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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 “[I]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 Afghani 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 way, 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.