challenges because of the ability of insurgents to merge into the general population and from the forms of warfare they engaged in—surprise guerrilla-style attacks, use of improvised explosive devices and so on. Counter-insurgency activities posed considerable threats to the forces involved in them. Equally, however, Afghan domestic authorities were interested in prosecuting insurgents, given that their activities almost inevitably involved the commission of crimes (for example, terrorism offences). So, the detention of an insurgent was likely to serve both armed conflict and law enforcement interests, albeit that armed conflict and law enforcement activities have different objectives. This is because armed conflict seeks to address immediate and future threats to safety, whilst law enforcement is concerned with punishing past infractions. Consequently, using a test which looks at operations based on their purpose, or the purpose of one of the forces involved, may not be particularly useful. There may be more than one purpose to an operation, and to a force's participation in that operation. This is an important part of any factual or contextual assessment.

- [81] We are troubled by the Crown Agencies' analysis for another reason. We take Operation Burnham as an example. If the two targets, Neimatullah and Kalta, had been captured during the operation as described in chapter 4, we consider it could not sensibly have been argued that NZDF personnel did not have "effective control" over them, even if at some stage of the operation they were formally arrested by Afghan personnel pursuant to Afghan arrest warrants. We say this because NZDF personnel were responsible for all meaningful elements of Operation Burnham—obtaining the necessary intelligence; undertaking the necessary liaison with ISAF; obtaining the necessary air support; and planning, organising, leading and undertaking the operation. The operation was far beyond the operational experience, skills and capabilities and equipment levels of the CRU personnel involved. For security reasons, CRU personnel were not advised of the operation until a day or two before it occurred. The planning documents make two things clear—first, that this was an operation motivated by armed conflict considerations (in particular, the protection of the NZPRT) rather than law enforcement ones, and second, that NZDF personnel considered they were entering an area of Taliban influence and anticipated the likelihood of armed resistance.
- [82] As we understand it, the Crown Agencies accepted that the planning for Operation Burnham proceeded on an armed conflict basis, and that if Neimatullah and Kalta had been captured during the operation as it in fact played out, New Zealand would have assumed jurisdiction over them for the purpose of the application of *non-refoulement* obligations. However, the Crown Agencies argued that if Neimatullah and Kalta had responded to the "soft knock" and surrendered, thus allowing the Afghan officials to move forward from the helicopter landing zone and execute the arrest warrants, the operation could properly be considered to be in support of Afghan authorities pursuing legitimate domestic law enforcement functions. On that scenario, New Zealand would not have assumed jurisdiction over them.
- [83] We find this analysis difficult to accept. While we agree that facts matter, we do not accept that the fundamental nature of an operation can be recast or reconstructed in the way this argument suggests. On the hypothetical scenario just outlined, the operation would have been planned and carried out as a highly complex armed conflict operation. The only significant role played by Afghan personnel would have been to execute arrest warrants prepared by NZDF personnel.

⁹⁸ Chapter 7 at [29]–[31].

⁹⁹ *R (oao Maya Evans) v Secretary of State for Defence* [2010] EWHC 1445 at [17]–[18].

We find it difficult to accept that that feature then becomes the decisive factor in terms of the application of *non-refoulement* obligations. Rather, we consider that weight must be given to the substance of what the operation entailed, particularly given the fundamental importance of the obligations at issue.

- [84] In summary, to determine whether a particular person was under the “effective control” of New Zealand or Afghan personnel, or possibly both,¹⁰⁰ we consider that the substance of what occurred on a partnered operation must be considered. We accept that there would have been operations where NZDF personnel did not take a leading role in the “active part” of the operation (as Brigadier Riordan put it in his opinion), but simply provided mentoring support and technical or other assistance to CRU personnel as they performed law enforcement functions. In such operations, we accept that New Zealand personnel would not have had jurisdiction for the purposes of obligations in relation to *non-refoulement*. They would, in a real sense, simply be “mentoring” their Afghan partners.¹⁰¹ But that cannot be said of all partnered operations.¹⁰²
- [85] Finally, before we leave the topic of the policy, we should note that, as discussed in chapter 10, New Zealand had relevant obligations besides those relating to *non-refoulement*.
- [86] First, Sir Kenneth Keith drew attention to Common Article 1 to the Geneva Conventions, under which states must “ensure respect” for, among other things, Common Article 3, which prohibits the mistreatment of, and requires minimum standards of care for, detainees. Sir Kenneth said that states were required to do everything reasonably within their power to ensure that other states complied with these obligations. In concluding his expert evidence to the Inquiry, Sir Kenneth said:¹⁰³

In the present situation the particular characteristics of the provision of “partnering, including close support and technical support” or more generally the “provision of assistance” by the NZDF with the Afghan authorities may well be decisive in determining whether the NZDF is in breach of the duty to ensure respect, to the best of its ability, for the prohibition on torture in terms of Articles 1 and 3 or is complicit in torture under customary international law.

This indicates that the Common Article 1 obligation operates at an individual level, not simply a systemic one. As previously noted, the obligations under Common Articles 1 and 3 overlap the various other treaty and general international law obligations to prevent torture.

- [87] Second, the Solicitor-General said that New Zealand had an obligation of non-complicity, which required it to ensure that it did not provide assistance to Afghan personnel where it was known, or ought to be known, that the assistance provided “sufficiently direct support” for acts of torture by Afghan authorities.¹⁰⁴ In partnered operations, the Solicitor-General saw this obligation as arising at a systemic level, requiring New Zealand to take steps to deter torture by Afghan authorities, gather information about the practices of Afghan personnel and institutions and, if necessary,

¹⁰⁰ Sam Humphrey *Submissions of Counsel for Jon Stephenson in Reply Following Public Hearing 3* Submission to Inquiry (16 August 2019) at [38].

¹⁰¹ Of course, the issue of complicity might arise in such situations.

¹⁰² We saw some indication in the evidence that TF81 distinguished between operations that were time sensitive, on short notice and based on JPEL listings and others.

¹⁰³ Rt Hon Sir Kenneth Keith “International Humanitarian Law and the Law of Armed Conflict” (Public Hearing Module 3, 29 July 2019) at 17.

¹⁰⁴ Solicitor-General, above n 86, at [40].

restrict or withdraw cooperation until matters were remedied¹⁰⁵ (for example, by varying or suspending partnering arrangements).

- [88] Third, the Solicitor-General said that it was possible that even where CRU operations were formally a matter of law enforcement, they might engage members of organised armed groups “at a sufficient level of intensity to engage the law of international armed conflict”. So, he said, it was prudent to anticipate that New Zealand forces might, in some operations, also become subject to International Humanitarian Law considerations. The Solicitor-General identified a relevant obligation as being the duty to “ensure respect” for Law of Armed Conflict standards, an obligation which he considered to be applicable in non-international armed conflicts such as Afghanistan. He noted that the ICRC had described the obligation as requiring states to exert influence, to the degree possible, to stop violations of International Humanitarian Law. He said this might include steps such as diplomatic pressure and withdrawal of co-operation or assistance.
- [89] Against this background, we turn to consider the facts of Operation Yamaha.

How should Qari Miraj’s capture and subsequent detention be analysed?

- [90] The Crown Agencies argued that as New Zealand did not have “effective control” over any area or facility where Qari Miraj was arrested or detained in January 2011, he could only be subject to New Zealand’s jurisdiction by way of personal jurisdiction.¹⁰⁶ While the Crown Agencies acknowledged that there were decisions of the European Court of Human Rights which employed a wide concept of personal jurisdiction, they argued that the concept of personal jurisdiction contemplated by the Convention against Torture or by the ICCPR was not as wide as that applied in these cases.
- [91] While we do not consider that this view necessarily reflects the international law or practice of torture prevention as it has developed,¹⁰⁷ we do acknowledge that even the European authorities currently consider that something more than the “mere” use of force or the short-lived application of some control by a state agent acting outside the state’s territory is needed to bring the “detainee” within the jurisdiction of that state.
- [92] In any event, once it is accepted, as New Zealand accepts, that a state operating outside its territorial jurisdiction may acquire obligations in relation to torture based on personal jurisdiction, it becomes necessary to identify when a state acquires such jurisdiction. This depends on an analysis of the facts—in this case, an analysis of the nature and details of Operation Yamaha.

¹⁰⁵ At [41]–[42].

¹⁰⁶ Dr Penelope Ridings and Ian Auld *Memorandum of Counsel for the Crown Agencies* Submission to Inquiry (13 June 2019) at [47]–[50].

¹⁰⁷ The Optional Protocol to the Convention against Torture requires a clear understanding of jurisdiction. OPCAT uses both “detained” and “deprived of liberty” (the latter covers personal jurisdiction). See UN General Assembly *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment* (9 January 2003) A/RES/57/199 and Rachel Murray and others *The Optional Protocol to the Convention against Torture* (Oxford University Press, Oxford, 2011) at 69–70. Murray and others confirm (at 77) that the Committee against Torture has accepted the ECHR case law on *de jure* and *de facto* control. In New Zealand, National Preventive Mechanisms under OPCAT can examine treatment occurring in institutions (where *de jure* control is readily established) and situations where individuals, while not formally in custody, are otherwise in the custody of state officials. The IPCA, for example, can monitor the treatment of persons in police cells or who are otherwise in the custody of police (Natalie Pierce “Implementing Human Rights in Closed Environments: The OPCAT Framework and the New Zealand Experience” in Bronwyn Naylor, Julie Debeljak and Anita Mackay (eds) *Human Rights in Closed Environments* (Federation Press, Annandale NSW, 2014) at 195). This includes, for example, treatment while in police vehicles during transit. In such situations, the person is not, in effect, free to leave but may not yet have been formally questioned, arrested, or charged.

- [93] The Crown Agencies acknowledged that where TF81 personnel captured a person when acting on their own, they had personal jurisdiction over the person and New Zealand's *non-refoulement* obligations were engaged. However, in relation to Operation Yamaha, they submitted that TF81's role in it was properly described as supporting Afghan authorities to conduct an arrest in pursuit of domestic law enforcement objectives, even though the operation could fairly be characterised as a "New Zealand-led" or a "joint" operation. The Crown Agencies said that there were interactions with Afghan authorities in the months prior to the operation about a possible operation, which showed the "law enforcement" nature of the operation. Further, although TF81 could have detained Miraj under International Humanitarian Law, in fact he was arrested under Afghan law and the limited period that TF81 had physical custody of him was insufficient to bring him within New Zealand's jurisdiction. They also argued that even if New Zealand's *non-refoulement* obligations were engaged, New Zealand could reasonably have concluded that Miraj did not face a real risk of torture, given the information available to it. Finally, the Crown Agencies submitted that there was no intent or knowledge of the type required for a finding of complicity.
- [94] We address the issues under two headings:
- (a) Did New Zealand owe *non-refoulement* or similar preventive obligations to Miraj?
 - (b) If so, did New Zealand breach them?
- [95] Before we do so, however, we should address an important preliminary point. As we noted in chapter 1, the Inquiry's Terms of Reference echo the Inquiries Act 2013 by stating that the Inquiry "has no power to determine the civil, criminal, or disciplinary liability of any person" although it may "make findings of fault ...".¹⁰⁸ The Crown Agencies submit therefore that the Inquiry may not state whether it considers New Zealand was in breach of a relevant obligation to Miraj, as this amounts to a finding as to the civil liability of New Zealand at international law.
- [96] The Inquiry accepts that it has no power to determine the civil liability of any person and does not purport to do so. It does not accept, however, that it is not entitled to express its view about whether (or not) New Zealand owed any relevant obligations to Miraj and, if so, whether it met them.
- [97] Under s 11(2) of the Inquiries Act, an inquiry may make findings of fault in the course of "performing its duties under this Act". Clause 7.8 of the Terms of Reference requires the Inquiry to report on whether NZDF's "transfer and/or transportation" of Miraj to the NDS in Kabul was "proper", given (amongst other things) the decision in *Evans*. We cannot answer this question without reaching and expressing a view about whether New Zealand had international obligations toward Miraj and, if so, whether it met them. Any view we express on that is our own and is not a final determination of New Zealand's liability one way or another. It will simply be a step in the reasoning that we must undertake so as to answer the question that has been put to us.

Did New Zealand owe *non-refoulement* or similar obligations to Miraj?

- [98] Operation Yamaha was not, in our view, a straightforward law enforcement operation conducted by Afghan personnel with TF81 personnel simply "in the vicinity" or adopting an oversight or mentoring role in respect of their actions. TF81 was concerned to ensure Qari Miraj's capture

¹⁰⁸ Clause 14; Inquiries Act 2013, s 11.

because he had played a key role in the 3 August 2010 attack in which Lieutenant O'Donnell died; as a result of that attack, he was a demonstrated threat to the NZPRT in Bamyān; intelligence after Operation Burnham indicated he was likely to attack again;¹⁰⁹ the NZPRT Commander had contacted TF81 in September 2010 seeking their assistance in capturing him; and he was listed on the JPEL at New Zealand's instigation and so was a legitimate ISAF target. Against this background, New Zealand had kept a close eye on Miraj's movements to identify an opportunity to mount an operation against him. From TF81's perspective, Operation Yamaha was undoubtedly important to New Zealand and had a significant "armed conflict" component to it. Indeed, given the NZPRT Commander's concerns and the fact that planning for Operation Burnham had indicated other ISAF force elements had other priorities, removing Miraj as a threat was akin to a New Zealand national task. We note that NZDF told us that Operation Burnham was not a law enforcement operation or mentoring exercise for the CRU, but a national task approved by the Chief of Defence Force.¹¹⁰ Although Operation Yamaha was not an "out of area" operation, we see it in the same way as NZDF described Operation Burnham.

- [99] Moreover, we consider that Afghan authorities were not involved in the planning or preparation for Operation Yamaha in a meaningful way. In this connection, we note that New Zealand personnel received the information leading to the operation and passed it on to TF81,¹¹¹ who then obtained the necessary air asset support and other approvals and undertook the planning and organisational work for the operation. We note that TF81 did not perform this operation with the Afghan partner force they were mentoring (the CRU), but with the NDS in conjunction with the ANP. While it appears that TF81 had previously had some involvement with the NDS, it is not clear to us what relationship they had with the ANP. In any event, TF81 personnel were not working with the Afghan partners whom they had been training for the previous year or so, which no doubt affected the way the operation was carried out.
- [100] In addition, post-capture processing of Miraj (and those arrested with him) was carried out by TF81 personnel, not by Afghan personnel.¹¹² This included steps taken at the roadside outside the mosque and at the NDS facility in Kabul to which TF81 personnel transported Miraj. These steps included formally identifying Miraj,¹¹³ plasti-cuffing and blindfolding him, searching him, seizing his cell phone so that information could be taken from it, photographing and taking biometric data from him and having a doctor observe him, after which he was handed over to NDS personnel at the facility.
- [101] Further, New Zealand had a strong interest in the fruits of the operation. As we noted earlier, the biometric processing equipment was controlled and operated by TF81 personnel, not Afghan personnel, and TF81 personnel took the biometric data for TF81/ISAF's use.¹¹⁴ In addition, TF81

¹⁰⁹ See, for example, QARI MIRAJ Conop Slides 12 August 2010 (12 August 2010) (Inquiry doc 06/02); Inquiry doc 10/05, above n 3; NZPRT Bamyān Daily Intsum 250 10 (7 September 2010) (Inquiry doc 10/11).

¹¹⁰ NZDF "NZDF unreferenced account of events at issue at 6, in Paul Radich QC *Memorandum of New Zealand Defence Force on the public and unclassified account of events at issue in Government Inquiry into Operation Burnham* Submission to Inquiry (7 November 2018) from 3.

¹¹¹ As is confirmed by the account in the Inspector-General's report: see IGIS, above n 1, at [59].

¹¹² NZDF "NZDF unreferenced account of events at issue" at 13, in Paul Radich QC *Memorandum for New Zealand Defence Force on the public and unclassified account of events at issue in Government Inquiry into Operation Burnham* Submission to Inquiry (7 November 2018) from 3; this was confirmed by oral evidence.

