



Assessment of conduct during Operation Burnham

Chapter 6

- [1] In this chapter we assess whether the actions of New Zealand Defence Force (NZDF) personnel during Operation Burnham complied with International Humanitarian Law and the applicable rules of engagement.¹
- [2] We have described in chapters 4 and 5 what happened during Operation Burnham and the casualties and property damage that resulted. In this chapter we focus on the conduct of NZDF personnel during the operation and the legal implications of that conduct. In particular, the Inquiry's Terms of Reference direct us to consider the "assessment made by NZDF as to whether or not Afghan nationals in the area of Operation Burnham were taking direct part in hostilities or were otherwise legitimate targets".²
- [3] Our analysis focuses on the legality of NZDF's conduct *during* the operation. Issues relating to how NZDF handled allegations of civilian casualties subsequently are addressed in chapters 8 and 9.
- [4] This chapter is divided into two parts:
- (a) Part I summarises the legal framework against which the conduct of NZDF personnel is to be assessed. This includes both the relevant principles of International Humanitarian Law and the rules of engagement that applied to Task Force 81 (TF81) at the time of Operation Burnham.
 - (b) Part II sets out our assessment of the conduct of TF81 personnel during the operation and whether it complied with the legal requirements set out in Part I. We consider the role of TF81 personnel in the engagements carried out and conduct of TF81 personnel that resulted in damage to property.

Part I – The legal framework

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

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

² Clause 7.2.

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

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

Applicable principles of International Humanitarian Law

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

Relationship between International Humanitarian Law and International Human Rights Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Emphasis added.)

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

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

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

²⁰ Professor Akande, above n 6.

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

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

²³ ICCPR, above n 15, art 6(1).

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

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

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

Core principles of International Humanitarian Law

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

²⁷ Melzer, above n 8, at 17.

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

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

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

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

³² Melzer, above n 8, at 73–75.

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

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

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

Distinction

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

Proportionality

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

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

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

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

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

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

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

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

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

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

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

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

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

Precaution

[26] All feasible precautions must be taken to avoid and minimise incidental loss of civilian life, injury to civilians and damage to civilian objects.⁴⁸ “All feasible precautions” requires all precautions that are practicable, or practically possible, taking into account all circumstances at the time.⁴⁹

[27] Parties to the conflict must accordingly do everything feasible to verify that targets are military objectives.⁵⁰ They must take all feasible precautions in the choice of means and methods of warfare with a view to avoiding and minimising incidental civilian casualties;⁵¹ and assess whether such anticipated casualties would be excessive in relation to the concrete and direct military advantage anticipated.⁵² They must give effective advance warning of attacks that may affect the civilian population unless circumstances do not permit such a warning.⁵³

Humane treatment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁶⁶ At [13].

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

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

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

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

Membership of an organised armed group

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

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

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

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

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

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

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

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

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

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

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

⁷⁴ At 33–34.

⁷⁵ At 34.

⁷⁶ At 34.

- [37] The ICRC's emphasis on a continuous combat function as the criterion for assessing membership has been criticised by some commentators as being too narrow and inconsistent with the approach taken to defining the armed forces of a State party to a conflict.⁷⁷ Critics have also argued that the ICRC's approach is too complex and creates uncertainty for the soldier on the battlefield.⁷⁸ The NZDF manual on the Law of Armed Conflict, for example, looks instead at whether the individual makes a "direct contribution to the combat effectiveness" of the organised armed group.⁷⁹
- [38] Although influential, the ICRC's guidance therefore should not be taken as a statement of settled law. But it does represent the high-water mark of protection. Professor Akande therefore advised the Inquiry that an individual who meets the ICRC's "continuous combat function" criteria can be safely considered to be a lawful target of deliberate attack under International Humanitarian Law.⁸⁰
- [39] In any case, the issue does not arise on the facts of Operation Burnham. As we have said, the principle of distinction only applies where an attack is directed against the person in question. At the time of Operation Burnham, TF81 did not know the identity of the individuals against whom force was used, nor did it have any specific information about their affiliations.⁸¹ Rather, the individuals were engaged based on their behaviour during the operation.

