

# **SUBMISSION TO THE GOVERNMENT INQUIRY INTO OPERATION BURNHAM**

Sam Warburton

{ phone number redacted }

{ email redacted }

## **Introduction**

1. This submission is made in my capacity as a private individual.
2. I do not have any knowledge of Operation Burnham or the NZ Defence Force's (NZDF) response to Hit & Run beyond what is publicly available in the book, in media reports or in the NZDF's responses to Official Information Act Requests. For this reason, the scope of my submission only concerns events since Hit & Run was published.
3. Apart from my contact details, no part of this submission should be kept confidential.
4. I am happy to answer questions from, or appear before, the Inquiry.

## **The terms of reference**

5. This submission concerns sections 7.5 and 7.6 of the terms of reference of the Government Inquiry into Operation Burnham:
  - 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.

## **The NZDF's response to Hit & Run**

6. On 27 March 2017, the NZDF presented its rebuttal<sup>1</sup> to Hit & Run.

### Location

7. A major part of the NZDF's response was that it never operated in the Afghanistan villages cited in Hit & Run:

*The central premise of Nicky Hager and Jon Stephenson's book, Hit and Run, is incorrect... NZDF troops never operated in the two villages identified in the book as having been the scene of combat operations and civilian casualties.*

8. The strong suggestion by the NZDF was Hit & Run was an unreliable account of any NZDF actions and that the NZDF was not responsible for casualties *as described* in the book.

### Casualties

9. At the end of the NZDF's presentation, the following exchange occurred<sup>2</sup>:

*Journalist: Do you have the names of the insurgents [inaudible] release them?*

*Tim Keating: No. We do not have the names of insurgents.*

## **The NZDF did know the names of some insurgents/civilians**

10. After being denied the information through written Parliamentary questions, Metiria Turei, then a Member of Parliament, made an Official Information Act Request for information held by the NZDF relating to the names of people killed in the raid.
11. The NZDF refused to release the information, before the Ombudsman determined the information should be released.
12. The release<sup>3</sup> says the NZDF knew the identity of all nine 'insurgents' the NZDF claims were killed including two names – Mohammad Iqbal and Abdul Qayoom – who were identified in Hit & Run as civilians.

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<sup>1</sup> <http://www.nzdf.mil.nz/news/media-releases/2017/20170327-rebuttal-of-the-book-hit-and-run.htm>  
<https://youtu.be/RBFoGV8BmaM>

<sup>2</sup> [http://www.nzdf.mil.nz/downloads/pdf/public-docs/2018/august-2017-responses\\_redacted.pdf](http://www.nzdf.mil.nz/downloads/pdf/public-docs/2018/august-2017-responses_redacted.pdf), p. 5.

<sup>3</sup> <http://www.nzdf.mil.nz/corporate-documents/operation-burnham/op-burnham---further-info.htm>

13. Unless the NZDF attained this information between 27 March 2017 and whenever Turei made their Official Information Act request, the NZDF's statement on 27 March 2017 that they did not know the names of insurgents/civilians was false.

#### **Hit & Run correctly identified the location of Operation Burnham**

14. In its attempt to undermine Hit & Run, the NZDF made a great deal about a map (and geo reference points) that placed the NZDF two kilometres north of where the NZDF actually operated.
15. The authors of Hit & Run admit they made an error in a map that appeared in the book which has been corrected in later printings.
16. However, the map was not the only evidence relating to the location of the events described in Hit & Run. The book contained photos of buildings supposedly raided.
17. On Tuesday 28 March 2017, a day after the press conference, Toby Manhire of The Spinoff found a low resolution photo of the area in question (Appendix 1).
18. Journalist Keith Ng followed up that day with sample-version high resolution photos (Appendix 2).
19. I read Hit & Run on 9 April 2017 and immediately recognised buildings in the book as being the same as those in the satellite photos found by Keith Ng (Appendix 3). I posted my findings online.<sup>4</sup>
20. By now it was clear that, except for the map, Hit & Run had accurately identified the location of the NZDF operation.
21. Matching photos in Hit & Run to satellite images of the area of NZDF's operation was such a simple task (and should have been especially simple for an agency like the NZDF) that Keith Ng turned it into a mocking online interactive<sup>5</sup> at the NZ Herald.

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<sup>4</sup> <https://twitter.com/Economissive/status/850942294911930371>

<sup>5</sup> <https://insights.nzherald.co.nz/operation-burnham/>

## **The NZDF matched photos in Hit & Run to satellite images, but did not inform the public or Ministers**

22. Either coincidentally or after seeing my finding<sup>6</sup>, the NZDF identified the same buildings in April 2017 (Appendix 4). The NZDF did not immediately or voluntarily provide this information to the public or correct its previous public statements. The NZDF only released this information publicly on 6 March 2018 after:
- an Official Information Act request by me on 5 May 2017
  - the NZDF declining my request on national securing grounds on 2 June 2017
  - a complaint by me to the Ombudsman on 6 June 2017
  - a determination by the Ombudsman that the information should be released.
23. On 2 April 2017, an NZDF employee is recorded as noting that Tim Keating has asked them to 'push home the geographical differences between the locations within Hit & Run and where Operation Burnham occurred' for a 'ground briefing'.<sup>7</sup>
24. On 7 April 2017 – two days before I matched the buildings to the satellite images, and the same month that the NZDF did – the NZDF briefed the Minister of Defence<sup>8</sup> with the purpose of assuring the Minister that NZDF had the location and name of the village(s) right (and, by implication, the book and other 'critics' were wrong).
25. The NZDF either knew its briefing to the Minister was wrong or incomplete at the time or failed to update the Minister when it found out no more than 23 days later. This is, at best, grossly unprofessional and, at worst, an attempt to obstruct justice by forestalling an inquiry.