¹¹³ TF81 personnel were carrying photographs of him.

¹¹⁴ ISAF regarded biometric data collection as a vital tool in defeating the insurgency in Afghanistan. As we understand it, the equipment was complex to operate and was programmed in English. Depending on the data collected and the nature of the equipment used, information could take at least five and possibly 15 or more minutes to input.

personnel retained and exploited the information obtained from Miraj's cell phone for their own (and presumably ISAF's) purposes. In taking these steps, TF81 personnel were, we consider, acting under their powers under the relevant Security Council resolutions and International Humanitarian Law rather than in a law enforcement context.¹¹⁵ As we have explained, New Zealand was also responsible for transporting Miraj in their vehicles to the facility where he faced a real risk of torture. Shortly after the operation, a deployed NZSIS officer, who had been told that Miraj had made a confession, enquired of Afghan authorities when New Zealand might expect to receive a debriefing in relation to it. A copy of Miraj's confession was provided a few days later. This suggests that Afghan authorities understood that New Zealand had a particular interest in Miraj and whatever information he divulged.

- [102] We accept that Afghan personnel were involved in the operation, but only to the extent of entering the mosque, executing the arrest warrant and undertaking site exploitation. TF81 personnel were not with them at the time, but that was the result of the fact that it turned out that Qari Miraj was not in the compound where he was originally thought to be but in the mosque opposite. TF81 personnel did make a forcible covert entry into the compound when there was no response to the "soft knock" but ISAF operating procedures precluded that in the case of the mosque. The Crown Agencies argue that this is a decisive consideration: whatever might have been the position if Miraj had been in the compound opposite, the fact was that Miraj was in the mosque with his companions; TF81 personnel did not enter and so were not present when Miraj was arrested and site exploitation was carried out; consequently, Miraj was under the jurisdiction of Afghanistan, not New Zealand.
- [103] We do not see it in that way, given the matters set out above. Looking at the operation overall, while Miraj was undoubtedly of interest to Afghanistan from a law enforcement perspective, he was of special interest to New Zealand as a result both of his leading role in the 3 August 2010 attack and the threat he posed to the NZPRT in the future. In reality, Operation Yamaha was:
- (a) substantially aimed at protecting the NZPRT in Bamyan, albeit that it would also protect Afghan forces and the local population;
 - (b) initiated by New Zealand personnel through the intelligence obtained;
 - (c) planned and triggered by New Zealand personnel, with limited input from Afghan authorities;
 - (d) directed by New Zealand personnel;
 - (e) substantially conducted by New Zealand personnel, the exceptions being the "soft knock", the execution of the search warrant and the site exploitation of the mosque.
- [104] Further, New Zealand obtained the "fruits" of the operation (directly by search and seizure, or, in the case of the confession, indirectly) and exploited them. TF81 personnel had physical control over Miraj for an hour or more from the time TF81 took over from the Afghan officers who entered

¹¹⁵ As we understand it, the power to "take all necessary steps" granted under the Security Council resolutions, which included the power to detain, encompassed detention for intelligence-gathering purposes: see Gregory Rose "Management of Detention of Non-State Actors Engaged in Hostilities: Recommendations for Future Law" in Gregory Rose and Bruce Oswald (eds) *Detention of Non-State Actors Engaged in Hostilities: The Future Law* (Koninklijke Brill NV, Leiden, 2016) 365 at 373–374. The power to take all necessary steps was, of course, subject to the restrictions of International Humanitarian Law.

the mosque, to the time TF81 personnel left the NDS facilities to return to Camp Warehouse.¹¹⁶ During this period they not only had physical custody of him but took possession of personal information obtained from him (the biometric data), information stripped from his cell phone, information obtained as a result of searches (specifically some documents) and, later, information from his confession. It was TF81 personnel who transported Miraj to NDS 90 in a TF81 vehicle and physically handed him over to those running the facility. From a substantive perspective, we consider that New Zealand personnel, rather than Afghan officials, were ultimately responsible for delivering up Miraj to NDS custody at the facility.

- [105] Accordingly, we do not agree with the argument of the Crown Agencies that New Zealand did not exercise “control and authority” over Miraj, so that New Zealand’s *non-refoulement* and related preventive obligations were not engaged. We consider they were engaged. As planned, the only substantive difference between Operation Yamaha and an operation carried out by TF81 personnel acting alone was that there were Afghan personnel present during Operation Yamaha who would conduct the “soft knock” and execute the arrest warrant against Miraj. That was their sole function; yet on the Crown Agencies’ argument that would be sufficient to affect fundamentally the obligations in relation to torture that would otherwise have applied to New Zealand. But such a result would not, in our view, reflect the reality of the operation, nor would it reflect the true nature of the relevant obligations. The fact that, as the operation played out, Afghan personnel also had to conduct the site exploitation does not cause us to change our analysis.
- [106] Apart from this, we consider that there is a strong argument that New Zealand may at least be regarded as jointly responsible for the operation and the resulting placement of Miraj in custody—either for the duration of the operation,¹¹⁷ or at the very least for the period during which Miraj was under New Zealand’s control. NZDF personnel were entitled to exercise control and authority over Miraj by virtue of their mandate to operate in Afghanistan and their arrangements with Afghanistan. As we see it, Miraj was subject to New Zealand’s authority in more than a *de minimis* way for more than a *de minimis* period. In essence, New Zealand and Afghanistan divided the essential tasks of his capture and transfer between them and cooperated throughout to ensure that detention was the final outcome.
- [107] New Zealand provided the impetus for the operation. The Afghan personnel involved could not have executed the warrants without substantial assistance from New Zealand.¹¹⁸ Where two states collaborate and share the task of returning and taking an individual into custody, it is possible for each state to bear separate (and, at times, overlapping) obligations towards that person. The Crown Agencies accepted this, but argued that it was not possible for two states to have primary responsibility for the breach of the same obligation in relation to the same person where jurisdiction is the basis for responsibility. It was argued that International Human Rights Law and International Humanitarian Law envisage only one detaining authority, and in this case that was Afghanistan.

¹¹⁶ Inquiry doc 06/04, above n 18. At a minimum, TF81 exercised control over Miraj for approximately 40 minutes (excluding travel time to NDS and time spent at NDS).

¹¹⁷ That is, by virtue of the operation’s classification as a partnered operation, for which New Zealand had the lawful authority to undertake, acting pursuant to the UN Security Council mandate and the MTA with Afghanistan. This was discussed by Counsel for Jon Stephenson in Humphrey, above n 100, at [13]–[30].

¹¹⁸ For an assessment of similar legal issues, see *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3 (11 January 2002) at [54]–[55].

- [108] We are unable to accept the Crown's argument. It is possible, both as a matter of logic and of legal principle, for two or more states to bear separate yet concurrent primary obligations towards an individual, with each state responsible to the extent that acts or omissions are attributable to it, and in light of the way in which those acts or omissions cause or contribute to the outcome at issue (for example, to the transfer of an individual, or to his or her subsequent treatment). In complex detention operations, each state enjoys authority to act (and thus to exercise jurisdiction) as a result of one or more sources of legal authority.¹¹⁹
- [109] With legal authority comes responsibility: states bear obligations which derive from various sources of law and attach to the state when it operates abroad. These obligations may derive from treaty provisions applied extraterritorially (such as the Convention against Torture); specific treaty obligations that, by their nature, may apply without territorial limits (such as Article 1 and Article 3 of the Geneva Conventions on ensuring respect and the protection of detainees); customary international law obligations; and obligations flowing from peremptory norms (such as the obligation to prevent torture through a range of effective measures).
- [110] In short, obligations may take different forms when applied abroad, but they follow a state when it engages on the international stage and apply alongside the obligations of others. States are not relieved of their individual responsibilities by virtue of their role in discharging international mandates (including Security Council mandates). Similar reasoning may be applied when the implementation of such mandates involves leading or assisting in joint operations with other states.
- [111] In partnered operations and similar contexts, jurisdiction may not, and need not necessarily, be exclusive.¹²⁰ Nor is it necessarily the case that a form of jurisdiction held by one state 'extinguishes' the jurisdiction of others. This is particularly relevant in contexts such as counter-terrorism and trans-national crime, where transfers are often the result of coordinated, incremental steps by multiple states to effect a transfer (whether lawfully or otherwise). When two or more states exercise different forms of jurisdiction over people, places or situations, therefore, it is useful to consider whether one of these forms of jurisdiction was the most relevant—and, if so, how or why it was relevant. When examining jurisdiction, context is important. Care should be taken to consider whether a state's conduct (including its handling of a detainee) had a decisive, or at least a material, impact on the particular right or obligation at issue or on the outcome or issue being examined (here, the transfer of a person from a place of safety to a place of risk).¹²¹
- [112] In Operation Yamaha, Afghanistan authorities lawfully exercised an arrest warrant and Miraj was clearly subject to it. It provided a basis for his subsequent entry into custody, interrogation,

¹¹⁹ New Zealand was discharging a mandate set down by the Security Council. It had authority to detain Miraj as a result of his JPEL listing, as well as to assist Afghan authorities in law enforcement operation in the context of its activities in Afghanistan. Its authority to assist was facilitated in its Military Technical Arrangement. Afghanistan had its own authority under its domestic legal framework to arrest and prosecute persons on its territory suspected of committing criminal offences.

¹²⁰ Exclusive control over a person is likely to provide useful evidence, or a useful basis upon which to conclude that a state had jurisdiction (and bore responsibilities) towards an individual. Exclusivity in this sense, however, is a matter of evidence (that is, of recognising that jurisdiction is made out on the facts), not a minimum criterion for establishing or apportioning responsibility of a state when acting abroad

¹²¹ This is not to say that other forms of conduct (and exercise of jurisdiction) are irrelevant, nor that only decisive acts/omissions attract legal responsibilities. Rather, an assessment of jurisdiction calls for both a general and a specific assessment of the nature and context of the operation, its legal basis (or bases), as well how it was, in fact, carried out by the various actors.

and possible trial (although, as noted elsewhere, the arrest warrant was not essential: NZDF had lawful authority to detain him on its own had it elected to do so).

- [113] Despite Afghanistan's *de jure* control via the initial arrest, from the moment New Zealand uplifted Miraj from Afghan authorities he was under their effective control and authority. While he was in their physical custody, they also exercised legal powers derived from the Security Council mandate to take and keep Miraj's personal data (biometric information, the contents of his cell phone and documents) before they transported him in their vehicles and handed him over to NDS at NDS 90. New Zealand's handling of Miraj was more than an incidental form of assistance: it was the final act and the active part of the transfer, and it followed a series of other essential contributions by TF81 over a longer period to remove Miraj from the battlefield, to process him and to secure his detention. New Zealand had an interest in that detention in light of the intelligence that might be gleaned from the ensuing investigation.
- [114] We consider, therefore, that the operation and transfer engaged New Zealand's *non-refoulement* and related preventive obligations arising under the Convention Against Torture, customary international law, and as a consequence of the peremptory norm prohibiting torture. This is because, in truth, the operation was New Zealand-led and because TF81 exercised control and authority over Miraj during the relevant part of the operation.
- [115] In addition, we accept that New Zealand was obliged under Common Article 1 to the Geneva Conventions to exercise due diligence to ensure that Afghanistan complied with its obligations under Common Article 3 in relation to the treatment of detainees, which is supported as well by New Zealand's other preventive obligations in relation to torture. In fulfilling these obligations, New Zealand could have taken steps at a systemic level and at an individual level (ie, in relation to Miraj specifically). As we will discuss below, we believe that New Zealand was obliged to take steps specifically in relation to Miraj.
- [116] To summarise, Qari Miraj was an insurgent in whom New Zealand had a particular interest; New Zealand was the prime mover behind the operation to capture him; New Zealand played the leading role in organising, triggering and executing the operation, and would have played an even greater role had Miraj not been in a mosque; and New Zealand took responsibility for handling and processing Miraj before he was handed over to the NDS at NDS 90, obtained personal and other information from him, and later exploited that information. New Zealand clearly had an interest in whatever information Miraj divulged in detention. Given those circumstances, we think it clear that New Zealand had an obligation to satisfy itself as to the conditions of Miraj's detention. The question now is whether it took sufficient steps to do so.

Did New Zealand breach its obligations?

- [117] The Crown Agencies argued that, if New Zealand's *non-refoulement* obligations were engaged in Operation Yamaha, New Zealand was not aware of the risks that Miraj faced in Afghan detention given the information available at the time. Accordingly, New Zealand was not in breach of its obligations.
- [118] The Crown Agencies emphasised that:
- (a) ISAF considered that that transfers to NDS facilities in Kabul were permissible, as did other ISAF partners.

- (b) The knowledge required is knowledge relating to the risks faced by a particular individual at a particular facility. New Zealand had no knowledge of any risks Miraj would face at NDS 90, especially given that the facility which caused concern in *Evans* was NDS 17.
 - (c) New Zealand authorities did not appreciate at the time of Operation Yamaha that NDS 90 was in the same compound as NDS 17 and that detainees could be transferred from one facility to the other.
 - (d) New Zealand was not aware of any evidence of widespread torture by the NDS in detention facilities over the period 2010–2011 until shortly before the UNAMA report was released in October 2011. The Crown Agencies acknowledged, however, that New Zealand could have undertaken further investigation as to conditions in Afghan detention facilities, as the Solicitor-General had recommended.
- [119] We see these points as being relevant to both the *non-refoulement* and Common Article 1 obligations just discussed.
- [120] We have seen no evidence that New Zealand made any enquiries specific to Miraj. Rather, New Zealand relied on:
- (a) the view of ISAF and other contributing nations that it was appropriate to send people to detention in NDS facilities in Kabul;
 - (b) what the Minister was told in discussions with Afghan counterparts in August 2010, to the effect that detention conditions were improving and there was greater scrutiny of NDS detention facilities;
 - (c) meetings with NDS officials after the *Evans* decision to obtain assurances that the issues raised in *Evans* were being addressed; and
 - (d) interactions with the ICRC about detention issues in Afghanistan.
- [121] As can be seen, New Zealand did not itself undertake any rigorous enquiry into conditions in Afghan detention facilities, or even attempt to reach an independent view about them. Rather, New Zealand relied on the views of others and assurances given in discussions with Afghan authorities, including the NDS itself. It did this despite the Solicitor-General's opinion that New Zealand had a duty to, among other things, gather information about the practices of Afghan personnel and institutions. As we understand it, the Crown Agencies accept that New Zealand officials should have undertaken a more rigorous and independent information-gathering process to satisfy themselves that the information received was accurate.
- [122] We think it disappointing that New Zealand authorities did not take greater steps at the time of the deployment in 2009 to find out what current conditions in Afghan detention facilities were, given that they were aware that international reports had identified significant problems over a number of years. It was improbable that conditions in Afghan detention facilities would have improved dramatically over a relatively short time, even those in Kabul. The effect of the *Evans* decision was to confirm that the problem of detention conditions persisted. The judgment in that case cited various United Nations documents and reports by reputable NGOs and other bodies. One such report, from Human Rights Watch in December 2009 and its country summary for 2010, stated

that there were persistent reports of torture and abuse of detainees held by the NDS.¹²² Similar reports cited in the judgment included those from the United Nations High Commissioner for Human Rights in January 2009, Afghanistan's report to the Human Rights Council as part of the Universal Periodic Review in February 2009, the US State Department in March 2008, and the 2008 Annual Report of the UK Foreign Affairs Committee of the British House of Commons.¹²³ The Solicitor-General's opinion was unequivocal in stating that New Zealand had an obligation to gather information.