Persons taking a direct part in hostilities

- [40] Even if an individual is not a known member of an organised armed group that is a party to the conflict, they can still be a lawful target of deliberate attack during such time as they take a "direct part in hostilities".
- [41] The concept of "direct participation in hostilities" is also not defined in either treaty or customary International Humanitarian Law, and it remains a particularly difficult area of International Humanitarian Law. The ICRC addressed this concept in its 2009 interpretive guidance.⁸² Under that guidance, direct participation is limited to specific acts that meet three cumulative criteria:⁸³
- (1) a threshold regarding the harm likely to result from the act, (2) a relationship of direct causation between the act and the expected harm, and (3) a belligerent nexus between the act and the hostilities conducted between the parties to an armed conflict.
- [42] The ICRC's guidance has been the subject of considerable debate but, even so, Professor Akande considered that it provides a useful analytical tool for making determinations as to direct participation in hostilities.⁸⁴ The Inquiry agrees with his view that it is appropriate to take a narrow interpretation of the direct participation concept.⁸⁵ We also note that while the ICRC's guidance is not binding on states, it is persuasive given the ICRC's mandate under the

⁷⁷ See the discussion in Melzer, above n 62, at 316 and the references in footnote 88.

⁷⁸ See, for example, Kenneth Watkin "Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance" (2010) 42 NYU J Intl L & Pol 641 at 662–664.

⁷⁹ NZDF, above n 67, at [6.5.25].

⁸⁰ Professor Akande, above n 6, at [23].

⁸¹ While there was some general intelligence indicating there was a Taliban presence in the area, we consider that was insufficient to establish that the particular individuals engaged during the operation were Taliban members.

⁸² ICRC *Interpretive Guidance*, above n 29.

⁸³ At 46. For a discussion of each of these criteria see pages 46–64.

⁸⁴ Professor Akande, above n 6, at [34].

⁸⁵ At [34].

Geneva Conventions.⁸⁶ We therefore take the approach that an individual who meets the ICRC criteria for “direct participation in hostilities” can safely be considered to be a lawful target under International Humanitarian Law.

[43] Accordingly, in assessing the conduct of NZDF personnel during Operation Burnham, we adopt the following test for when a civilian may be treated as “directly participating in hostilities”, based on the ICRC’s *Interpretive Guidance*:⁸⁷

- (a) The civilian must be acting or preparing to act in a manner likely to adversely affect the military operations of a party to an armed conflict (including, but not limited to, causing death or injury to military personnel). The harm must “reasonably be expected to result from [the] act in the prevailing circumstances”.⁸⁸
- (b) There must be a direct causal link between the act and the likely harm. This requirement will be met if the act “may reasonably be expected to directly—in one causal step—cause harm that reaches the required threshold.”⁸⁹
- (c) The act must be one that “can reasonably be perceived as an act designed to support one party to the conflict by directly causing the required threshold of harm to another party.”⁹⁰

[44] This test focuses on what could reasonably be perceived and expected in the circumstances. This accounts for the fact that the commanders and soldiers must make decisions based on the information available to them, which will often be incomplete. Provided their assessment is reasonable in the circumstances, they will not breach International Humanitarian Law. It must, however, be remembered that in cases of doubt International Humanitarian Law requires that an individual is treated as a civilian entitled to protection from attack.⁹¹

Use of force in self-defence

[45] The rules of International Humanitarian Law that we have been discussing govern the use of force as a matter of direct attack against people or property. Under those rules, offensive force may be used against legitimate military targets—whether or not they are engaged in hostile action at the time of the attack. At the same time, force is prohibited against civilians and civilian property. Civilians only lose their protection from direct attack at such time as they are directly participating in hostilities.

[46] In addition to those rules, the right of soldiers to use force in their own self-defence is recognised under international and domestic law.⁹² Any such force is defensive only. It is permitted only when: an attack is occurring or is imminent; the use of force is necessary (there being no feasible

⁸⁶ See generally Fleck, above n 8, at [1424]. We note there has been some criticism of the ICRC’s approach. However, the main areas of controversy do not affect the analysis of Operation Burnham, so we are not required to resolve them. See, for example, the discussion in Gill and Fleck, above n 10, at [16.02].