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<sup>6</sup> The document in Appendix 4 only says 'April 2017' and the NZDF refused to provide the exact date (including day) when I asked for it.

<sup>7</sup> [http://www.nzdf.mil.nz/downloads/pdf/public-docs/2018/june-2017-responses\\_redacted.pdf](http://www.nzdf.mil.nz/downloads/pdf/public-docs/2018/june-2017-responses_redacted.pdf), p. 80.

<sup>8</sup> 'Tirgiran Village: Evidence of Correct Name', [http://www.nzdf.mil.nz/downloads/pdf/public-docs/2018/june-2017-responses\\_redacted.pdf](http://www.nzdf.mil.nz/downloads/pdf/public-docs/2018/june-2017-responses_redacted.pdf), p. 49.

Note: this was not the only briefing where emphasis was made about NZDF having the location correct, but it is one where, from the title, the express purpose was to assure a Minister that the NZDF had the correct location and Hit & Run was wrong. The NZDF made similar points in talking points for the Prime Minister and Minister of Defence on 23 February 2018 and in a briefing for the Minister of Defence on 4 April 2018.

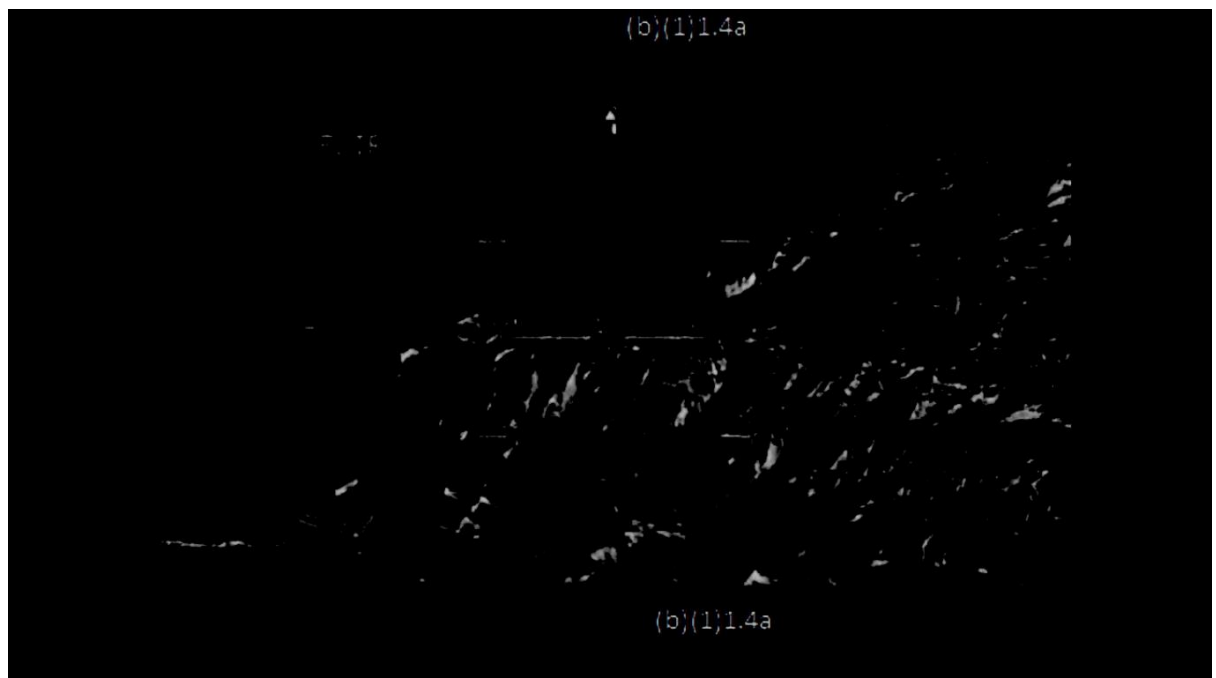
## Update 11 August 2019

26. The Inquiry is now well advanced and, since my submission, much information has been released. I wish to submit further information and analysis that I have not yet seen noted by the Inquiry – though it may do so in making further interim reports or final reports – or by media.

### The videos

#### Video 8-1

27. It is difficult to make out anything in this video at normal brightness and contrast, but if we reduce the brightness and increase the contrast, video 8-1 (see between about 12 seconds and 19 seconds) appears to show four people in a line as if they were on a narrow track.
28. The last person of the four – the one furthest to the left – appears to be struggling with something; repeatedly bending over. It appears to be big and long and might be the rocket launcher from video 6. The four people appear to be stationary, perhaps waiting for the fourth person to be in a position to carry the launcher. [Zoom in on the images.]





29. The four can be seen again at 24 seconds, with the last person again seeming to struggle with what they are carrying. Shapes and shades to the left and to the right of the four indicate that they have not moved from the earlier part of the clip.

Video 8-2

30. Page 85 of the US Report says that the person seen returning to the village has been positively identified as carrying a weapon.