- [123] In these circumstances, we were unimpressed with the Crown Agencies' submission that there was no evidence known to New Zealand of widespread torture by the NDS in detention facilities over the period 2010–2011 until shortly before the UNAMA report was released in October 2011. The reality is that New Zealand did not look very hard, despite what we consider to be obvious indications that torture and mistreatment remained prevalent. Indeed, in light of the obligation to investigate identified by the Solicitor-General, which New Zealand did not fulfil adequately, the argument has something of the quality of "seeking to take advantage of one's own wrong".
- [124] Further, we have the impression that TF81 personnel took little interest in which facilities the CRU or other Afghan forces would send those they arrested on partnered operations to, on the basis that it was none of New Zealand's business—not surprisingly perhaps, given the Government's policy on detention during partnered operations.
- [125] New Zealand would be in breach of its *non-refoulement* obligations if there were substantial grounds to believe that Miraj faced a real risk of torture if it handed him over to the NDS at NDS 90. New Zealand made no particular enquiries about that as it did not consider that it was under any obligation to do so—at most, it was a discretionary matter. While we accept that ISAF favoured the use of NDS detention facilities in Kabul for operational reasons, we do not think it acceptable that New Zealand authorities did not realise that NDS 90 was in the same compound as NDS 17 and that detainees could be moved between the two facilities. *Evans* should have resulted in meaningful enquiries. In the result, we consider that New Zealand is not entitled to rely on its lack of information to argue that it did not breach its *non-refoulement* obligations. On an objective view, we consider it is clear that, as at January 2011, there were substantial grounds to believe that detainees such as Miraj faced a real risk of torture or mistreatment at NDS 90.
- [126] The same analysis applies in respect of New Zealand's obligations under Common Article 1 and Common Article 3. We consider that New Zealand did not take sufficient steps at a systemic level to meet its obligations under those Articles. In addition, given New Zealand's particular interest in Miraj and the other aspects of Operation Yamaha discussed above, we consider that New Zealand had an individual obligation to Miraj and was obliged under the Common Articles to satisfy itself that he did not face a real risk of mistreatment in detention. This required active steps on New Zealand's part, which it did not take.
- [127] The Crown Agencies argued that the Inquiry is, unfairly, applying "hindsight analysis" and assuming that if New Zealand had made further inquiries, it would have discovered what UNAMA found. We do not accept this:
- (a) First, New Zealand was sufficiently concerned about conditions in Afghan detention facilities that it considered it necessary in 2009 to enter into a written arrangement with Afghanistan

¹²² *R (oao Maya Evans) v Secretary of State for Defence*, above n 99, at [289].

¹²³ At [63]–[64] and [74]–[75].

relating to the treatment of people NZDF personnel detained on non-partnered operations and transferred to Afghan control. It was well aware that there was a problem that needed to be addressed.

- (b) Second, Evans provided clear warnings in the mid-2010 that conditions in NDS detention facilities had not improved dramatically so as to remove the risk of torture or mistreatment in detention.
- (c) Third, a complaint of this nature does not sit well, given that Crown Agencies accepted that New Zealand did not meet the investigative obligations that the Solicitor-General had identified.

[128] Given the views we have expressed, we do not need to address the issue of complicity here, although we dealt with it briefly in our outline of the law in chapter 10, given its importance. However, we should record that we accept that New Zealand authorities did not intend for Miraj to be tortured, nor have we seen any evidence that they had actual knowledge of any intent on the part of Afghan authorities to torture him. We leave open the position in relation to constructive knowledge.

New Zealand's response to the allegations of torture

[129] As we have described, New Zealand authorities received a copy of Qari Miraj's confession not long after it was made. About a month later, they learnt of the allegations that he had been tortured. Despite the policy position which we quoted at paragraph [39], no one appears to have taken any steps with Afghan authorities or counterparts to establish what, in fact, happened to Miraj; to express New Zealand's clear position on torture and concern about the allegations through appropriate channels; to brief senior leaders (internally) or relevant ministers (for whom this information would have been highly relevant given the decisions they were being advised to make); or to review New Zealand's legal and policy position as it then stood. In interviews with the Inquiry, it was clear that officials appreciated the seriousness of torture as a legal or moral issue; however, none were able to explain in detail the policies or procedures that existed for escalating, investigating or following up allegations of torture.

[130] In his advice, the Solicitor-General recalled the Committee against Torture's guidance which states parties to the Torture Convention that become aware of torture in the course of joint operations "are then obligated to report and seek investigation of those allegations." He noted that such information might change the overall assessment of New Zealand's legal responsibility for persons detained on Afghan-partnered operations.¹²⁴

[131] Given that advice, it was essential that New Zealand have clear and effective policies in place so that this form of evaluation, both proactive and reactive, could take place. Against the backdrop of international and United Nations reporting that existed up to and including that time, the information on Miraj's treatment was specific and highly relevant to New Zealand's position. It was, in short, an allegation made in the context of an operation where New Zealand had played a leading role in successfully delivering up a high-value target to Afghan intelligence officials. Ministers ought to have been briefed and provided with an opportunity to reconsider the legal and policy position and direct officials on next steps. Afghanistan was under an obligation to investigate

¹²⁴ Solicitor-General, above n 86, at [54].

any allegation of mistreatment, even if not made directly to its authorities. New Zealand, as the state that, in substance, led the operation and played a material role in Miraj's transfer to NDS, was under a similar obligation to follow up, and to consider and, if necessary, revise its overall approach.

- [132] The Crown Agencies accepted in submissions that New Zealand did not meet its obligations in this respect and acknowledged that further investigation may be needed or additional training could be provided to operational officials so that they recognise where such allegations need to be reported, and what further steps should be taken. We agree.
- [133] We should also note that the IGIS has addressed this issue in some detail in her report.¹²⁵ There are two features of her analysis to which we should draw attention.
- [134] First, the Inspector-General records that on 3 February 2011, relevant ministers were informed that Miraj and others had been arrested and that Miraj and one other person remained in detention in Kabul. A deployed NZSIS officer in Kabul advised NZDF, the NZSIS in Wellington and the New Zealand Ambassador in Kabul that news of Miraj's detention had spread throughout Tala wa Barfak and that his fellow insurgents were focused on obtaining his early release by whatever means necessary, including through the Afghan "reconciliation" process. Given New Zealand's special interest in Miraj, the deployed NZSIS officer sought and received assurances from the NDS that Miraj would not be released but would remain in detention. The Inspector-General describes this as consistent with "the New Zealand Government stance".¹²⁶ The concern that Miraj remain in custody continued even after New Zealand agencies learnt of the allegations that he had been tortured.¹²⁷
- [135] Second, the Inspector-General examines in some detail how the intelligence agencies responded to the allegations that Miraj had been tortured. She identifies faults with the way the matter was handled, particularly because New Zealand had urged the NDS to keep Miraj in custody. She sees this as giving rise to a duty on the New Zealand Government, through its officials, to assure itself that there was no real risk that Miraj was being tortured or mistreated. She expressed concern that the NZSIS did not identify any responsibility to make sure the Government understood the conditions of Miraj's detention and to assess whether they were appropriate in light of New Zealand's legal obligations.¹²⁸ As will be obvious, we share the IGIS's concern.

Conclusion and findings

- [136] When the New Zealand Government decided to deploy the NZSAS to Afghanistan in 2009, it followed ISAF's policy that Afghan authorities would be responsible for persons arrested and/or detained by Afghan personnel on partnered operations; ISAF personnel would only become responsible for such people if they assumed control and placed them in detention.¹²⁹

¹²⁵ IGIS, above n 1, at [62]–[96].

¹²⁶ IGIS, above n 1, at [67].

¹²⁷ IGIS, above n 1, at [68].

¹²⁸ IGIS, above n 1, at [91].

¹²⁹ As set out in ISAF SOP 362. As we have explained in this chapter, ISAF's policy allowed states to seek their own bilateral arrangements to meet national policies or positions on international legal obligations. New Zealand followed the SOP provisions and did not pursue bilateral arrangements with Afghanistan on the treatment of people who were detained as a result of partnered operations supported by New Zealand.

NZDF personnel followed that policy and also developed the arrest warrant mechanism. This mechanism was, as we understand it, ultimately adopted more widely within ISAF. Moreover, the Government's detention policy was supported in principle by an opinion from the Solicitor-General.

- [137] In our view, the difficulty with the policy, as it was applied, is that it did not take sufficient account of the facts of particular operations—in particular, the comparative roles of NZSAS and Afghan personnel in those operations. Rather, the policy gave decisive weight to form. In general, it treated as decisive the fact that an Afghan official executed an Afghan arrest warrant to arrest the target. The policy did so even though these warrants were generally prepared by NZSAS personnel—in some cases, after substantial involvement by NZSAS personnel in making the case for arrest (for example, by developing admissible evidence from intelligence) and even though the operation was substantially instigated, planned, organised and carried out by New Zealand personnel. In respect of operations such as Operation Yamaha, this approach seems to us to have the appearance of a “workaround”.
- [138] The policy as applied meant that there was little real incentive for New Zealand authorities to find out exactly what the conditions were in NDS detention facilities, given that they saw New Zealand's *non-refoulement* and similar obligations as arising only in relation to very few detainees, in respect of whom there was a written arrangement with Afghanistan, which included a monitoring regime. This was despite the fact that the Solicitor-General had advised that New Zealand had a duty to undertake enquiries as to the conditions of detention in the context of his discussion of partnered operations.
- [139] Given publicly available information about conditions in Afghan detention facilities at the time of the deployment in 2009, including in relation to the NDS, we consider that New Zealand should have attempted to enter into some form of arrangement with Afghanistan, covering the treatment of persons captured during partnered operations. An individual monitoring regime in relation to each detained individual may not have been necessary (although it may have been necessary or appropriate in relation to some, such as Miraj, depending on the circumstances of the detention).
- [140] What was required was some mechanism by which New Zealand could obtain accurate information about the treatment of people in Afghan detention facilities, with the ability to respond effectively (for example, by suspending cooperation) if conditions were found to be unsatisfactory. The Solicitor-General had, after all, said that New Zealand had a duty to obtain such information. The Government chose not to attempt to enter into an arrangement, however, or to take effective steps to obtain accurate information about conditions in Afghan detention facilities. Steps such as minister-to-minister conversations and discussions with Afghan authorities such as the NDS were simply not sufficient.
- [141] We were particularly troubled by the weight that seems to have been given to resource implications in Government's consideration of this issue, and by the attempts made in submissions to the Inquiry to justify New Zealand's approach on the basis of lack of resources. Compliance with human rights standards requires a level of resource commitment that reflects the fundamental nature of values at stake and the harm that is to be prevented. We see in this an important issue going to New Zealand's core values. Is it consistent with the core values to which New Zealand says it is committed to follow a policy that means it has no responsibility for taking steps to ensure appropriate conditions of detention for persons who its forces were closely involved in capturing, in part because it would require too much in the way of resources? If New Zealand is not in a

position to commit the resources necessary, should it become involved in the enterprise in the first place?¹³⁰

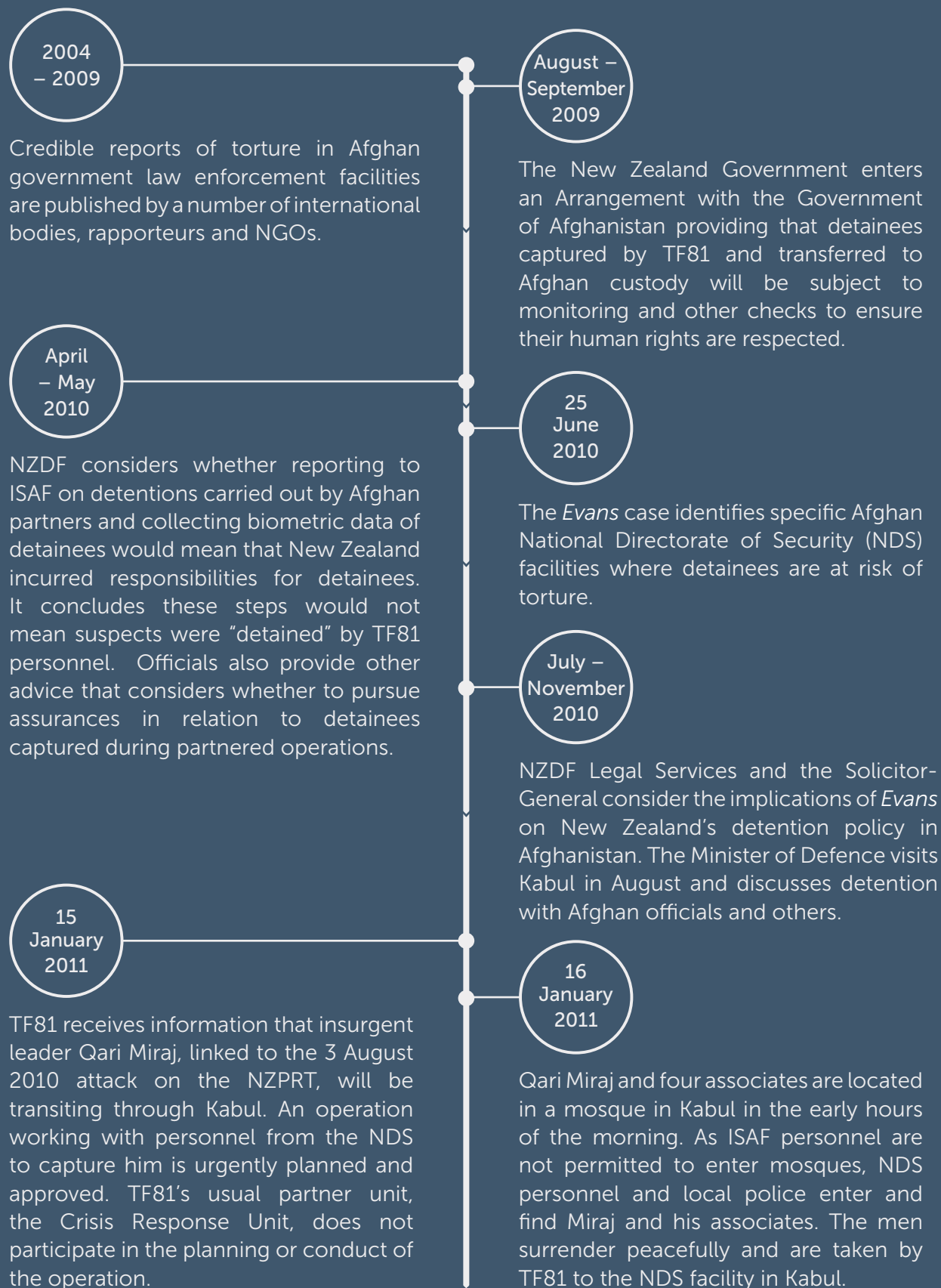
- [142] In relation to Operation Yamaha, we consider that, given the circumstances of the operation discussed above, Qari Miraj came within New Zealand's "jurisdiction", so that New Zealand owed certain obligations to him. The fact that he was arrested under an Afghan arrest warrant by Afghan officials does not mean that Miraj was not also within New Zealand's jurisdiction for a period. New Zealand owed *non-refoulement* and related preventive obligations to Miraj; Afghanistan had obligations not to torture or mistreat him in detention.
- [143] We consider that New Zealand was in breach of its obligations to Miraj because, at the time he was handed over to NDS custody, there were substantial grounds to believe that he faced a real risk of torture or other mistreatment given the information available about conditions in Afghan detention facilities, including NDS facilities in Kabul. New Zealand was in breach of the duty identified by the Solicitor-General because it had failed to take effective steps to find out about conditions in such facilities. There were also no enquiries in relation to Miraj's position specifically.
- [144] Further, we are satisfied that New Zealand breached its obligations under Common Articles 1 and 3 of the Geneva Conventions. New Zealand's obligation was to "ensure respect" "in all circumstances" for the Conventions' obligations, including in relation to the treatment of detained persons such as Miraj. In relation to the detention of Miraj, given the background to the operation, its nature, New Zealand's role in it and New Zealand's particular interest in information obtained from Miraj, New Zealand had a specific obligation to take all steps reasonably possible to ensure that Afghanistan complied with its obligations towards Miraj while in detention. New Zealand did not do so and was therefore in breach of its obligations under the Common Articles.
- [145] Moreover, having learnt of the allegations of Miraj's torture, New Zealand failed in its obligation to respond by making further investigations, including taking the matter up with Afghan authorities. Indeed, it does not appear agencies advised ministers of the allegation, which is obviously unacceptable given the circumstances of the operation and the nature of New Zealand's interest in Miraj. As we understand it, the Crown Agencies accept that New Zealand did not respond to the allegations in the way it should have.
- [146] We make two final points. First, as we noted during our brief overview of developments in relation to New Zealand's detention policy, there were points at which officials could have brought particular matters to ministers' attention (such as new information or developments, or the nature of TF81 operations with NDS) but did not. Obviously, it is a matter of judgement as to when something needs to be brought to a minister's attention. But issues concerning New Zealand's obligations in relation to torture in the context of its participation in a non-international armed conflict do engage the country's interests in a fundamental way. Our impression, admittedly on the basis of our exposure to specific issues and evidence, is that ministers would have benefitted from learning of some of these matters when they arose.