⁸⁷ ICRC *Interpretive Guidance*, above n 29.

⁸⁸ At 47.

⁸⁹ At 58.

⁹⁰ At 64.

⁹¹ See, for example, the ICRC’s commentary on “Situations of doubt as to the character of a person” in “Practice Relating to Rule 6. Civilians’ Loss of Protection from Attack” ICRC <ihl-databases.icrc.org>.

⁹² See generally Gill and Fleck, above n 10, at [10.03](18), [22.06]–[22.08], [22.12], [23.01] and [23.12].

alternatives); and the force used is proportionate to the level of attack being defended against.⁹³ The right applies on both the individual and the unit level, and a commander has the right to take all necessary measures to defend his or her unit against attack.⁹⁴

- [47] Where the right of self-defence applies there is no need to determine that the attacker is directly participating in hostilities or is otherwise a legitimate military target. The right to use force is triggered by the threat posed by the individual not his or her status. For example, a soldier would be entitled to defend him or herself against an attack by a civilian who is not involved in the insurgency and is motivated by non-military factors. However, the force used in defence must be necessary and proportionate to the threat the soldier is facing. No more force than is strictly necessary should be used to counter the attack.⁹⁵

Consequences of breaching International Humanitarian Law and/or International Human Rights Law

- [48] A state is responsible under international law for violations of International Humanitarian Law committed by its armed forces.⁹⁶ The New Zealand Government is therefore legally responsible under international law for any breaches of International Humanitarian Law committed by NZDF.
- [49] In addition, some breaches of International Humanitarian Law are “war crimes” incurring criminal responsibility on the part of individuals under both domestic and international law.⁹⁷ Not every breach of International Humanitarian Law constitutes a war crime—only those that are “serious” or “grave” and that are committed with the requisite *mens rea*.⁹⁸ Criminal responsibility for war crimes may attach to persons who (directly or indirectly) committed the crime,⁹⁹ as well as those in a position of command responsibility.¹⁰⁰ Central to “command responsibility” is the requirement that the commander knew, or ought to have known, that their subordinates were committing a war crime.¹⁰¹
- [50] Some breaches of International Humanitarian Law may also give rise to criminal responsibility for individuals in certain limited circumstances. Gross breaches of human rights amounting to “crimes against humanity” are recognised as crimes under both New Zealand domestic and

93 At [22.08] and [23.02].

94 At [22.06].

95 At [23.07].

96 Henckaerts and Doswald-Beck, above n 35, rule 149; Fleck, above n 8, at [1419](4); International Law Commission *Draft Articles on State Responsibility* (2001) UN Doc A/56/10, art 4.

97 In situations of non-international armed conflict, both serious violations of Common Article 3 and other serious violations of International Humanitarian Law constitute “war crimes”: Henckaerts and Doswald-Beck, above n 35, rule 156. These “war crimes” are criminalised in New Zealand law under both s 11 of the International Crimes and International Criminal Court Act 2000 and s 3 of the Geneva Conventions Act 1958. For a discussion of the development of the international criminal law with respect to violations of International Humanitarian Law see Paola Gaeta “War Crimes and Other International ‘Core’ Crimes” in Clapham and Gaeta, above n 11, at 737.

98 *Mens rea* (literally, “guilty mind”) refers to the mental element of a criminal offence—for example, intention, knowledge or recklessness.

99 Henckaerts and Doswald-Beck, above n 35, rule 151. See, for example, Rome Statute of the International Criminal Court 1998 art 25(2) and (3).