31. Media stories have said that the person is returning to the village is unarmed. The person also appears to be injured. Their right arm appears to be somewhat lame, with their left arm clutching at it near the elbow joint. US report material says he's limping ([page 85](#)).
32. I also cannot see a weapon. There is nothing in the person's hands – or if there is, it doesn't glow white like the guns in earlier videos – or on his back. There *may* be something between the person's legs, but it does not glow white. If there is something, one possibility is a stick to aide walking with the injured leg.
33. The group of people huddled by the wall of the building can be seen in the bottom right of the video.

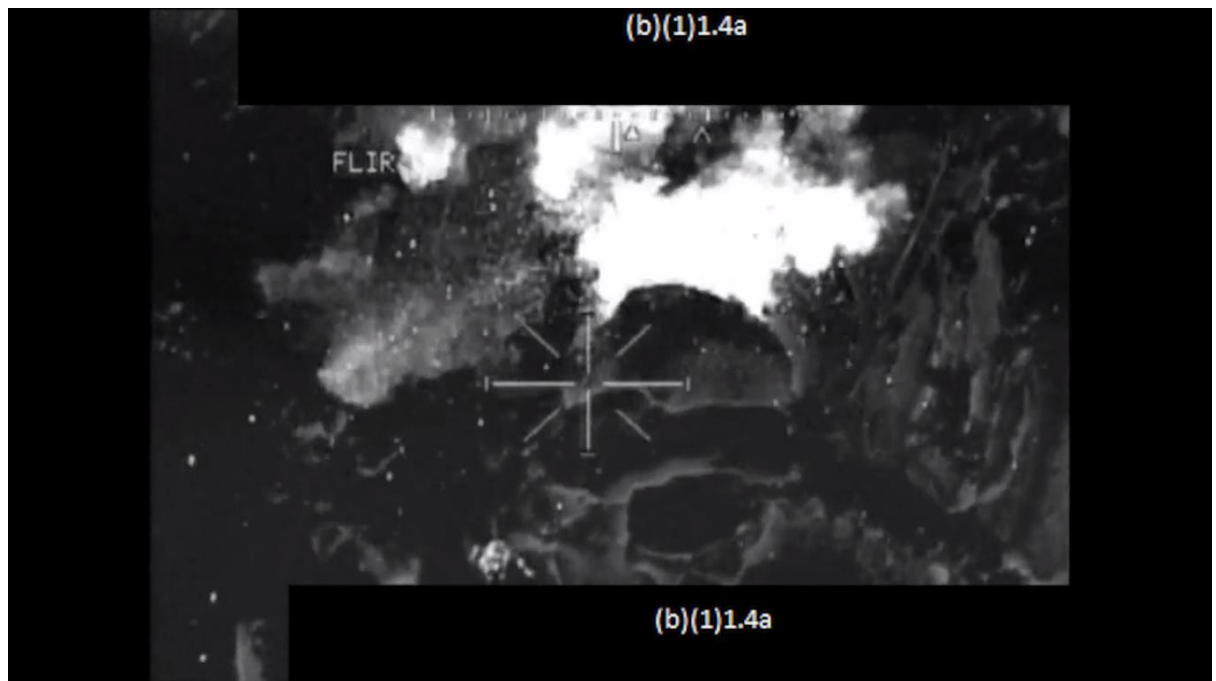


34. When the helicopter fires, the seemingly unarmed person is, by my estimate, less than 20 metres away from those huddled against the wall. The rounds miss, some by more than 20 metres, though above the target.
35. Something small appears to be attached to the person's belt and swings around when the person dives onto his hands and knees. The small item does not glow white.
36. It is lucky for the group huddled against the wall<sup>9</sup> that the rounds miss to the top. If the rounds had been on target, the radius would have taken the strike zone within a couple of metres of

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<sup>9</sup> Note: While lucky for those against the wall, the US report says rounds struck buildings off screen which may have also caused casualties.

the huddled group, with the shrapnel creating significant danger. While this outcome is avoided, the rounds strike rock, and fragments can be seen scattering in all directions and at a velocity that could have hit those huddled against the wall.



37. The US report notes that the person targeted appeared to be injured and the women and children were close by ([page 34](#)):

engaged the insurgent moving towards the buildings. In summarizing the sequence of the engagement, (b)(1)1.4a, (b)(3), (b)(6) Pilot-in-Command) stated: I do not entirely remember the situation in question. There was a point when we were engaging one man that appeared to be wounded and he was evading. We lost sight of him for a minute and then a group of women and children came into view running in a separate direction. We ceased to engage that individual because of the women and children [Exhibit 4 – (b)(3), (b)(6) statement]. A

That statement seems to be from the pilot of an aircraft which was different from that which recorded the released video, making it hard to reconcile all of the statement with the video. The group including women and children appear to be stationary (but were perhaps running prior to the clip). Further, while the aircraft of this 'pilot-in-command' may have stopped firing, the other one for which video has been produced did not.



### Comparing the videos to statements by the NZDF

*Were some of the people armed and for how long?*

38. It may be that some of the people who headed up the hill carried weapons with them for further than media reports have indicated. Decreasing the brightness, increasing the contrast and putting the videos into slow-motion as I did for video 8-1 will help determine this. I did this on VLC Player, a freeware programme.
39. Whether or not they were armed, video 8-1 does not seem to show any kind of attack formation or any other intention to attack, though I am certainly no expert here. The four people are in a single line. Three are standing at full height while one struggles to carry the launcher at waist height. They appear to be walking up a narrow path.