¹³⁰ It is a well-established principle of international law that insufficiency of legal means cannot justify a failure to act: *Alabama claims of the United States of America against Great Britain* (1872) XXIX RIAA 125 at 131 (reproduced from John Bassett Moore (ed) *History and Digest of the International Arbitrations to which the United States has been a party* (Washington, Government Printing Office, 1898), vol 1 at 656). See also, Andrew Clapham *Brierly's Law of Nations* (7th ed, Oxford University Press, Oxford, 2012) at 411–413.

- [147] Second, one of the lessons that emerges from our analysis is that the way an issue is framed often determines how it is answered. A lawyer who is asked what New Zealand's obligations are in relation to torture when NZDF personnel are "in the vicinity" when Afghan personnel arrest a suspect on a partnered operation is likely give a different answer than a lawyer asked to express a view about those obligations in relation to an operation such as Operation Burnham, which was, in substance, a New Zealand-led ISAF operation rather than a true partnered operation.
- [148] The Crown Agencies repeatedly described partnered operations as operations in which persons were detained by Afghan authorities "with the support of ISAF forces". A variant seen in contemporaneous documents was that the CRU took the lead on all operations and were accordingly the detaining authority.¹³¹ In respect of the operations we have examined closely—Operations Burnham, Nova and Yamaha—such descriptions do not accurately reflect what was planned or in fact occurred. The short point is that facts matter. This is particularly so when legal advice is sought. In that context, it is dangerous to talk in abstract generalities—rather, the legal adviser needs to be advised of the range of likely factual scenarios.
- [149] It will be recalled that cl 7.9 of the Inquiry's Terms of Reference requires us to examine:
- Whether the NZDF's transfer and/or transportation of suspected insurgent Qari Miraj to the Afghanistan National Directorate of Security in Kabul was proper, given (amongst other matters) the June 2010 decision in *R (oao Maya Evans) v Secretary of State for Defence* [2010] EWHC 1445;
- [150] Our answer is that we consider that in handing Miraj over to the NDS at NDS 90, New Zealand breached its *non-refoulement* and related preventive obligations, and its obligations under Common Article 1 of the Conventions to "ensure respect" for the obligations contained in Common Article 3 concerning the treatment of detainees. The hand-over was accordingly improper.
- [151] Arising out of this, we have some recommendations to make on the matter of detention, which we will discuss in chapter 12.

¹³¹ See, for example, Cable re Visit of Minister of Defence and CDF to Afghanistan 18 022 August [2010] – Detainees (2 September 2010) (Inquiry doc 05/36) at [3].

Timeline of key events relating to detention and Operation Yamaha





12

Looking to the future

Chapter 12

- [1] During the course of what has turned out to be a long and arduous Inquiry, we have identified deficiencies in the way the New Zealand Defence Force (NZDF) dealt with the allegations of civilian casualties after Operation Burnham, and in the application of New Zealand's detention policy in the context of Operation Yamaha. In this chapter, we outline measures to address some of the key problems that have become apparent to us during the Inquiry. Some issues we address by way of recommendations; in respect of others, we simply make observations that we hope will be taken up by others. One of the recommendations we make will require legislation.
- [2] We have not arrived at our views lightly. Change is necessary. We stress, however, that the problems that emerged in relation to NZDF do not relate to matters of military capability. As far as the conduct of Task Force 81 (TF81) personnel during the various operations discussed in this report is concerned, we make no recommendations for further investigation or other action. Further, we make no recommendations in relation to the New Zealand Special Air Service (NZSAS) and NZDF personnel involved in the events after Operation Burnham. Our focus here is forward-looking—what can be done to prevent or reduce the likelihood of the problems we have seen reoccurring?
- [3] The main recommendations we make relate to:
- (a) Issues of public administration and institutional accountability. The primary problems, although not the only ones, relate to the quality of information provided by NZDF to ministers and, through them, to Parliament, and the mechanisms within NZDF for gathering, recording, preserving and providing information. As the foregoing chapters have shown, the systems in operation in the period covered by this Inquiry were manifestly inadequate.
 - (b) Issues relating to detention arising out of the discussion of Operation Yamaha in chapter 11.

We begin with issues of public administration and institutional accountability.

What the Constitution requires

- [4] In chapter 2, we highlighted two mutually reinforcing constitutional principles that are fundamental to the proper functioning of New Zealand's Westminster-style democracy. They are:
- (a) civilian control of the military; and
 - (b) ministerial accountability to Parliament.
- [5] The effective operation of these principles depends in the first instance on the provision of accurate information to ministers by NZDF. As demonstrated in earlier chapters, and as was accepted by the four current and former Chiefs of Defence Force from whom we heard evidence, NZDF did not provide accurate information about the Incident Assessment Team's investigation and the possibility of civilian casualties on Operation Burnham to successive ministers. The result was

that, over a number of years, NZDF and ministers (including two Prime Ministers) made public statements that were inaccurate, including in response to parliamentary questions.

- [6] Ministerial accountability is a familiar concept. In a democracy such as New Zealand's, those who govern need to be accountable and responsible to those over whom they govern.¹ Power flows from the voters in elections. A basic duty of Parliament is to hold the Executive Government to account. This accountability requires portfolio ministers actively to supervise and monitor the agencies for which they are responsible, albeit they are likely to focus on policy rather than operational matters. Ministers are answerable to Parliament, and through Parliament to the people, for their stewardship.
- [7] Ministerial accountability takes many forms. Ministers must defend their agencies' policies and activities in parliamentary debates. Ministers must obtain from Parliament the funding needed to ensure their agencies can operate effectively and efficiently. They must appear before parliamentary select committees examining appropriations, as well as appearing in other contexts such as select committee inquiries. Ministers must answer parliamentary questions, and must front to the media and the public, about the policies and activities of their agencies.²
- [8] To perform these various functions, ministers need accurate information. When incorrect information is provided by an agency to a minister, or where important information is not brought to a minister's attention, the system breaks down. Incomplete or misleading information fractures the application of ministerial responsibility and renders accountability to Parliament ineffective.
- [9] It also disturbs the operation of the Cabinet and the conventions which surround it. The Cabinet Manual describes the Cabinet as:³

... the central decision-making body of executive government. It is a collective forum for Ministers to decide significant government issues and to keep colleagues informed of matters of public interest and controversy.

Obviously, ministers cannot fulfil their obligations to Cabinet if they are not given accurate information by officials. This may jeopardise their relationships with the Prime Minister and other Cabinet colleagues and, if it persists over time, undermine their effectiveness.

- [10] There is the same need for full and accurate advice to ministers to give proper effect to the principle of civilian control of the military, as required by s 7 of the Defence Act 1990.⁴ For agencies such as Police, there is a clear distinction between policy issues, which are the concern of the responsible minister, and operational matters, which (by statute) are not.⁵ This is not the case in relation to the armed forces. Given the nature of their responsibilities, Ministers of Defence will need to be informed of operational matters, certainly when NZSAS or other NZDF personnel are deployed to areas of armed conflict abroad and perhaps in other contexts as well. As we

¹ AW Bradley, KD Ewing and CJS Knight *Constitutional and Administrative Law* (16th ed, Pearson, London, 2015) at 95.

² Cabinet Office *Cabinet Manual* (Wellington, 2017) at 46. On ministerial responsibility see also Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 243–246; Mary Harris and David Wilson (eds) *McGee Parliamentary Practice in New Zealand* (4th ed, Aratia Books, Auckland, 2017) at 124 and 570; Geoffrey Palmer and Matthew Palmer *Bridled Power – New Zealand's Constitution and Government* (4th ed, Oxford University Press, South Melbourne, 2004) at 85–89; and KJ Scott *The New Zealand Constitution* (Clarendon Press, Oxford, 1962) at 118–131.

³ Cabinet Office, above n 2, at [5.2].

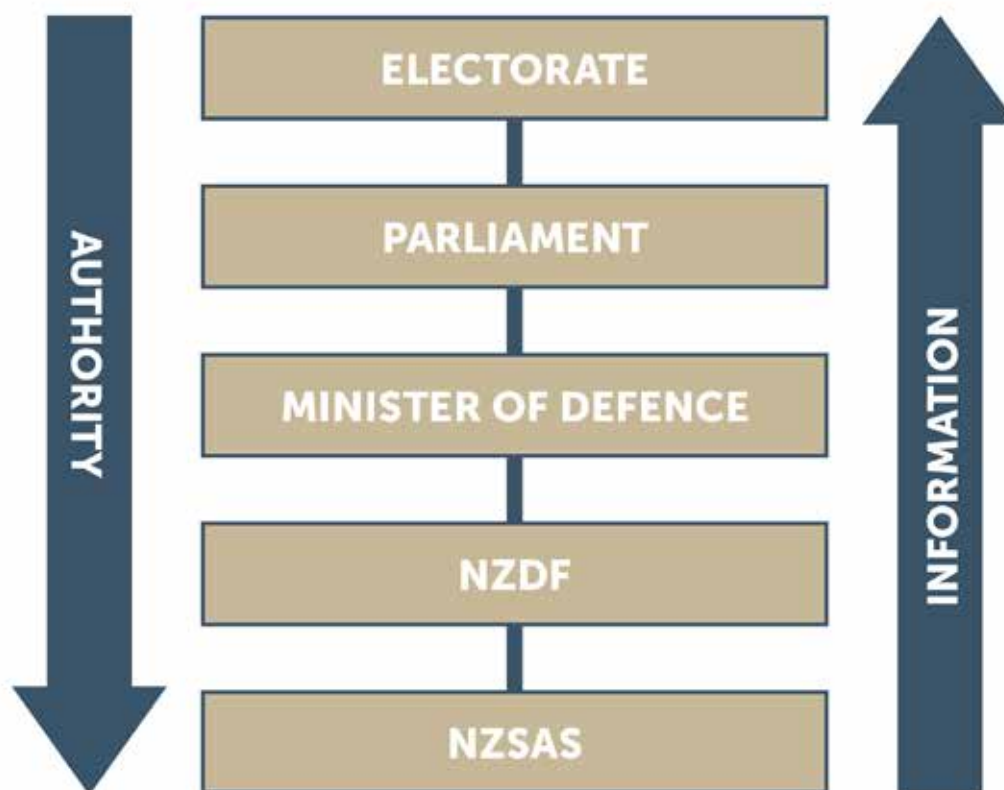
⁴ Discussed in chapter 2 at [62] and [81].

⁵ Chapter 2 at [72].

explained in chapter 2, operational decisions in the military can have profound reputational, legal and political consequences, both internationally and domestically.⁶

- [11] As will by now be obvious, if the system is to work effectively, the flow of information from NZDF to the Minister must be timely, comprehensive and accurate. Where these features are missing, the quality of government decision-making will be affected and democratic legitimacy and accountability fractured. Hence, the constitutional significance of the problems the Inquiry has seen.

Figure 7:
Authority and information flows



NZDF's engagement with ministers

- [12] Over the period 2010 to 2017 there were four Ministers of Defence. As Hon Dr Mapp noted, the personality and interests of different ministers affect the way they interact with NZDF. A high level of “churn” of ministers is a feature of government in New Zealand, largely because of the short three-year election cycle. This creates obvious risks for effective civilian control of the military, and further emphasises the need for NZDF to provide ministers with full and accurate

⁶ Chapter 2 at [78]–[80].

briefings on a regular basis. This need is especially acute where sensitive or complex issues arise. In those instances, lines of communication and accountability assume even greater significance.

- [13] We heard evidence from two of the four ministers, Hon Dr Mapp and Hon Dr Coleman. Each approached the role in a different way, reflecting their different backgrounds. Each expected full information from NZDF on relevant matters, but neither always received it, at least in relation to Operation Burnham.
- [14] In the context of civilian control of the military, Dr Coleman considered that there was often a lack of political sophistication in NZDF about what ministers needed to know and what was relevant to the Government's legitimate interests. He emphasised that a failure by NZDF to inform its minister of significant issues created real risks for the minister. If a matter became politically contentious, that might mean, in extreme cases, that the Prime Minister would lose faith in the minister, which could result in his or her dismissal.
- [15] Dr Coleman said:

Yes, in general terms just a closer link between the politicians and the senior military people would be a good idea and ... the military people really understanding that the Minister and the Prime Minister are not just there to rubber stamp what they do and I think it does go back to their training early on, they do not have enough exposure to the political context from an early enough stage.

He said he thought the leadership training in NZDF had to be improved to retain talent and develop a deeper and broader pool of viable candidates for the most senior roles in the NZDF. This would in turn increase the chances of senior NZDF leaders appreciating more fully the principle of civilian control of the military. Dr Coleman suggested that picking candidates to be the Minister's military adviser in his Parliamentary office from the ranks of those who seem to be likely candidates for higher office within NZDF would help with this aim. The Inquiry agrees that those in the upper echelons of NZDF need a better and more sophisticated understanding of ministerial concerns and the political environment, and considers that Dr Coleman's suggestion has value.

- [16] The Inquiry notes that concern about how NZDF deals with ministers is not new. As we outlined in chapter 2, in his 2002 review Mr Don Hunn emphasised the importance of civilian control of the military through the Minister.⁷ The failure to engage adequately with ministers was remarked upon in the 2015 *Review of the New Zealand Defence Force* in the following terms:⁸

Improving its rating in terms of engagement with Ministers will require NZDF to do more to ensure that its voice is heard by Ministers and seen to be heard, and respected by its sector partners. The NZDF needs to adapt its modus operandi to be more agile in responding in a timely and user friendly way to its Ministers, recognising the way they like to work. NZDF staff in and engaging with, Ministers' Offices would benefit from opportunities to develop experience of the workings of the Public Service and the interface between agencies, Ministers and Parliament before being put into these roles.

⁷ D K Hunn *Review of Accountabilities and Structural Arrangements between the Ministry of Defence and the New Zealand Defence Force* (30 September 2002) at [2.7] and [2.9], quoted in chapter 2 at [66].

⁸ State Services Commission, *The Treasury and the Department of Prime Minister and Cabinet Performance Improvement Framework: Review of the New Zealand Defence Force (NZDF)* (September 2015) at 45.

- [17] It is to some extent surprising that these issues persist. One of the features of NZDF Headquarters over the period 2010–2018 that struck us was the fact that a small number of senior personnel circulated among the limited number of available appointments. Where personnel have occupied several positions within the NZDF hierarchy in or around NZDF Headquarters, it might be expected that they would develop a “feel” for the need for appropriate interactions with ministers. Our examination of the interactions between NZDF and ministers on the issue of civilian casualties following Operation Burnham shows that this is not so, and that the issues raised by Mr Hunn in 2002 have not yet been fully and effectively addressed. They need to be.