100 Henckaerts and Doswald-Beck, above n 35, rule 153. See, for example, Rome Statute, above n 99, art 28.

101 See the elaboration of the elements of command responsibility by the International Criminal Court in *Prosecutor v Jean-Pierre Bemba Gombo*, PTC II, Decision on the Confirmation of Charges, 15 June 2009 at [407].

international law.¹⁰² These include murder¹⁰³ and torture¹⁰⁴ when committed as part of a “widespread or systematic attack” knowingly directed against a civilian population.¹⁰⁵

Applicable rules of engagement

- [51] Rules of engagement are the internal rules adopted by a military that define the conditions, circumstances, degree and manner in which force may be used. Typically, they specify the conditions under which force, including lethal force, can be used and place limits upon its use. They generally define who or what may be targeted and under what circumstances.
- [52] In New Zealand, rules of engagement are made under the legal authority of the Royal Prerogative in the form of formal military orders. That means that they are enforceable under the Armed Forces Discipline Act 1971 and violations can be subject to prosecution under New Zealand’s military justice system. When issued, rules of engagement apply to all military members undertaking the operation for which the rules of engagement were issued. Both individual personnel and commanders who authorised their unit’s operations are bound by the rules of engagement.
- [53] Rules of engagement are formulated to reflect policy, operational and legal requirements and are issued at the highest level of military command and approved at the highest level of government. At a minimum they must be consistent with the legal requirements of International Humanitarian Law. Rules of engagement cannot authorise actions that breach International Humanitarian Law or domestic law.¹⁰⁶ But they will also take account of policy and operational considerations. Frequently they may impose *stricter* conditions on the use of force than those required by International Humanitarian Law.
- [54] In an overseas coalition setting, combined or international rules of engagement may be issued to cover all the coalition. In Afghanistan, ISAF had its own rules of engagement. As a contributing member to that coalition, New Zealand was required to adhere to ISAF’s rules of engagement to obtain approval to conduct operations within ISAF’s area of operation and control. However, like many nations that contributed to ISAF operations in Afghanistan, New Zealand also had its own rules of engagement. In the event of inconsistency between New Zealand’s rules of engagement and ISAF’s rules of engagement, NZDF personnel were bound to follow New Zealand’s rules of engagement.
- [55] The following discussion therefore focuses on the rules of engagement for the Operation Wātea deployment dated 25 May 2010, which was the version current at the time of Operation Burnham. These rules of engagement have been declassified in part and published by the Inquiry.¹⁰⁷ The Inquiry has also had access to the full, unredacted rules of engagement, and notes the redactions do not affect our analysis.

¹⁰² Rome Statute, above n 99, art 7; see also the International Criminal Court “Elements of Crime” (2013) <www.icc-cpi.int> at 5–12. “Crimes against humanity” are criminalised in New Zealand law under s 10 of the International Crimes and International Criminal Court Act 2000.

¹⁰³ Rome Statute, above n 99, art 7(1)(a).

¹⁰⁴ Art 7(1)(f).

¹⁰⁵ Art 7(1) *chapeau* and 7(2)(a).

¹⁰⁶ NZDDP-06.1 pdf 2010 Doctrine_Redacted (February 2010) (Inquiry doc 04/03) at 1–6 and [15].

¹⁰⁷ Inquiry doc 04/04, above n 3.

- [56] In interpreting and applying the rules of engagement, it is necessary to have regard to the practical context in which they operate. As Brigadier (Retired) Kevin Riordan (the Judge Advocate General and former Director of Defence Legal Services) said in evidence at Module 2 of the Inquiry’s public hearings, soldiers must make rapid decisions in complex situations and exercise important elements of judgement in applying the rules of engagement.¹⁰⁸ The Inquiry is conscious of the need to be realistic about what can be expected of soldiers in conflict situations.
- [57] Against that background, the following four rules of engagement are of particular relevance to Operation Burnham.

Rule A: Use of force in self-defence

- [58] Rule A of the rules of engagement recognised the right of TF81 to use force in self-defence. It permitted the use of force to protect individual TF81 members, the unit or “designated persons” (which included other ISAF personnel and the Crisis Response Unit (CRU)).¹⁰⁹ Rule A provided that:¹¹⁰

Use of **minimum force**, up to and including **deadly force**, is permitted for individual or unit self defence or in defence of **designated persons** against a **hostile act** or demonstration of **hostile intent**.