*The misfiring helicopter*

40. On 27 March 2017, Tim Keating said:

TIM KEATING: Well, it's not a misfire. What the technical reason was, was the sight wasn't slaved to the barrel correctly, and as soon as it was noted that rounds were falling short, that gun was- so the SAS ground controller said you cannot use that helicopter and the gun, and the crew knew it as well. So who's in control of it? The pilot was in control, the gunner was in control, but he stopped once he noticed that he had a gun that was not firing properly.

41. Versions of this account were made repeatedly: that the helicopter stopped firing as soon as it was realised that it was misfiring / that rounds were 'falling short'.
42. However, the NZDF has also alluded to several engagements – maybe four or five or more. It is certain that the gun was misfiring/misaligned in previous engagements – the other videos will show this.

43. There is a question about why the helicopter was firing in a village where civilians were known to be. There is an even bigger question about why a helicopter with a misaligned weapon was firing in a village.<sup>10</sup>
44. There are further questions about when the NZDF commanders knew the helicopter was misfiring and whether it permitted the helicopter to continue the operation near and in the village, and about why the NZDF would suggest (explicitly or by omission) to the public and to Ministers that the malfunctioning weapon only became apparent when fired at the seemingly unarmed, injured person in the village.

#### **Two other notable quotes from the US report**

45. The first is that one of the crew believed a ground unit member had been shot ([page 68](#)). Perhaps this was a result of the bad communication lines the report notes, and refers to the ground unit member who was injured by the collapsing building. To what extent did believing a ground unit member had been shot contribute to the operation going the way it did?
46. The second – as this is startling – was that ‘During the brief it was stated that everyone leaving the objective was declared hostile’ ([page 77](#)).

#### **NZDF’s offer to consider any further evidence, withholding information from Ministers, and other secrecy**

47. The NZDF, including Tim Keating on 27 March 2017, promised to consider any further evidence offered by anyone. Tim Keating said this wasn’t just his desire, but a legal obligation.
48. When I wrote to the NZDF pointing out that the photos of the buildings in Hit & Run matched satellite images and whether the NZDF had any information that similarly cross-referenced material, my request was declined. As in my earlier submission, it appears that the NZDF had not done so until it had seen my correspondence.
49. From publicly-available briefings, it appears that the NZDF did not inform Ministers of this development.

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<sup>10</sup> The US Report ([page 52](#)) notes that helicopter was even showing ‘laser fail’ and ‘low energy’ alerts about the malfunctioning weapon. While hinting that some ‘adjustments’ were made, it is unbelievable that the helicopter was permitted to fire anywhere near the village at all.

50. Further, NZDF did not seem particularly interested, and indeed tried to prevent, further investigation into whether Hit & Run had the right location. When I complained to the Ombudsman about the NZDF declining my information request, the NZDF told the Ombudsman (according to the Ombudsman) that ‘the OIA does not require NZDF to venture opinions or provide comment on whether the claims made in the book are accurate nor does it require NZDF to explain the discrepancies between the account set out in the book, and NZDF’s version of events’<sup>11</sup>.
51. The NZDF is correct that the Official Information Act does not require that – it only requires the release of the information I sought – but the NZDF’s other undertakings and legal requirements did require it to investigate this new information.
52. When the NZDF finally released the information, along with others’ requests, the NZDF was obstructive. In the words of the Ombudsman<sup>12</sup>:

*...didn’t tell the requesters or my Office at the time they uploaded this information, and further where they placed it wasn’t a prominent part of its website.*

*So in this case we have an agency doing the right thing by releasing information, but in a manner that could be seen as trying to bury it.*

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<sup>11</sup>

[http://www.ombudsman.parliament.nz/system/paperclip/document\\_files/document\\_files/2726/original/chief\\_ombudsman\\_s\\_opinion\\_on\\_oia\\_requests\\_about\\_operation\\_burnham\\_-\\_452111\\_453166\\_455308\\_450612\\_458164\\_.docx?1523229583](http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/2726/original/chief_ombudsman_s_opinion_on_oia_requests_about_operation_burnham_-_452111_453166_455308_450612_458164_.docx?1523229583)

<sup>12</sup>

[http://www.ombudsman.parliament.nz/ckeditor\\_assets/attachments/626/MBIE\\_Peter\\_Boshier\\_speech\\_13\\_April\\_2018.docx](http://www.ombudsman.parliament.nz/ckeditor_assets/attachments/626/MBIE_Peter_Boshier_speech_13_April_2018.docx)

## **Update 1 September 2019**

53. This updates follows the Inquiry's 28 August 2019 disclosure of documents.
54. It covers three matters:
- 54.1. Probable misleading of the Government in 2018 by the NZDF about the accuracy of Hit & Run as it relates to the location of Operation Burnham.
- 54.2. Confirmed misleading of the Government in 2018 by the NZDF about the accuracy of Hit & Run as it relates to the presence of shell casings in Tirgiran Valley.
- 54.3. Likely misleading of a journalist in 2017 by the NZDF about the accuracy of Hit & Run as it relates to the presence of shell casings in Tirgiran Valley.
55. The above probabilities reflect those used by the NZDF in various documents:
- Confirmed            approximately 95 percent or greater
  - Probable            approximately 75 percent or greater
  - Likely                approximately 50 percent or greater
  - Possible            approximately 15 percent or greater
  - Doubtful            approximately 14 percent or less
56. As with earlier actions by the NZDF (see paragraphs 22 to 25), this behaviour is, at best, grossly unprofessional and, at worst, an attempt to obstruct justice by forestalling an inquiry.