Structural issues in relation to special operations

- [18] A structural problem that played some part in the way that the Operation Burnham saga unfolded was the place of the NZSAS within the NZDF organisational setup. The Directorate of Special Operations was located in NZDF Headquarters rather than with the Joint Forces Command at Trentham, and operated to a large extent within a silo. It appears that the Director of Special Operations regularly briefed the Minister of Defence directly (rather than through the Chief of Defence Force) and, as a practical matter, seems to have had direct access to the Prime Minister and other ministers, particularly the Minister of Foreign Affairs, when he thought it necessary.
- [19] The fact that the Director of Special Operations had, effectively, direct access to the Minister was problematic, especially in light of the secrecy that necessarily surrounded some NZSAS activities. Even senior officers in the office of the Chief of Defence Force were not aware of issues relating to the NZSAS. The following exchange between Ms McDonald QC and former Chief of Defence Force Lieutenant General (Retired) Tim Keating at one of the Inquiry’s public hearings is illustrative:⁹

Q. And you were then Chief of Staff to the CDF when the Operation Burnham unfolded, so you knew about the Operation presumably at the time?

A. Not necessarily in my role, Chief of Staff to the CDF was more administrative. So various operations throughout that time were compartmentalised for security reasons and matters, operations of that nature were sometimes need to know and only certain people in the Defence Force were included in the briefings.

Air Marshal Short made a similar point. He said:¹⁰

... matters involving the NZSAS were held tightly by CDF, the Directorate of Special Operations, and the Commanding Officer of the NZSAS. That closed command structure was well entrenched, having been in place for decades.

- [20] These observations reflect a culture of exclusivity and secrecy associated with the NZSAS as an elite special operations force. This culture resulted in NZDF overly compartmenting information. In chapter 2, we outlined the command and control arrangements the Chief of Defence Force directed for the NZSAS in Afghanistan. Operational command was delegated to the Commander Joint Forces New Zealand. That was a stronger command authority and responsibility than the technical control assigned to the Director of Special Operations. Yet it is apparent that most

⁹ Evidence of Lieutenant General (Retired) Tim Keating, Transcript of Proceedings, Public Hearing Module 4 (18 September 2019) at 497.

¹⁰ Evidence of Air Marshal Kevin Short, Transcript of Proceedings, Public Hearing Module 4 (16 October 2019) at 1003.

information about NZSAS operations in Afghanistan went through the Director of Special Operations, and that he had effective decision-making responsibility. This culture of closed command and over-compartmentation appears to have been a contributing factor to the problems we have described in this report.

- [21] The performance of the Directorate of Special Operations was one of the problems highlighted by Dr Coleman in June/July 2014, when the Incident Assessment Team Executive Summary came to light and the Minister expressed his displeasure at NZDF's record-keeping failures.¹¹ Lt Gen (Ret) Keating said in his evidence that he changed the existing organisational structure in an effort to address the problems that had emerged.¹² In particular, he moved all special forces operations to the control of the Commander Joint Forces, who was located at Trentham rather than at NZDF Headquarters. Lt Gen (Ret) Keating said he considered that running such operations out of NZDF Headquarters was inappropriate as there were not the systems there to handle the wealth of documentation that came in.
- [22] An issue for the current Minister of Defence is whether this organisational change has been effective.

Information management

- [23] Lt Gen (Ret) Keating acknowledged that operational documentation was not well handled within NZDF Headquarters at the time and that this impacted on briefings. He said he conducted a workshop to examine international best practice to find a better way of handling accusations of civilian casualties.¹³ The workshop concluded that NZDF systems were "not fit for purpose for contemporary operations, to give assurances to the public that we're behaving professionally."¹⁴ Lt Gen (Ret) Keating said he worked to ensure that better information management systems were put in place. He considered that the various changes he had initiated had improved matters.
- [24] Air Marshal Short told us that considerable work was currently being undertaken to improve NZDF's information management systems, particularly by reducing the number of different electronic systems that NZDF ran (at one point there were 15). He advised us that there had been "a period of intense growth and focus on information management within NZDF". In particular:
- (a) In 2014, the Knowledge and Information Management Directorate was created, headed by a Chief Data Officer.
 - (b) In 2017, the Commander Joint Forces New Zealand (JFNZ) issued a Directive for Information Management.
 - (c) In 2018, Information Management Instructions were implemented within HQ JFNZ Operation Instructions. The instructions require compulsory repatriation of all physical and electronic records to HQ JFNZ, with specific instructions for managing information while deployed.

¹¹ See chapter 8 at paragraphs [103]–[105]. In his evidence, Dr Coleman raised other instances where he considered that he had not been properly advised of operational developments that had the capacity to impact on the Government's legitimate interests.

¹² Evidence of Lt Gen (Ret) Keating, Transcript of Proceedings, Public Hearing Module 4 (19 September 2019) at 533–534 and 643–644.

¹³ At 644–645.

¹⁴ At 649.

This includes the provision of an Information Management Office for every deployment and deployment-specific sites within the Document Management system.

In addition, a complete technology refresh is under way.

- [25] NZDF generates and receives a large amount of information, much of it classified. Our experience in this Inquiry was that NZDF was unable readily to retrieve and make available to us all the information we sought. Rather, as it was described to us, NZDF had to devote significant time and resources to finding relevant material, which included locating, reactivating and interrogating old electronic systems. Even then, its searches failed to produce some relevant information. On several occasions the Inquiry had to make specific requests for information it became aware of through other means, but which had not been provided by NZDF as part of the disclosure process. In June 2020, we were still receiving material from NZDF that was plainly relevant and should have been provided much earlier. Yet this was an operation that occurred in August 2010, only a decade ago. The point is that the problems we have described occurred even though the Inquiry was dealing with reasonably recent events.
- [26] This difficulty in identifying and accessing relevant information is not only problematic for subsequent investigations of the type this Inquiry has conducted. It is apparent from the events described in chapter 8 that senior NZDF personnel were themselves unaware of critical information held by NZDF in the period following Operation Burnham. This was a significant factor in the way they responded to the allegations of civilian casualties.
- [27] It cannot be right that obtaining information about an operation that occurred in 2010 should prove so difficult for NZDF. It is self-evident that the wealth of information NZDF holds needs to be managed appropriately, in a way that enables NZDF to access relevant material whenever required, including for the purpose of independent oversight. We are in no position to assess whether the organisational and systems changes made by Lt Gen (Ret) Keating and more recently by Air Marshal Short are sufficient to minimise the possibility of problems of the type described in this report occurring in the future. This is ultimately a matter on which the Minister of Defence will need to be satisfied—as a matter of priority.
- [28] To enable the Minister to make informed decisions about the adequacy of the changes to NZDF's organisational structure and record-keeping and retrieval systems, and any further changes that ought to be made to them, we recommend that the Minister appoint an expert review group. This group should consist of members from both within and outside NZDF, including some overseas military personnel with relevant expertise. This will help to ensure that the Minister receives robust advice on how NZDF's organisational structure and systems currently operate, and how they compare to international best practice. While NZDF should, of course, play an active role in the review process, we consider it undesirable that the Minister receive advice on these issues solely from NZDF, particularly given the historic failures to provide full and accurate advice to ministers highlighted in this report. In addition, such a process would assist in the important function of ensuring public confidence in the process and its outcome and, ultimately, in NZDF itself.
- [29] Finally, it is relevant to note that there exists in New Zealand modern and carefully drafted legislation “to enable the Government to be held accountable” by requiring agencies to keep “full and accurate records” of their activities, namely the Public Records Act 2005.¹⁵ That Act aims to provide “for the preservation of, and public access to, records of long term-value” and “to

15 Public Records Act 2005, s 3.

enhance public confidence in the integrity of public records.”¹⁶ We will not engage in an analysis of the legislation here. We simply note that its purposes were not being met by the record-keeping practices within NZDF to which we were exposed.

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.

The need for independent oversight

[30] In chapters 8 and 9 we outlined numerous inadequacies in NZDF’s performance in the aftermath of Operation Burnham. In chapters 10 and 11 we identified a range of issues before, during and after Operation Yamaha. As will be apparent, in relation to Operation Burnham we were deeply concerned by NZDF’s handling of the allegations of civilian casualties. In relation to Operation Yamaha, there were problems with New Zealand’s detention policy in relation to partnered operations and its application in-theatre, as well as a failure to follow up on credible allegations of torture.

[31] In this section, we recommend the establishment of an Independent Inspector-General of Defence to provide a mechanism for independent oversight of NZDF’s activities. We consider this is a necessary step to minimise the possibility of similar failures occurring in the future, and to ensure that, if they do occur, they are investigated and remedied promptly and appropriately. This means addressing any issues identified in a way that:

- (a) is consistent with the underlying constitutional principles of civilian control and ministerial accountability; and
- (b) promotes best practice, as well as public confidence in NZDF.

Why is independent oversight of NZDF required?

[32] Armed forces occupy a unique position that confers on them both significant powers and significant responsibilities. Their actions can have serious consequences for individuals—including, in some circumstances, death or deprivation of liberty—and for international relations. Accordingly, they are bound to act consistently with the rule of law and the Government’s defence policy objectives, and in a way that facilitates effective civilian control. It is also critical in a democratic society that

¹⁶ Public Records Act 2005, s 3(c) and (d).

they have the confidence and support of the public.

- [33] However, the specialist and often secret nature of their activities can make it difficult for the Government and the public to ensure those responsibilities are being met. As the Geneva Centre for the Democratic Control of the Armed Forces has observed:¹⁷

There is always a risk, even in more developed countries that, because of their unique qualities and specialisms, the armed forces exercise an influence that is difficult for the non-specialist politician or citizen to question.

It is therefore essential that these forces should be part of a framework which ensures they are subordinate and accountable to democratically elected authorities; implement the political goals set by that leadership, and constitute an integral and respected part of the societies they serve and protect. Mechanisms that facilitate transparency and oversight are essential elements in this democratic framework.

The Centre has also emphasised that independent and impartial oversight bodies are critical to ensuring transparency and accountability in armed forces.¹⁸ This in turn assists in preventing maladministration and human rights abuses.

- [34] The failures within NZDF that we have identified in this report signal to us that the structural and legislative framework currently in place is insufficient for these purposes. Over a number of years, NZDF personnel failed to provide full and accurate information to ministers and the public, and failed to adequately scrutinise or respond to the information available to them. Their actions prevented civilian control and ministerial accountability from operating effectively, and have diminished public confidence in NZDF as an institution. Clearly, some form of increased oversight is needed to ensure this does not happen again.
- [35] As a starting point, we compared NZDF to other organisations that exercise some powers of a similar nature: the New Zealand Police and the intelligence agencies (the Government Communications Security Bureau (GCSB) and New Zealand Security Intelligence Service (NZSIS)). Like police officers, military personnel exercise powers that can impact the life and liberty of individuals. They must comply with laws that protect human rights. In relation to serious complaints against police forces, international best practice indicates that independent, statutorily-based investigative processes are necessary to ensure accountability and to preserve public confidence.¹⁹ Such a mechanism contributes to building public trust and confidence in the Police.
- [36] In New Zealand, this is achieved through the Independent Police Conduct Authority, an independent statutory body that investigates complaints against Police, including complaints of misconduct or neglect of duty; incidents involving death or bodily harm, and wider issues of Police policy, practice or procedure.²⁰ The Authority's statutory function extends to examining the conduct of specialist Police units that are engaged in dangerous or high-risk situations, such as the Armed Offenders Squad. While defence forces are not in exactly the same position as police forces, there are sufficient similarities to justify applying the same principles to investigations into

¹⁷ Eden Cole, Philipp Fluri and Simon Lunn (eds) *Oversight and Guidance: Parliaments and Security Sector Governance* (Geneva Centre for the Democratic Control of Armed Forces, Geneva, 2015) at 15.

¹⁸ Benjamin S Buckland and William McDermott *Ombuds Institutions for the Armed Forces: A Handbook* (Geneva Centre for the Democratic Control of the Armed Forces, Geneva, 2012) at v.

¹⁹ See, for example, United Nations Office on Drugs and Crime *Handbook on Police Accountability, Oversight and Integrity* Criminal Justice Handbook Series (United Nations, New York, 2011).

²⁰ Established under the Independent Police Conduct Authority Act 1988.

the more serious instances of alleged NZDF misconduct.

- [37] The secrecy surrounding many of NZDF's activities, particularly those involving special operations, adds a further layer of complexity. The fact that much of the information NZDF holds is classified means that public transparency and accountability are often unable to be achieved through the usual mechanisms, such as Official Information Act requests. In this respect, NZDF is comparable to the intelligence agencies, which operate largely in secret and have intrusive powers that can impact on the rights of individuals. The need for independent external oversight has long been recognised in relation to the intelligence agencies, which have been subject to the jurisdiction of the Inspector-General of Intelligence and Security (IGIS) since 1996.²¹
- [38] The IGIS has wide-ranging investigatory powers aimed at ensuring that the intelligence agencies conduct their activities lawfully and with propriety.²² As the former IGIS, now Justice Gwyn, explained in her 2018/2019 annual report:²³

The secrecy under which the intelligence agencies operate constrains the usual constitutional accountability mechanisms, such as access to the courts and access to information under the Official Information Act 1982 or Privacy Act 1993. The Inspector-General is uniquely placed to examine and publicly explain, within appropriate limits, the operational activities of the New Zealand agencies.

We consider there is an equal need for independent scrutiny and reporting on the activities of NZDF.

- [39] We note that NZDF has its own intelligence arm, but it is not subject to the jurisdiction of the IGIS. This can be contrasted with the position in Australia, where the Australian IGIS has jurisdiction over the Defence Intelligence Organisation.²⁴ Australia has also had an Inspector-General of the Australian Defence Force since 2005.²⁵ The Inspector-General's office is currently conducting an inquiry into allegations of misconduct by Australian special forces in Afghanistan.
- [40] It is not only domestic considerations that point to a need for independent external oversight. Such oversight has benefits from an international perspective as well. New Zealand is party to a significant number of international treaties or conventions and is in any event bound by customary international law. This means that New Zealand may be called to account for the conduct of its troops before international institutions when it employs lethal force abroad or detains and transfers people who may run the risk of being tortured. The requirements of the international treaties to which New Zealand adheres, including the Convention against Torture and the Rome Statute (which established the International Criminal Court) are onerous. For example, the International Criminal Court can carry out investigations into certain types of conduct if New Zealand fails to do so.²⁶

²¹ The Inspector-General of Intelligence and Security Act 1996 is now repealed, but the office of the Inspector-General of Intelligence and Security is maintained under the Intelligence and Security Act 2017, pt 6.

²² Intelligence and Security Act 2017, s 156.

²³ Office of the Inspector-General of Intelligence and Security *Annual Report: For the year 1 July 2018 to 30 June 2019* (5 November 2019) at 4.

²⁴ Inspector-General of Intelligence and Security Act 1986 (Cth), s 8(3).

²⁵ Inspector-General of the Australian Defence Force is established under of the Defence Act 1903 (Cth), pt VIIIB. Although it sits within the Department of Defence, it is independent from the Defence Force chain of command.

²⁶ We note that the International Criminal Court recently authorised the commencement of an investigation into alleged war crimes committed in connection with the Afghanistan conflict: see *Situation in the Islamic Republic of Afghanistan* ICC Appeals Chamber ICC-02/17 OA4, 5 March 2020.

[41] New Zealand must also answer for its actions to the Committee against Torture established by the Convention against Torture. The Committee seeks periodic reports from states. It is in New Zealand's interest as a good international citizen to be conscientious, thorough and professional in these matters so it can respond fully to international scrutiny and consider recommendations or suggestions for improvement to laws, policies and practices at a domestic level. Accurate information is critical to meeting these requirements.

[42] Finally, we note that independent investigations should not be regarded by military personnel in a negative way. External oversight can provide a platform to enhance public understanding of complex legal and operational issues, and to identify good (or bad) practice in a fair, independent and impartial manner. Often, it results in improvements to the way the military operates. This point is well made by the Geneva Academy of International Humanitarian Law and Human Rights in its 2019 publication *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice*.²⁷ The Academy says:

26. The existence of effective domestic procedures and mechanisms for investigations in armed conflict serves to enhance a State's military operational effectiveness. Investigations may be a source of information on the success or failure of military operations and enable appropriate steps to be taken in the latter case. They can likewise assist in the identification of good practice and lessons-learned. Ultimately, investigations are crucial for maintaining discipline in an institution that depends on high levels of command and control.