## **Misleading the Government in 2018 about location**

57. It is very hard to believe that the NZDF truly thought Hit & Run had the wrong location when it issued its response in March 2017.
58. It is impossible to believe that the NZDF truly thought Hit & Run had the wrong location after it matched photos in the book to satellite images in April 2017.
59. Yet, the NZDF continued to maintain that Hit & Run had the wrong location publicly.

60. And not just publicly. But seemingly in a briefing<sup>13</sup> to the Ministry of Defence and the Attorney-General two months before the Attorney-General announced the Inquiry.
61. The following image appears on page 3 of that briefing. It is an image that has appeared in many documents, including in the NZDF's 'rebuttal' in March 2017:



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62. As we know, and the NZDF should have known, Khak Khuday Dad and Naik are located in and near the red area, not the blue.
63. It is doubtful that the NZDF included the image in the presentation to the Government in January 2018 in order to show and then correct the misinformation it gave the public and journalists in March 2017. For this reason, it should be deemed 'probable' that the NZDF was continuing to mislead, or lie to, the Government.

#### **Misleading the Government about shell casings**

64. The erroneous and misleading information about location was not the erroneous and misleading information the NZDF presented to the Minister of Defence and Attorney-General in January 2018.

<sup>13</sup> <https://operationburnham.inquiry.govt.nz/assets/IOB-Files/9-190827-43.-OPERATION-BURNHAM.pdf>

65. Here's page 14:

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Equipment claimed to have  
been used by NZSAS on 22  
August 2010



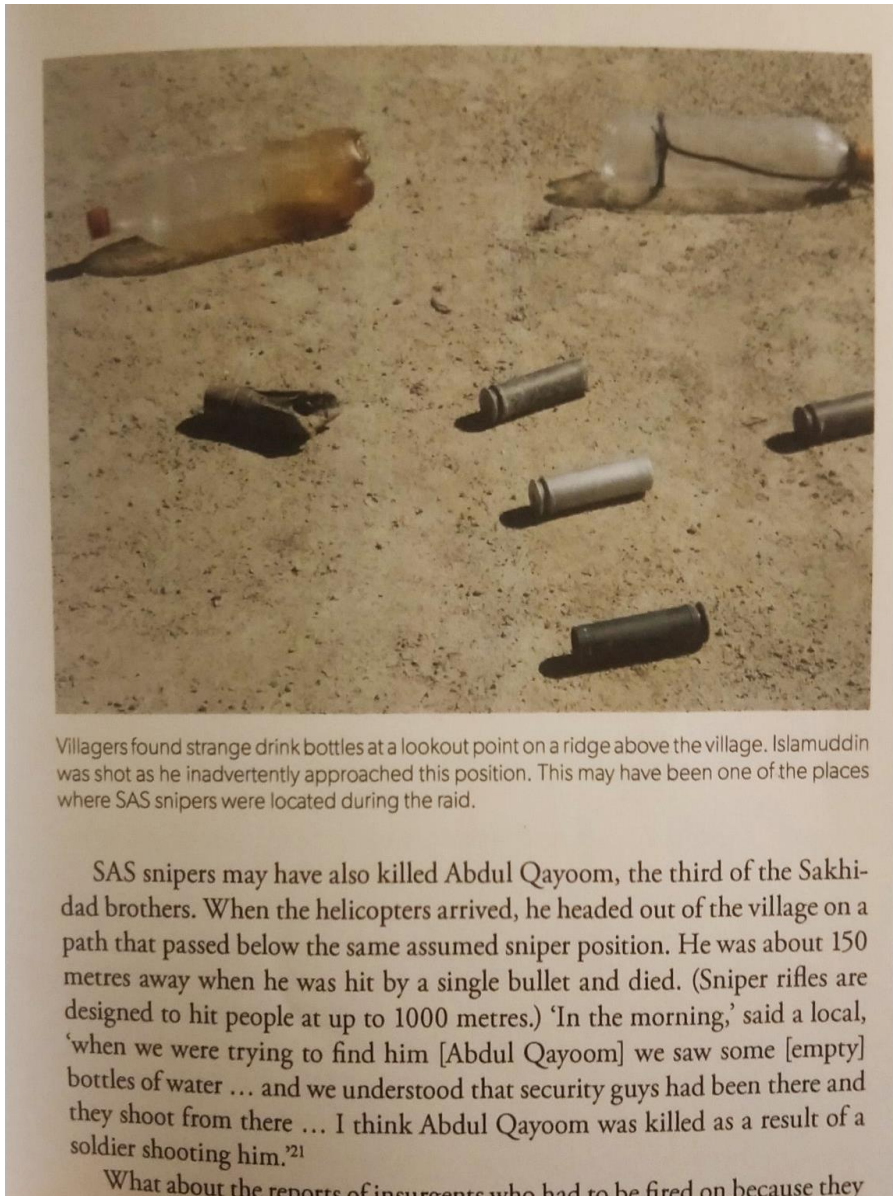
Types of equipment used  
by NZSAS on 22 August  
2010



66. We don't need to know exactly what was said in this presentation to know from the images and the titles to them that the NZDF told the Minister of Defence and Attorney-General that Hit & Run claimed NZDF personnel used these bottles and fired those rounds on the left, when personnel actually used the items on the right.
67. The same images appeared in the March 2017 presentation to journalists.
68. The NZDF's claims about Hit & Run here are also false and were, similar to the claims about location, debunked shortly after the NZDF's March 2017 presentation.



69. Hit & Run did (p. 59) record a villager's account that they had found the bottles near where they thought soldiers had been. (You will note that the NZDF presentation omits the caption and accompanying paragraph from page 59 of Hit & Run.)



70. Hit & Run did not suggest the shell casings came from the NZDF. Indeed, Hit & Run was explicit earlier (p. 49) that the shell casings were from an Apache helicopter and had been found throughout the village, and were not bullets from the NZDF.



Empty shell casings were scattered throughout the villages, each stamped '30MM HEDP M789': Apache helicopter high explosive cannon rounds.

was an extended family of women and children with their grandfather, Deen Mohammad, an elder of the village. Around the tents were their sheep, cows and donkeys, which ran away when the helicopter arrived. Deen said, 'The villagers started running away because they thought these people have come to take us away.' But when the people in the village started running, 'that's when the helicopters started shooting.' As the helicopters fired into the village, people were 'frightened and yelling and trying to hide themselves. We were trying to find a wall or a tree to hide ourselves.'<sup>4</sup>

The children in Deen's care 'wanted us to hide them, but we couldn't really



71. The book Hit & Run is not the only media the NZDF had available to correct its position on the shell casings.
72. The exact same weird and obviously wrong claim about shell casings had been made by journalist Barry Soper in the NZ Herald in March 2017.
73. The original story, and its retraction and replacement was the subject much public coverage in social media and on Radio NZ's Mediawatch<sup>14</sup>, and a press release by Hager<sup>15</sup>.
74. Between the book and the extensive public coverage, it is beyond all credibility that the NZDF did not know its position on Hit & Run and the shell casings was false. This matter should be deemed 'confirmed' that the NZDF was misleading, or lying to, the Government in January 2018.

#### **Misleading a journalist about shell casings**

75. Despite the shell casings matter being briefly covered in the NZDF presentation in March 2017, the NZ ran Barry Soper's story as an 'exclusive' with no reference given to the NZDF's presentation.
76. What caused Soper to think that Hit & Run claimed the shell casings were from NZDF guns and not an Apache helicopter? Was Soper fed this story by the NZDF?
77. Soper's stories about the NZDF have certainly been sympathetic to the NZDF.
78. In one story, Soper claimed that:<sup>16</sup>  
  
*there's little doubt in what this inquiry, with two million bucks being thrown at it for starters, will come up with – the allied forces were under fire and responded'*
79. The NZDF itself has not claimed Operation participants were 'under fire'.
80. In another story, Soper said:<sup>17</sup>

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<sup>14</sup> <https://www.rnz.co.nz/national/programmes/mediawatch/audio/201839481/hit-and-run-claims-and-counterclaims>

<sup>15</sup> <http://www.scoop.co.nz/stories/PO1703/S00400/complaint-on-story-published-by-the-herald-and-newstalkzb.htm>

<sup>16</sup> [https://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=12030737](https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12030737)

<sup>17</sup> <https://www.nzherald.co.nz/index.cfm?objectid=12242476>

*Having travelled with the SAS in Afghanistan one thing became apparent - they were meticulous, careful and they most certainly were not trigger happy but above all they were caring.*

81. The NZDF's November 2018 OIA release included its general media strategy.<sup>18</sup> That document reveals that the NZDF has a list of journalists 'to be engaged' and updates the list based on whether journalists' stories are good, bad or indifferent.

### Focus groups 3 (NZ media) & 4 (International media)



- Review journalist engagement list every six months
  - Does our original list of journalist to be engaged still appropriate six months later (remove some, add some?)
- Review content & tone of media coverage quarterly
  - What is the content & tone like? – good, bad, indifferent – use as a feedback loop with our journalist engagement list
- Plan media experience in Ex SK17 and Ex SK19
  - Build the engagement with journalists by giving them first hand experience – turn them into advocates.

82. It is 'probable' that Barry Soper would appear in the NZDF's list of journalists 'to be engaged'. It feels more likely than not, and therefore 'likely', that Soper was engaged by the NZDF on the issue of shell casings for his 'exclusive'.

83. The matter of journalistic professionalism is one for the NZ Herald to deal with.

84. The matter of NZDF's professionalism is one for this Inquiry to deal with.

<sup>18</sup> <http://www.nzdf.mil.nz/downloads/pdf/public-docs/2018/novemberoiaresponses2018.pdf>, p. 21.