[43] Lieutenant General (Retired) Sir Jerry Mateparae told us that had he been advised that civilian casualties might have occurred on a New Zealand-led operation, he would have ordered the New Zealand Senior National Officer in Afghanistan to conduct an investigation and would have sent legal support from New Zealand.²⁸ We accept that investigations conducted internally within the military will often serve useful purposes and will be sufficient in many situations. But in some instances, internal investigations may not provide an environment that will enable:

- (a) defence force personnel to speak freely, particularly where those in positions of command may bear some responsibility for what has occurred or otherwise be part of the problem; or
- (b) interested members of the public (and perhaps ministers) to have trust and confidence in the outcome.

In some cases, both internal and external examination will be necessary. In others, the most effective outcomes will be achieved following review or investigation by an independent body.

[44] As a recent study into the standards and procedures of the United States military for investigations into civilian casualties noted, the fact that military commanders both direct operations and order investigations into harm resulting from those operations "creates an inherent tension and a potential conflict of interest".²⁹ The report goes on to say that to reduce the risk of bias, commanders should select investigating officers from other units. In a relatively small defence force such as New Zealand's, we consider that the risk of bias or perceived bias is high, which points towards a process independent of NZDF, at least in relation to some matters.

²⁷ Geneva Academy of International Humanitarian Law and Human Rights *Guidelines on Investigating Violations of International Humanitarian Law: Law Policy and Human Rights* (September 2019).

²⁸ Evidence of Lieutenant General (Retired) Sir Jerry Mateparae, Transcript of Proceedings, Public Hearing Module 4 (16 September 2019) at 25.

²⁹ Columbia Law School Human Rights Institute and Center for Civilians in Conflict *In Search of Answers: US Military Investigations and Civilian Harm* (February 2020) at 2.

An Independent Inspector-General of Defence

- [45] For the reasons canvassed above, we have concluded that an office of Independent Inspector-General of Defence should be established to provide independent and external oversight of NZDF. This would promote civilian control of the military and foster public confidence in the effectiveness of that civilian control—thus supporting the two fundamental constitutional principles identified at paragraph [4]. It would give ministers and the public assurance that significant issues in relation to NZDF are being investigated thoroughly and objectively, and that any problems are being identified and rectified effectively. We see the feature of independence from NZDF as critical to fulfilling these objectives, and consider that independence is best emphasised and maintained where the independent office or entity has a statutory underpinning.
- [46] The Inspector-General would stand outside NZDF³⁰ and would supplement rather than replace existing investigatory mechanisms such as command investigations or courts of inquiry. An investigation could be triggered by the Inspector-General on his or her own motion, or by the Minister of Defence, the Chief of Defence Force, the Secretary of Defence and, perhaps, Parliament's Foreign Affairs and Defence Select Committee. The Inspector-General would not be limited to investigating only where internal avenues had been exhausted. This is likely to delay investigations and impede the ability of the Inspector-General to obtain access to the best information. The Inspector-General would operate separately and independently from any internal oversight processes, and should be able to investigate whenever he or she consider it appropriate (although we note that, in making that assessment, the fact of any ongoing or completed internal investigation could be taken into account).
- [47] The Inspector-General need not be a person with a military background, but he or she would need to have access to investigators/advisers with significant military expertise. He or she would also need procedural powers in relation to matters such as gathering evidence, but would probably have to operate under similar constraints to inquiries. This would include having the power to make findings of fact and fault but not to determine liability, and having a power of recommendation (to either the Chief of Defence Force or the Minister, as appropriate). As is the case for other independent oversight bodies, the statutory framework should also clarify how recommendations are received and considered, and what avenues are available if no reasonable or timely action is taken in relation to recommendations.
- [48] The Inspector-General would be able to investigate some “one-off” matters, such as allegations of civilian casualties on a particular operation, issues going to detainee treatment, as well as issues going to the prevailing culture within NZDF (or part of it) or which are, or may be, systemic in nature. Examples of the latter might be allegations of systemic gender discrimination or of systemic failure to respond to sexual abuse allegations appropriately.
- [49] The independent office we recommend would have the capacity to accommodate what is likely to be a feature of many military investigations, namely, the need for confidentiality. Much of the information provided to the Inquiry was classified or otherwise confidential. In relation to military matters today, that will generally be the case. Similarly, much of the oral evidence we heard was given in private, for good reason. Again, that will commonly be the case. The Inspector-General would be able to deal with classified material and preserve confidentiality of witnesses if required;

30 As noted at footnote 25 above, the Australian Inspector-General sits within the Australian Ministry of Defence but is independent of the Defence Force chain of command. As far as New Zealand is concerned, we consider an Inspector-General should sit completely outside NZDF and have legal, functional and financial independence from it, especially given NZDF's relatively small size and the need to preserve public confidence in the office.

but the fact that the Inspector-General would be independent of NZDF should give ministers and the public reassurance about the integrity of the investigatory process despite its confidentiality. Furthermore, our experience suggests that, in a military context, a confidential process facilitates getting at the truth.

- [50] Given the need for the office to be independent of, and situated apart from, NZDF, there is a question whether the office should be a stand-alone one or associated with another entity. One possibility is that the office could be located as a separate unit within the Ministry of Defence, with the Ministry providing the necessary support services. Unlike NZDF, the Ministry is part of the mainstream public service. As we described in chapter 2, the Defence Act demonstrates a strong commitment to civilian control. The Secretary of Defence is “the principal civilian adviser to the Minister and other ministers.”³¹ The Secretary and the Ministry should be an important source of contestable advice for the Minister. Locating the Inspector-General in the Ministry may strengthen the element of civilian oversight. But whatever decision is made about that, the Inspector-General must, in our view, be located outside NZDF.
- [51] To set up an office of Independent Inspector-General of Defence, it will be necessary to pass a short amending Act. The detailed nature of that legislation cannot be fully analysed in this report. The best existing statutory model is the office of the Inspector-General of Intelligence and Security provided for in pt 6 of the Intelligence and Security Act 2017, although some adjustments would be required. The purpose of the new office would have similarities to the IGIS and it would need similar powers and procedural provisions, including in regard to access to information, handling of classified material and public reporting. We have set out in our recommendation what we consider to be the key areas of focus for the new office.
- [52] We put the idea of establishing an Independent Inspector-General of Defence (in general terms) to several witnesses:
- (a) Lt Gen (Ret) Keating had examined the situation in Australia, where there is an Inspector-General of the Defence Force. He was comfortable with some form of independent scrutiny so long as it had the capacity to understand military operations.³²
 - (b) Dr Mapp expressed strong support for such an office and considered that if an investigatory process of this type was available, it would assist accountability.³³
 - (c) Dr Coleman also expressed support for this idea and said he thought the person appointed would need to stay in the role for a reasonable period to be effective, say five to seven years.
- [53] The non-Crown core participants, Mr Hager and Mr Stephenson, supported our recommendation in their comments on our draft report. While accepting the fundamental aim of promoting civilian control of the military and fostering public confidence, NZDF considered that the idea required further consideration and analysis. While we agree that policy work will need to be done to implement this recommendation, there can be no prevarication about the need for the establishment of an independent office of the type we recommend. The need is indisputable.

³¹ Defence Act 1990, s 24(2)(a).

³² Evidence of Lt Gen (Ret) Keating, above n 12, at 650.

³³ Evidence of Hon Dr Wayne Mapp, Transcript of Proceedings, Public Hearing Module 4 (18 October 2019) at 1095–1096 and 1107–1108.

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.

A Defence Force Order on allegations of civilian casualties

- [54] Sir Jerry Mateparae noted in his evidence that during his tenure as Chief of Defence Force, work had begun on the preparation of a formal order under s 27 of the Defence Act concerning civilian casualties. He said that the work had not been completed for resource reasons.³⁴ A further effort was made in 2011/2012 but nothing was promulgated then either. A full draft of the 2012 document was provided to the Inquiry in October 2019. It sets out an elaborate set of procedures for the investigation of unintended casualties if they occur during NZDF operations outside New Zealand. The approach contemplated is thorough, although it may be too elaborate, especially if our recommendation to establish an Inspector-General's office is accepted.
- [55] The Inquiry's preference is for an order that sets out a preliminary process that is intended to determine whether any further, formal investigation is needed—that is, a relatively quick preliminary inquiry carried out in-theatre. A written preliminary assessment would be produced and provided to the Chief of Defence Force so that a decision could be made as to whether a full investigation was required, and if so, what type of investigation that should be. In terms of what approach should be taken to a preliminary investigation, there is useful guidance in the Geneva Academy's *Guidelines on Investigating Violations of International Humanitarian Law*.³⁵
- [56] It is a well-known observation that the first information a commander receives after an operation is likely to be wrong. While we acknowledge that, it does not mean that an initial investigation

³⁴ Evidence of Lt Gen (Ret) Mateparae, above n 28, at 75.

³⁵ Geneva Academy of International Humanitarian Law and Human Rights, above n 27, at 14–23.

of the type we contemplate should not be carried out. Early investigation generally gives the best opportunity to gather the best evidence. The most obvious example is video footage. Armed conflict in the modern era generates a great deal of objective evidence in the form of video and other imagery. Much of this material is recorded by overseas partners through aerial intelligence, surveillance and reconnaissance platforms (such as drones), and by various forms of attack aircraft (weapons video), although increasingly NZDF will gather its own video footage through helmet cameras and such like. As we understand it, such material is not preserved unless there is some particular reason to preserve it. Obviously, the best opportunity to ensure its preservation is immediately after the particular operation. The investigator(s) could gather such objective evidence,³⁶ along with any other relevant material, and create a file, which would be available to any subsequent investigation and/or to NZDF personnel who have to address questions about the operation, either at the time or in the future.

- [57] That there should be a process such as this seems self-evident. When it is recalled that Operation Burnham was a rare occasion on which NZDF faced allegations that a New Zealand-led operation had resulted in civilian casualties, it is surprising that NZDF did not undertake something of this sort in any event despite the International Security Assistance Force (ISAF) Incident Assessment Team investigation, which ISAF conducted for its purposes, not New Zealand's.³⁷
- [58] In addition to an order on handling allegations of civilian casualties after an operation, the Inquiry considers that greater clarity and direction is required in the directives to NZDF personnel appointed as Senior National Officers and Commanders in operational theatres. The directives we reviewed were what may be described as administrative in nature. They lacked specific guidance, for example, on reporting incidents that may impact New Zealand's national reputation, contravene international or domestic law, or be of significance to the Government. Senior National Officers are delegated national command responsibilities and are appointed to preserve New Zealand's national interests. They should be provided with as much guidance as possible.³⁸ We understand Australia and other countries conduct specialist briefings for personnel deploying on operations in a specific range of appointments. These briefings are given by the strategic-level headquarters. This training is a formalised package highlighting those matters of national importance with which these appointments must be familiar. NZDF should consider similar briefings.

³⁶ We acknowledge that accessing and retaining material created by overseas partners has challenges. It may be that New Zealand should, where it participates in coalitions such as ISAF, make its participation conditional on being able to access objective evidence of the type referred to in the text where there are credible allegations of the type that followed Operation Burnham.

³⁷ Based on his evidence to us, we think it likely that Sir Jerry Mateparae would have ordered such an investigation following Operation Burnham had he not been erroneously advised on the basis of Lt Col Parsons' misdescription of the Incident Assessment Team's conclusions.

³⁸ We note in this context that Brigadier Parsons told us he had not had time to read ISAF's standard operating procedures on "inquiries" and was not aware of ISAF's investigation processes before taking up his responsibilities as Senior National Officer in Afghanistan.

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.

SUMMARY OF RECOMMENDATIONS IN RELATION TO NZDF

R1. We recommend that the Minister of Defence take such 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.

R2. 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.

R3. We recommend that a Defence Force Order be promulgated setting out how allegations of civilian casualties should be dealt with in-theatre and at New Zealand Defence Force Headquarters.

Detention

- [59] As described in chapter 11, we consider that New Zealand breached its international obligations in relation to (a) the capture and transfer of Qari Miraj to the NDS and (b) its failure to take appropriate steps after it learnt of the allegations that he had been tortured. The question is, how can the failings we have identified be addressed in a way that minimises the possibility that they may reoccur?
- [60] The answer, in our view, lies in:
- (a) having well-considered detention policies in place in advance of any similar deployment, which reflect New Zealand's values and the letter and spirit of international law on torture prevention; and
 - (b) ensuring that the forces and agencies involved, whether in New Zealand or in-theatre, have a clear understanding of how they should operationalise those policies.³⁹
- [61] Future conflicts in which New Zealand forces may become involved are likely to be non-international armed conflicts of the type that occurred in Afghanistan, involving forces from various countries supporting a local government against insurgent forces. Almost inevitably, the fact that there is an insurgency will mean that the local government will not have full control of the country's institutions or agencies. Torture or other mistreatment of detainees in the host country's facilities is likely to be a real risk, at least in some areas, in some facilities, or within some agencies.
- [62] If New Zealand chooses to deploy its forces in a non-international armed conflict, including as part of a coalition, New Zealand needs to determine beforehand what detention policies it will follow and how it will implement them in its arrangements with its coalition partners and the host country. The policies adopted should not be based simply on the letter of the law but should reflect the core values that the law seeks to embody. The approach should not be to limit New Zealand's obligations to a bare legal minimum but rather to act consistently with the fundamental human rights norms to which New Zealand says it adheres—a law and values approach.
- [63] As applied, New Zealand's policy in respect of persons arrested by Afghan personnel on partnered operations meant that New Zealand troops could participate in capturing suspected insurgents without any concern about, or responsibility for, their subsequent mistreatment in detention (assuming no complicity). On the assumption that the Crown Agencies' legal analysis in relation to Operation Yamaha is correct, there must surely be a question as to whether it is consistent with New Zealand's values to allow its forces to be as closely involved in the capture of Miraj as they were without acknowledging any responsibility for the risks he faced in detention. There is an obvious question about a policy which has such an outcome—is that really us?
- [64] In situations of non-international armed conflict, the deployment of forces to assist the local government to deal with the insurgency may well be only one element of a multi-pronged international assistance effort, as was the case in Afghanistan. However, the fact that programmes

³⁹ We note this was a significant theme in the 2019 report of the Inspector-General of Intelligence and Security (Inspector-General of Intelligence and Security *Inquiry into possible New Zealand intelligence and security agencies' engagement with the CIA detention and interrogation programme 2001–2009* (31 July 2019)), in which significant policy changes were recommended.

or projects are under way with local agencies and personnel to improve understanding of human rights norms, to introduce processes that respect rights, to enhance skills and so on does not relieve an assisting force from addressing the issue of the treatment of those in whose detention it is involved. The way that an assisting force addresses the issue may, of course, assist in the process of promoting and developing an understanding of human rights amongst local officials and agencies.

- [65] Where New Zealand decides to deploy forces to assist in counter-insurgency operations, it should enter into written arrangements with the host country that address how *all* those people New Zealand forces are involved in detaining are to be treated in detention. New Zealand should make it clear that New Zealand forces will not be involved in operations, partnered or otherwise, which result in the detention of suspects who face a real risk of torture without workable and effective arrangements in place to ensure that the risk is not realised.
- [66] We note that in the United Kingdom, the Government issued a policy statement in July 2019 entitled *The Principles relating to the detention and interviewing of detainees overseas and the passing and receipt of intelligence relating to detainees*.⁴⁰ The statement provides useful guidance on a range of matters and includes the following:⁴¹

When UK Armed Forces or other personnel are operating in a coalition with others and are under time-sensitive operational conditions, they may find themselves engaged in tactical questioning of detainees held by other nations, or in possession of threat to life intelligence, with no opportunity to refer to senior personnel or Ministers. If such a situation arises, all personnel should continue to observe this guidance insofar as is practicable and report all the circumstances to senior personnel at the earliest opportunity. This does not apply when personnel know or believe i) unlawful killing ii) torture or iii) extraordinary rendition will take place, when they will not proceed.