## Appendix 1



**Toby Manhire**

@toby\_etc

Following



re the which-village puzzle, the US National Geospatial-Intelligence Agency offers two "populated places" for Tīrgīrān, Baghlān, shown here:

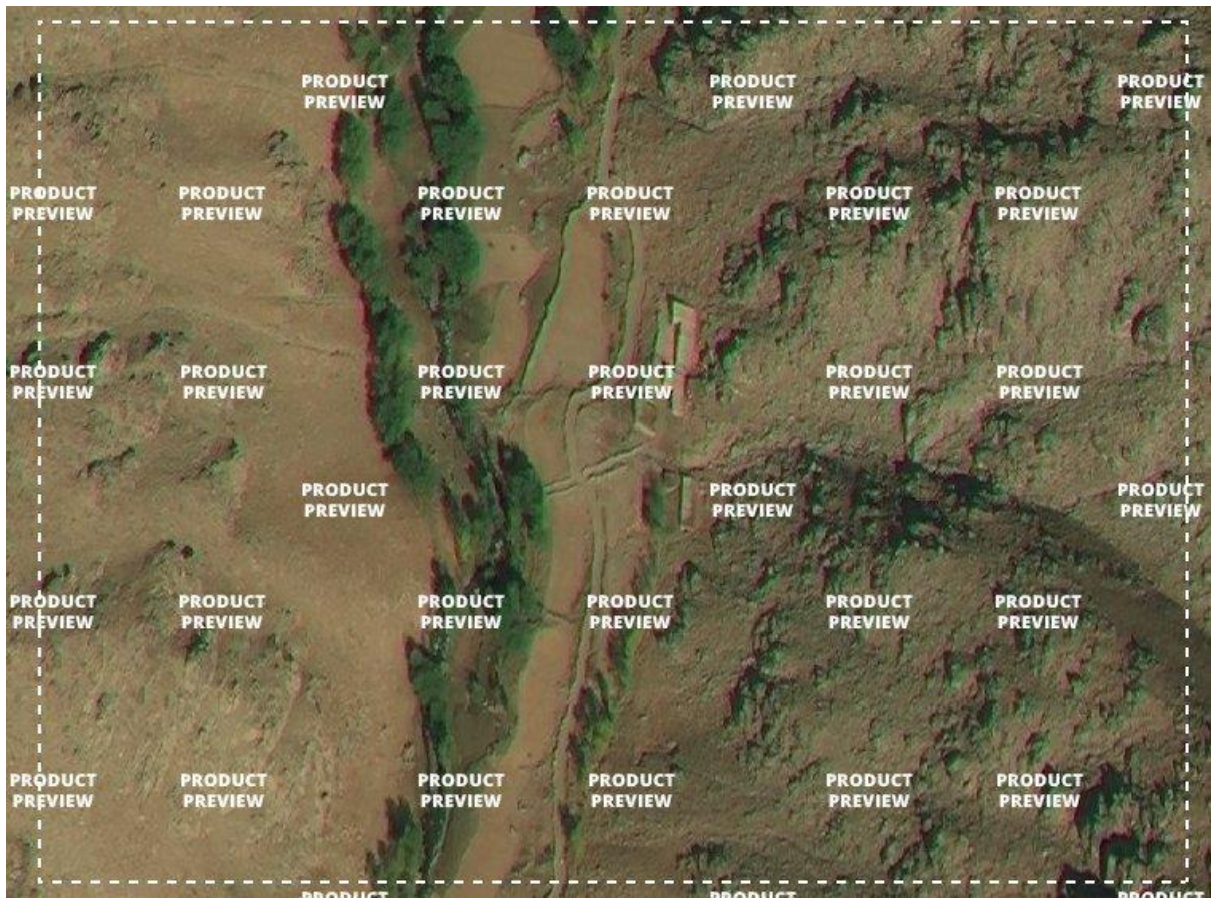


9:30 AM - 28 Mar 2017



## Appendix 2

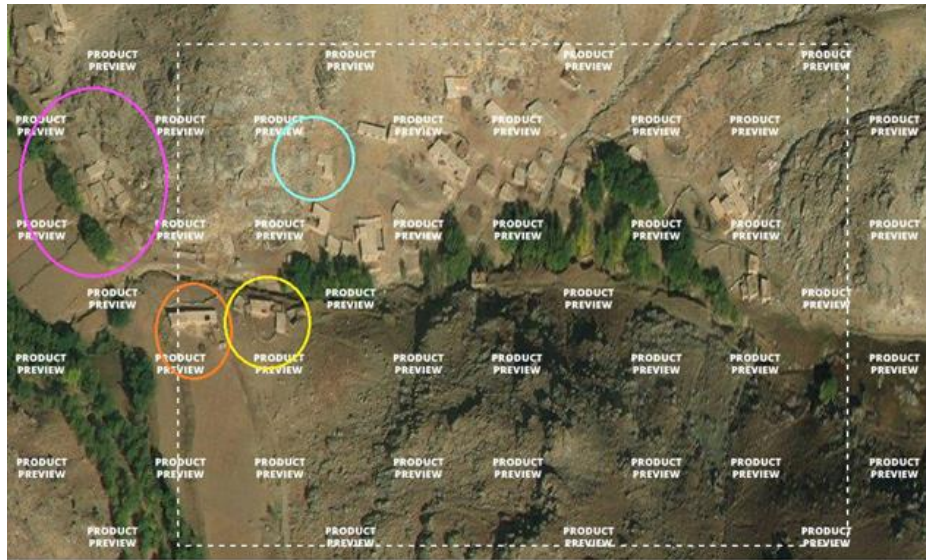
[https://twitter.com/keith\\_ng/status/846634645210873856](https://twitter.com/keith_ng/status/846634645210873856)





### Appendix 3

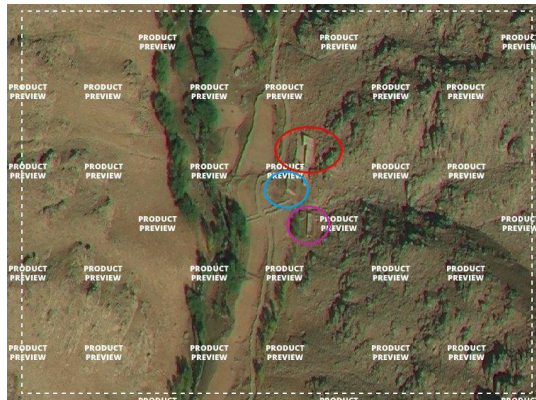
<https://twitter.com/Economissive/status/850942294911930371>



HIT & RUN



Naik village in summer. The valley to Khak Khuday Dad begins behind the rocky ridge on the left. The L-shaped house in the foreground was Naimatullah's father's. The long house in the centre of the picture was Abdullah Kalta's. Their families have rebuilt the houses.