- [67] We consider that a policy statement of this type should be developed and promulgated by the New Zealand Government. Given the importance of torture prevention in international law, the potential impact of a detention policy on the safety of individuals and the need to ensure public confidence in the outcome, the work to finalise the policy would benefit from the input of independent experts. Such experts would have legal or other knowledge and practical experience in preventing torture in a range of settings, including human rights, law enforcement and military settings. New Zealanders are also entitled to know what New Zealand's proposed policy is and to comment on it, a requirement we believe to be imperative.⁴²
- [68] Crown Agencies accepted that the allegations that Miraj had been tortured were sufficiently credible to warrant further enquiry. They said that it appeared that the personnel involved in analysing the allegations did not appreciate that New Zealand's obligations to take further steps were triggered even where the allegations had not been established conclusively. The Solicitor-General's advice in his opinion of November 2010 as to what New Zealand needed to do in these circumstances had not been operationalised. In terms of both law and principle, there should be policies and procedures in place to deal with circumstances such as this promptly and effectively. The policies and procedures, as well as the underlying values, principles and rules, should be addressed in training programmes and employee policies in a way that ensures they are followed.

⁴⁰ HM Government *The Principles relating to the detention and interviewing of detainees overseas and the passing and receipt of intelligence relating to detainees* (July 2019).

⁴¹ At [17].

⁴² We understand that the Ministry of Foreign Affairs and Trade has been working on a policy in relation to complicity.

These should be reviewed regularly to ensure that they remain effective.

The role of resources

- [69] One of the matters that has arisen during the Inquiry is the question of resources. New Zealand deployed a relatively small number of NZSAS personnel to Afghanistan in 2009 (around 70) and they conducted many operations. As we noted in our brief outline of the development of New Zealand's detention policy in Afghanistan in chapters 10⁴³ and 11⁴⁴, the issue of resources was raised both before and after the deployment in the context of discussions about detention policy, particularly in relation to those detained on partnered operations. As we discussed in chapter 11, in evidence or submissions, Dr Mapp, NZDF and Crown Agencies raised the issue of lack of resources in this context,⁴⁵ and it was also raised in the context of NZDF's ability to conduct investigations into allegations of civilian casualties. The point was that the limited resources available to New Zealand personnel in Afghanistan impacted NZDF's ability to do such things as inspecting detention facilities, monitoring detainees or conducting investigations into allegations of civilian casualties.
- [70] In both contexts, we were disappointed to see the prominence that lack of resources assumed. We accept, of course, that resources are always limited and are an important element of any policy discussion about deployments. We also accept that the commitment of resources may differ where New Zealand is under legal obligations than where the obligations are moral in nature, although in cases of doubt, a precautionary approach should be taken. But, overall, we were left with the strong impression, on the basis of the contemporaneous documentation and the evidence and submissions that we heard, that the issue of resources was a weighty consideration in choices that were made—in our view, too weighty a consideration.
- [71] On future overseas deployments of the type undertaken by the NZSAS in Afghanistan, it will be important to ensure that NZDF has, or has access to, sufficient human and other resources to enable it to meet its responsibilities properly, whether they relate to investigatory obligations or obligations in relation to the treatment in detention of those in whose detention NZDF personnel have been involved. As we described in earlier chapters, New Zealand has a range of obligations under international law and there are significant risks to New Zealand if it fails to meet them, as well as the risk that exists for detainees who are transferred to the jurisdiction of another state. This has resource implications that must be confronted. Lack of resources cannot justify inadequate processes or shortcuts. That devalues the norms at issue. If it is the case that New Zealand does not have the necessary resources and cannot make arrangements to access adequate resources, it should not become involved.
- [72] In our view, it should be possible for NZDF to meet its obligations without the commitment of significant additional resources. We note that Cabinet had imposed a cap on troop numbers in relation to the deployment to Afghanistan, and the number was reduced at the time of the Rugby World Cup in New Zealand in 2011. While the cap was likely imposed as a reasonable government control measure to limit the cost of the deployment, it may also have inadvertently contributed to a less than optimal performance by NZDF in some respects. Obviously, that is something which should be taken into account in relation to future deployments of this type.

⁴³ Chapter 10 at [97].

⁴⁴ Chapter 11 at [53], [69]–[70] and [70].

⁴⁵ Chapter 11 at [77] and footnotes [94]–[96].

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.

Some observations

[73] In addition to these recommendations, we make four observations.

Culture and transparency

[74] When NZDF personnel commit to their oath or affirmation on enlistment, they enter into a unique arrangement involving what has been termed “unlimited liability.”⁴⁶ They can use lethal force in service but run the risk of surrendering their own lives. Each person undertakes in the final analysis to kill or be killed for a purpose in which they may have no direct personal interest. It is this feature that gives the military its distinct culture and sets it apart from nearly all other agencies of the State.

[75] During our examination of the operations at issue, we have seen evidence of what we regard as failings of culture at the upper echelons of NZDF—confirmation bias, lack of objectivity and rigour in scrutinising “facts”, unnecessary defensiveness coupled with an unwillingness to acknowledge error, failure to follow up inconvenient information, and non-compliance with the disciplines and obligations inherent in the principles of ministerial control of the military and

⁴⁶ John Hackett *The Profession of Arms* (The Times Publishing Co, London, 1962) at 63.

ministerial responsibility to Parliament. While our perspective is a relatively narrow one, so that we cannot say with confidence that these failings are characteristic, we suspect that they go beyond what we have seen.

- [76] We note that in 2010, the Controller and Auditor-General conducted an inquiry into NZDF payments to officers seconded to the United Nations. In her report, the Auditor-General identified three features of NZDF's organisational structure:⁴⁷
- (a) a “silo” mentality, where people saw strong boundaries between organisational units and did not see any need to draw attention to mistakes being made by others;
 - (b) military hierarchy and the operation of command lines within the organisation, which meant that some people saw themselves as unable to raise concerns about decisions made by more senior officers; and
 - (c) inadequate recognition of when an issue may touch on fundamental public sector values of integrity and the rule of law.
- [77] We saw similar shortcomings. It may be that NZDF has taken steps which go some way to rectifying them, but we are unable to assess that. However, given what we have seen, we are not confident that any steps that have been taken will be sufficient. While organisational and other changes may help, what is required is a fundamental change in culture. Our recommendation for an Independent Inspector-General of Defence may assist in that regard.
- [78] We also consider that NZDF's culture would benefit if NZDF embraced greater openness and transparency as an operating principle, thereby building greater public trust and confidence. The 2002 Hunn Review noted that NZDF needed to move from an information-denial culture to an information-sharing culture.⁴⁸ Internally, this would require rebalancing towards security rather than secrecy. Security is a positive attribute and entails classifying and protecting information while ensuring appropriate distribution and awareness. Secrecy, on the other hand, has a more negative connotation of denial of information, including to NZDF's own people, some of whom may need the information.
- [79] Based on our admittedly constrained look into NZDF's performance, we query whether NZDF has been prepared to share sufficient information with the public in a timely way. Dr Mapp told the Inquiry that he favoured a move to greater openness.⁴⁹ The argument that secrecy is required to preserve security, both operational and national, is sound in many circumstances. But it must be balanced against the values of transparency in a democratic country and what is a “reasonable” approach to the public's right to know in the military sphere. A closed approach can be taken too far, as the Inquiry suspects has been the case with the activities of the NZSAS.
- [80] On occasion, the NZSAS are called upon to carry out dangerous operations in hostile conflict areas. Being too open about their activities may place them in danger. Much of what they do depends on the element of surprise, and the conditions in which they operate are challenging, with the constant prospect of casualties.

⁴⁷ Auditor-General *Inquiry into New Zealand Defence Force payments to officers seconded to the United Nations* (July 2010) at [8.48]–[8.49].

⁴⁸ Hunn, above n 9, at 33.

⁴⁹ Evidence of Hon Dr Wayne Mapp, above n 33, at 1108–1109.

- [81] Despite the need for some security constraints, however, it seems possible that a policy of greater openness with regard to information about NZDF's activities could be adopted, including as to the activities of the NZSAS.⁵⁰ The special tactics, techniques and procedures that provide the NZSAS with an operational edge must be protected. Yet when they are deployed in New Zealand's name because of policy choices made by the Government, there must be some transparency concerning their actions. The NZSAS are the forces of New Zealand. What they do engages New Zealand's cultural, legal and reputational interests and will be relevant to all New Zealanders. The tasks they perform must accord with New Zealand public opinion as to what is appropriate for our forces operating abroad. It is relevant in this context to note that both intelligence agencies, the GCSB and the NZSIS, have engaged publicly to a greater extent than previously.
- [82] We encountered an instructive example of the value of openness in an event into which we enquired, namely the death of Abdullah Kalta discussed in chapter 7. It was an event that attracted some media attention. The Chief of Defence Force, Lieutenant General Rhys Jones, was interviewed on *Morning Report* on *Radio New Zealand* on 27 November 2012.⁵¹ He was asked some detailed questions on the nature of the operation, including the nature of the intelligence that led to it and other details. He was able to answer the questions without compromising national security. As far as we can see, the appearance satisfied the public interest in that operation at the time.

The Protective Security Requirements

- [83] As we said in chapter 1, the work of the Inquiry was complicated by the fact that most of the documentary and other material provided to us has been classified. While we have been able to release a reasonable amount of classified material to the public through the review process we established, most of the material we have seen remains classified.
- [84] Each of us has, in our past professional lives, been involved in the public sector, including in relation to classified material. Indeed, one of us has held the positions of Prime Minister, Deputy Prime Minister, Minister of Justice and Attorney-General. Each of us has been astonished at how the classification system has grown since the time of our work in the public sector. One measure of this is the proliferation of facilities to handle classified material.
- [85] Extensive classification of information in the public sector is costly in financial terms, given its surrounding apparatus of facilities, clearance processes and the like. More importantly though, it has the potential to cut across—and significantly undermine—the freedom of information regime that New Zealand adopted in 1982 in the Official Information Act. When the Inspector-General of Intelligence and Security reviewed the New Zealand Security Classification System in 2018,⁵² she made the point that classification systems have an “inherent bias towards over-classification”, noting that “security bureaucracies give officials powerful reasons to over-classify and little or no reason to avoid or challenge over-classification.” She described several harmful effects of this, notably that “[p]ublic access to official information, including the historical record, is excessively restricted.”⁵³ Our experience on this Inquiry is consistent with the Inspector-General's views.

⁵⁰ We should make it clear that we are referring to genuine transparency, not a series of public relations exercises.

⁵¹ Morning Report “Defence Force speaks out about Abdullah Kalta death” *Radio New Zealand* (27 November 2012) <www.rnz.co.nz>.

⁵² Inspector-General of Intelligence and Security *A review of the New Zealand Security Classification System* (August 2018).

⁵³ At [106]–[107].

- [86] When the Protective Security Requirements were introduced in 2001, it was emphasised that there had to be a proper basis for classification and that classifications should, in general, be time-limited, in the sense that the need for material to remain classified should be kept under review.⁵⁴ That approach continues to apply. The updated Protective Security Requirements require that, when first applying a protective marking to information (that is, classifying it), agencies should limit the duration of the protective marking and set up review procedures in order to keep the volume of protectively marked information to minimum.⁵⁵ The Protective Security Requirements also note that archiving protectively-marked information can create high administrative and financial costs.
- [87] In her review, the Inspector-General of Intelligence and Security said that the systematic declassification programmes of agencies were “modest, meagre or non-existent”⁵⁶ and recommended a new topic-based approach supervised by a multi-agency group of officials.⁵⁷ For our part, we have seen no evidence of systematic classification review programmes within NZDF.
- [88] Another feature of the Protective Security Requirements that we noted in chapter 1 relates to information sourced from overseas partners. As we said, government agencies refused to provide information of that type which they held to the Inquiry without the consent of the relevant overseas partner. We think that approach is wrong in principle. The information was provided to the New Zealand government for its use. We are a government inquiry with power to make recommendations to our appointing minister. We accepted at an early stage that we would handle classified information (including confidential information sourced from overseas partners) in accordance with the Protective Security Requirements. To that extent, the Inquiry was in no different a position than a government agency.
- [89] The Inquiry does, of course, have the same powers as a court under s 70 of the Evidence Act 2006 to order disclosure of classified information, including overseas partner-sourced material.⁵⁸ The tests are the same as those applied under the Official Information Act 1982. Overseas partner information is at no greater risk of being made public when held by an inquiry than it is when a government agency holds the information, given the Official Information Act and to the courts’ power to order disclosure should the information be relevant to some issue in legal proceedings. Such information is, after all, held subject to New Zealand law. Obviously, such information would not be disclosed publicly without first having a hearing so that the relevant issues can be thoroughly examined.
- [90] The consequence of the Crown’s approach was that, in some instances, we waited almost six months before the relevant overseas partner granted its consent. From the Inquiry’s perspective, this time lag was excessive and caused significant difficulties. It cannot be right that a New Zealand inquiry process should be held up by delays of this sort. If an overseas partner were to refuse to grant consent, the position would be even worse: a government agency would hold relevant information which it would presumably refuse to disclose to the Inquiry. This could result in a contested s 70 hearing, with all the difficulties that entails. If New Zealand intends to maintain its current approach to information sourced from overseas partners, that should be taken into account before New Zealand agrees to participate in international coalitions such as that in Afghanistan.

⁵⁴ Department of the Prime Minister and Cabinet “Security in the Government Sector” (2002).

⁵⁵ “Guidelines for protective markings” (5 August 2019) Protective Security Requirements <www.protectivesecurity.govt.nz>.

⁵⁶ Inspector-General of Intelligence and Security *A review of the New Zealand Security Classification System*, above n 52, at [252]

⁵⁷ At [249].

⁵⁸ Inquiries Act 2013, ss 15 and 22.

This is because the approach inhibits New Zealand's ability to examine matters in which its own personnel have been closely involved and in respect of which it may incur international obligations.

- [91] In summary, the Protective Security Requirements have greatly complicated our work and mean that the Inquiry has taken longer and been more expensive than it needed to be. We are concerned that a public Inquiry looking into the conduct of New Zealand forces operating within a coalition overseas should face the constraints that we have faced in first, obtaining and second, being able to use information because it remains classified, in circumstances where the particular information does not appear to require protection because it reveals nothing other than what happened a decade ago.
- [92] As we acknowledged in Minute No 4 and Ruling No 1, we accept that there are legitimate security interests to be protected in an inquiry such as this, including information about sources and methods of gathering information, operational methods and tactics, and other matters of that sort. But factual information about what happened on an operation that occurred in 2010 as part of a coalition that no longer exists seems to us to be, in general, of a different order.

The role of military lawyers

- [93] The Inquiry heard many submissions and much evidence from military lawyers in the course of the Inquiry, both in the public hearings and in private. Access to timely and accurate legal advice that takes account of the facts on the ground is essential for those conducting military operations abroad, given the demanding requirements of International Humanitarian Law / the Law of Armed Conflict. The Chief of Defence Force recognised this in 2009 when he accepted that an NZDF lawyer should be deployed with the NZSAS to Afghanistan.
- [94] The legal issues arising from International Humanitarian Law / the Law of Armed Conflict, as well as International Human Rights Law which continues to operate in these settings, can be complex. Soldiers must understand the law sufficiently to be able to act in accordance with it, often in circumstances of confusion and uncertainty. NZDF's manual on the Law of Armed Conflict is an impressive document. We were struck by how thoughtful and careful NZDF's lawyers were in the advice and training they provide to soldiers, both as part of their training and in theatre.
- [95] We had the impression, however, that legal advisers in-theatre are not always kept fully in the information loop by commanders. Military command structures seem to work on a "need to know" basis. The consequence is that legal staff may not be told of information that would be important from a legal perspective. This in turn affects the ability of legal advisers to brief their senior officers in New Zealand, who will be responsible for briefing ministers on complex and sensitive legal matters. We saw examples of this in relation to the aftermath of Operation Burnham and in relation to detention and the aftermath of Operation Yamaha.
- [96] We acknowledge the steps that NZDF has taken for some years now to, for example, enhance its legal capacity, develop and publish legal manuals and training materials, conduct training modules for troops on the Law of Armed Conflict, and include lawyers on deployments. They are commendable. However, where legal officers are taken on deployments (which is, we think, of great value), care must be taken to keep them fully engaged by sharing all information that might be relevant to potential legal issues. The approach should be to err on the side of caution by giving more information, not less. There is little point in having competent legal advice available in-theatre if it is not fully or properly used, especially as part of the lawyer's role is to ensure New Zealand forces comply fully with their international legal obligations.

The role of the Vice Chief of Defence Force

- [97] In 2014 and 2017, when issues arose in relation to allegations of civilian casualties on Operation Burnham, the Chief of Defence Force was overseas and the Vice Chief of Defence Force was performing his duties. On each occasion NZDF adopted a “holding position” until the return of the Chief of Defence Force, by (in effect) simply reiterating the last public statement issued by NZDF on the topic. On each occasion, the public statement relied on was NZDF’s erroneous public statement of 20 April 2011 that allegations of civilian casualties on Operation Burnham were “unfounded”.
- [98] NZDF advised that on both occasions, the Chief of Defence Force, Lt Gen Keating, provided letters to Vice Chief of Defence Force, Air Vice Marshal Short, temporarily delegating authority to him. These letters set out the dates when authority was delegated, and what tasks Vice Chief of Defence Force, as acting Chief of Defence Force, was authorised to undertake. However, it is unclear to us to what extent the delegation of authority involved a hand over of awareness and knowledge of particular events and ongoing issues. In a governance and accountability sense, it is important that the person to whom the delegation is made is in a position to assume control of any matters that may arise. The Chief of Defence Force is the principal military adviser to the Government and, in the event of a domestic security incident requiring NZDF’s involvement, would be pivotal. In the absence of the Chief of Defence Force, this and other key decisions fall to the Vice Chief of Defence Force, an appointment not referenced in the Defence Act. By definition a “Vice” should be prepared to assume the duties of the “Chief” at any time. To do so, the Vice Chief of Defence Force must be as informed on NZDF issues as the principal. Oral evidence presented to the Inquiry suggests this may not have been the case during key events in 2010–2017 relating to Operation Burnham.

A concluding perspective

- [99] *Hit & Run* is a collaboration between two investigative journalists, of whom one, Mr Jon Stephenson, provided most of the sources and the other, Mr Nicky Hager, did most of the writing. The authors relied on a variety of sources from both New Zealand and Afghanistan. Although the authors succeeded in uncovering a considerable amount of factual material, they inevitably fell into error, especially in relation to the operation at the heart of the book: Operation Burnham. This is not surprising as the authors had to place heavy reliance on leaks and did not have access to the extensive intelligence, planning and operational material relating to the operation.
- [100] The book does not attempt to present a dispassionate account of what happened on Operation Burnham or the other operations it discusses. It makes serious allegations about the conduct of NZSAS personnel, claiming that they were out to seek revenge on the operations and deliberately and without justification destroyed houses in the villages of Khak Khuday Dad and Naik. In this way, the book impugns the integrity and professionalism of the NZSAS personnel involved. The book also impugns their capability and skills, alleging that the intelligence on which NZSAS personnel relied was wrong and there were no insurgents in the villages at the time of Operation Burnham. It claims that those killed or injured were innocent civilians.
- [101] The book is as much polemic as investigative account and contains many errors besides the obvious ones relating to location. Some of these could have been avoided if common research techniques had been followed, for example, taking metadata from photographs.

- [102] Despite this, in important respects the book was right. We think it likely that a child was killed on Operation Burnham; some civilians did suffer injuries; an NZSAS trooper did punch Qari Miraj; the evidence indicates that Miraj was tortured while in NDS detention; New Zealand did, in our view, breach its *non-refoulement* and related preventative obligations to him; New Zealand agencies were advised that Miraj had been tortured by the NDS when detained but did not advise ministers or take any other action; NZDF did give erroneous information to ministers and the public about the allegations of civilian casualties on Operation Burnham over a number of years.
- [103] Given this, and given that we have made recommendations that, if adopted, should assist in preventing or minimising failures of this type in the future, we think it right to acknowledge that the book has performed a valuable public service. We think Mr Stephenson made an important point when he submitted:

A healthy democracy and free society depend on more than Parliament and the judiciary. The authors of *Hit and Run* and their sources, as well as the Inquiry, have played a vital role in holding the defence force to account regarding Operation Burnham. Our job, like yours, is to monitor power. The Fourth Estate, like Parliament and the judiciary, is an integral part of democracy, serving society by holding powerful people and organisations accountable. The point I would like to make here is this: the conduct of the defence force relating to Operation Burnham has not only undermined Parliament, it has undermined the Fourth Estate.

- [104] We said when we began this Inquiry that we were determined to get at the truth. In some respects, we are confident that we have been able to do so; in other respects, we are not so confident that we have the full picture. We are, however, confident that the report has taken matters as far as they could be taken given the available evidence. Most importantly, we are confident that the recommendations we have made will, if implemented properly, assist in preventing or reducing failures of the type we have seen.
- [105] Ultimately, how useful the report is will be for others to judge. For our part, if our recommendations are accepted and implemented without undue delay, we will feel it has all been worth it.
- [106] To conclude, the evidence given by NZDF to the Inquiry shows that it is not necessarily an incident in conflict that defines the character of an organisation. Rather, it is how that organisation characterises and manages the incident subsequently that reveals its character and will either instil or undermine public trust in the organisation. The friction, uncertainty and complexity of armed conflict mean that some contentious incidents will inevitably occur—the “fog of war” results in mistakes. It is how our military personnel choose to respond to situations where it is alleged that things have gone wrong that is defining. In relation to Operation Burnham, it is indisputable that NZDF’s response was woeful. In Operation Yamaha, a person was transferred to NDS custody despite a real risk of torture, and NZDF and other New Zealand agencies did not respond as they should have when they learnt of the possibility that he had been tortured. How NZDF addresses its failings and goes forward will reveal its true character and the strength of its purpose.

A1

Terms of Reference: Government Inquiry into Operation Burnham and related matters

Background

- [1] Between late 2001 and 2013, New Zealand Defence Force (“NZDF”) forces were operating in Afghanistan. In 2010, NZDF was operating as part of the International Security Assistance Force (“ISAF”). ISAF was authorised by the United Nations Security Council to train Afghanistan National Security Forces, to assist in rebuilding key government institutions and to support the Afghanistan government in combating the Taliban and restoring security.
- [2] On 21-22 August 2010, the NZDF forces took part in an operation with coalition partners (Afghan Crisis Response Unit and the Armed Forces of the United States of America) in Tirgiran Valley in Baghlan Province (“Operation Burnham”). This was followed by a second mission to Tirgiran Valley on 2-3 October 2010 (“Operation Nova”).
- [3] In March 2017, the book *Hit & Run* by Nicky Hager and Jon Stephenson was published, which contained a number of serious allegations against NZDF personnel involved in the Operations. While NZDF has strongly denied these allegations, and has endeavoured to respond to them, they have had an impact on its public reputation, which an independent review can address.
- [4] In light of these allegations, it is in the public interest that a Government Inquiry be established into Operation Burnham and related matters. The full spectrum of powers and duties set out in the Inquiries Act 2013 will therefore be available. The Attorney-General is the appointing Minister.

Purpose of the Inquiry

- [5] The matter of public importance which the Inquiry is directed to examine is the allegations of wrongdoing by NZDF forces in connection with Operation Burnham and related matters. Operation Burnham took place during a non-international armed conflict, and the applicable legal framework (including international humanitarian law) will be considered.
- [6] To this end, the Inquiry will:
 - 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;
 - 6.5. Report its findings and any recommendations to the Attorney-General as appointing Minister.

Scope of the Inquiry

- [7] Having regard to its purpose, the Inquiry will inquire into and report on the following:
- 7.1. The conduct of NZDF forces in Operation Burnham, including compliance with the applicable rules of engagement and international humanitarian law;
 - 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;
 - 7.3. The conduct of NZDF forces in the return operation to Tirgiran Valley in October 2010;
 - 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;
 - 7.5. 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;
 - 7.6. Public statements prepared and/or made by NZDF in relation to civilian casualties in connection with Operation Burnham;
 - 7.7. Steps taken by NZDF after Operation Burnham to review the conduct of the operation;
 - 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;
 - 7.9. 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; and
 - 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.
- [8] The Inquiry may also make such recommendations as it considers appropriate.
- [9] The Inquiry has no jurisdiction to make determinations about the actions of forces or officials other than NZDF forces or New Zealand officials.

Conduct of Inquiry

- [10] In conducting its review, the Inquiry is expected to consider available:
- 10.1. evidence of relevant Government officials and NZDF personnel (including those who took part in Operation Burnham);
 - 10.2. evidence of Afghan nationals and/or other witnesses;
 - 10.3. relevant audio-visual material;
 - 10.4. NZDF reports, briefings, intelligence and operational documentation relating to the Operations;
 - 10.5. reports produced by ISAF, international organisations, Non-Governmental Organisations, or other parties in relation to the Operations; and
 - 10.6. any other evidence the Inquiry considers relevant to determining the issues within its scope.
- [11] The Inquiry may, if appropriate and after liaising with the relevant State, conduct Inquiry business (including interviewing witnesses and/or conducting site visits) outside New Zealand (having regard to the need to avoid unnecessary cost in relation to public funds).

Principles of Inquiry

- [12] In all of its work, the Inquiry shall act independently, impartially, and fairly.
- [13] The Inquiry, in common with all inquiries under the Inquiries Act, has no power to determine the civil, criminal, or disciplinary liability of any person. It may, however, make findings of fault or recommendations that further steps be taken to determine liability.¹
- [14] As further set out in the Inquiries Act, the Inquiry may, where appropriate, hold the Inquiry, or any part of it, in private. It may restrict access to inquiry information (including evidence, submissions, rulings, hearing transcripts and the identity of witnesses). Such steps may be taken in order to:
- 14.1. Protect the security or defence interests of New Zealand or the international relations of the Government of New Zealand;
 - 14.2. Protect the confidentiality of information provided to New Zealand on a basis of confidence by any other country or international organisation;
 - 14.3. Protect the identity of witnesses;
 - 14.4. Ensure that individuals' fair trial rights are protected;
 - 14.5. Ensure that current or future criminal, civil or other proceedings are not prejudiced; or for any other reason the Inquiry considers appropriate.

¹ Inquiries Act 2013, s 11.

- [15] After consultation with the appropriate or appointing Minister, and if the statutory criteria are met, the Inquiry may postpone or temporarily suspend the inquiry.

Appointments

- [16] The members of the Inquiry are Sir Terence Arnold KNZM QC and Sir Geoffrey Palmer KCMG AC QC PC.
- [17] Of the members Sir Terence Arnold shall act as Chairperson of the Inquiry.

Authority

- [18] The Inquiry is established as a Government Inquiry under s 6(3) of the Inquiries Act 2013.

Commencement of work and reporting requirements

- [19] The Inquiry will commence on, and may begin considering evidence on, dates to be confirmed.
- [20] The provisional reporting date for the Inquiry is no later than 12 months following establishment of the Inquiry.
- [21] Where appropriate, the Inquiry may issue recommendations prior to issuing its final report.

A2

List of common acronyms

Term	Definition
AC-130	Lockheed Spectre gunship
AH-64	Boeing Apache attack helicopter
ANP	Afghan National Police
AR 15-6	United States Army Regulation 15-6
CDF	Chief of Defence Force
CH-47	Boeing Chinook heavy lift helicopter
CIVCAS	Civilian casualties
COIN	Counter-insurgency
CONOP	Concept of Operations
CRU	Crisis Response Unit of the Afghan Ministry of the Interior
DSO	Director of Special Operations
EOD	Explosive ordnance disposal
GCSB	Government Communications Security Bureau
HLZ	Helicopter landing zone
IAT	Incident Assessment Team
IAW	In Accordance With
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
IED	Improvised explosive device
IGIS	Inspector-General of Intelligence and Security
IHL	International Humanitarian Law
IHRL	International Human Rights Law

Term	Definition
ISAF	International Security Assistance Force
ISR	Intelligence, surveillance and reconnaissance
JPEL	Joint Prioritised Effects List
JTAC	Joint Tactical Air Controller
MINDEF	Minister of Defence
NATO	North Atlantic Treaty Organisation
NDS	National Directorate of Security
NZBORA	New Zealand Bill of Rights Act
NZDF	New Zealand Defence Force
NZPRT	New Zealand Provincial Reconstruction Team
NZSAS	New Zealand Special Air Service
NZSIS	New Zealand Security Intelligence Service
PSR	Protective Security Requirements
RC	Regional Command
ROE	Rules of engagement
RPG	Rocket propelled grenade
SNO	Senior National Officer
SOF	Special Operations Forces
TF81	NZSAS Task Force 81
UNAMA	United Nations Assistance Mission in Afghanistan
USFOR-A	United States Forces – Afghanistan

CONTRIBUTORS	
Core Participants	Counsel
Nicky Hager	Steven Price (for final submission)
	Felix Geiringer (for Public Hearing Module 4)
Jon Stephenson	Davey Salmon
	Daniel Nilsson
	Sam Humphrey
The New Zealand Defence Force	Paul Radich QC
	Lucila van Dam
	Dr Scott Sheeran
Afghan Villagers (withdrew in June 2019)	Rodney Harrison QC
	Deborah Manning
	Richard McLeod
	Simon Lamain
Other Participants	
Crown Agencies	Aaron Martin (Deputy Solicitor-General)
• Government Communications Security Bureau	Ian Auld (Crown Counsel)
• New Zealand Security Intelligence Service	Paul Rishworth QC (for Public Hearing Module 3)
• Ministry of Foreign Affairs and Trade	Dr Penelope Ridings MNZM
• Department of the Prime Minister and Cabinet	
• Ministry of Defence	
Counsel appointed to review classification of material	
David Johnstone	Ben Keith

Specialists and Experts

The Inquiry was assisted by, and received advice from, a range of experts and specialists in different fields. These included:

- Air Chief Marshal Sir Angus Houston AK, AFC (Ret'd) (former Chief of the Defence Force Australia)
- Rt Hon Sir Kenneth Keith ONZ KBE QC, Emeritus Professor, former Judge of the International Court of Justice and the Supreme Court of New Zealand
- Professor Dapo Akande, Professor of Public International Law at the Blavatnik School of Government, Fellow of Exeter College, Oxford
- Brigadier V G Khan DSC and Bar, AM, military subject matter expert
- Alison Cole, specialist in open source investigation
- Elana Geddis, Barrister, specialist in public and international law
- Maarten Kleintjes MNZM, digital forensic analyst
- Gordon Muir, specialist in imagery and geospatial analysis
- David Napier, specialist in aerial imagery and geospatial analysis
- Natalie Pierce, specialist in international law (detention and torture)
- Refugees as Survivors New Zealand
- Rosenstock Legal Services, Afghanistan
- The Forensic Group Ltd, expertise in metadata analysis.

Counsel Assisting the Inquiry

Kristy McDonald ONZM QC

Andru Isac QC

Assistants to Counsel

Tim Morrison

Asher Emanuel

Secretariat

Anna Wilson-Farrell

Koria Stevens

Anna Foley

Victoria Taylor

Renee Lyons

Dena Valente

Mike Jaspers

Leah Walls

Dylan Page