OPERATION BURNHAM



On the outskirts of Naik, the SAS burned down these houses (since rebuilt, as in this photograph) belonging to insurgent leader Naimatullah (furthest house) and Naimatullah's father Mohammad Iqbal, who did not support his son's activities (nearest house).





## Appendix 4

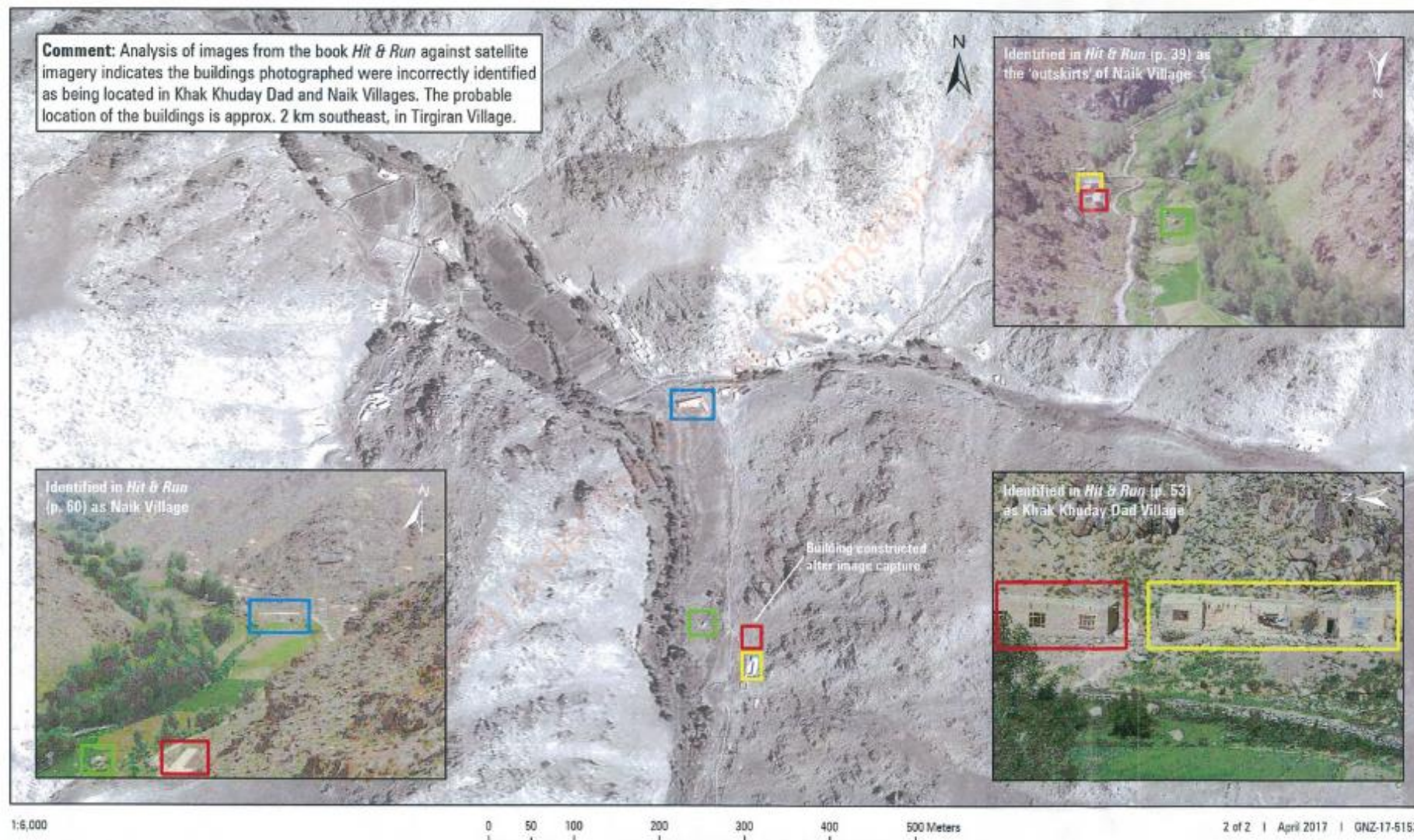
[http://www.nzdf.mil.nz/downloads/pdf/public-docs/2018/op\\_b\\_information\\_pack\\_v2b.pdf](http://www.nzdf.mil.nz/downloads/pdf/public-docs/2018/op_b_information_pack_v2b.pdf), p. 7.



### Afghanistan: Geolocated Photographs from *Hit & Run*

Tirgiran Village, Bahglan Province (Geo: 350947N/0680916E)

UNCLASSIFIED



UNCLASSIFIED

Includes data sourced from ESRI, Earthstar Geographics, CNES/Airbus DS. Photographs by Jon Stephenson.