- [59] Relevant to Operation Burnham, the following terms are defined in the rules of engagement:¹¹¹

Deadly force means force that is intended or likely to cause death or serious injury.

Hostile act means the use of force by any person or group against one or more members of TF 81, **designated persons** or **designated property** where death or serious injury is likely to result.

Hostile intent means that there is an imminent intent to commit a **hostile act**. The existence of a hostile intent may be judged by either:

- (a) The threatening individual or unit’s capability and preparedness to inflict imminent or immediate damage; or
- (b) Information, particularly intelligence, which indicates an intention to conduct an imminent or immediate attack.

Minimum force means the minimum degree of force that is necessary, reasonable and lawful under the circumstances to achieve the objective. It includes the full range of force, up to and including **deadly force**.

Self defence means the use of reasonable force to protect any member of TF 81 or any other **designated person** against a **hostile act** or **hostile intent**.

¹⁰⁸ Judge Advocate General Kevin Riordan, Transcript of proceedings, Public Hearing Module 2 (22 May 2019) at 59–96; see also Judge Advocate General Kevin Riordan “Rules of Engagement and military doctrine” (Public Hearing Module 2, 22 May 2019).

¹⁰⁹ See the definition of “designated persons” in Inquiry doc 04/04, above n 3.

¹¹⁰ At [3A] (bold in original).

¹¹¹ At [2] (bold in original).

- [60] The effect of the rule, taking account of the definitions of “minimum force” and “self-defence”, was that TF81 could use *only such force as was necessary* to protect individual members, the unit or designated persons against an act of force or imminent intent to commit an act of force that was likely to result in serious injury or death. This is consistent with the principles applying to self-defence under international law, which require the use of force to be necessary and proportionate.¹¹² While proportionality was not expressly referred to in rule A, similar considerations are likely to be relevant in determining whether the level of force was “reasonable”.

Rule C: Use of force to achieve the mission

- [61] Rule C of the rules of engagement provided:¹¹³

Use of **minimum force**, up to and including **deadly force**, to achieve the mission is permitted.

- [62] The use of the term “minimum force” (defined in paragraph [59] above) meant, in the context of this rule, that the level of force used had to be necessary, reasonable and lawful to achieve the mission. In this respect, rule C imposed greater restrictions on TF81 than International Humanitarian Law required. The use of minimum force is not a general requirement under International Humanitarian Law, although the level of force used may be relevant in assessing compliance with the principles of proportionality and precaution.
- [63] On its face, rule C has a potentially broad application. By way of illustration, the “mission” for Operation Burnham was to conduct a helicopter assault force operation to detain Abdullah Kalta and Maulawi Neimatullah.¹¹⁴ To achieve that mission, use of force might be necessary, for example, to facilitate entry to the objective buildings, to capture and detain the targets, or to ensure troops could be safely extracted. However, any such use of force would, under the definition of “minimum force”, need to be both reasonable and lawful. The “lawful” aspect of the definition recognises that any use of force to achieve the mission had to comply with International Humanitarian Law. As we described earlier, the principle of distinction under International Humanitarian Law provides that civilians are protected against direct attack unless, and only for such time as, they take a direct part in hostilities. Accordingly, rule C could not permit the use of force against a civilian unless they were directly participating in hostilities—even if their conduct might threaten mission accomplishment in some other way.
- [64] Rule C of the rules of engagement also appears to be the primary rule that would have applied in relation to the use of force against property. The principle of distinction is relevant in this context as well, as it requires that attacks only be directed against military objectives. While the wording of rule C differed from the definition of “military objective” under International Humanitarian Law, it appears generally consistent with the requirements of International Humanitarian Law. If the property in question did not make an effective contribution to military action, or damage to it would not offer any military advantage, it is difficult to see how the use of force against it could be “necessary ... to achieve the mission”.

¹¹² See the discussion in paragraphs [45]–[47].

¹¹³ At [3C] (bold in original).

¹¹⁴ The orders for the operation state that the mission is to “conduct HAF DDO on Obj Burnham and Obj Nova”: OP RAHBARI ORDERS (Inquiry doc 09/39) at 34. A “HAF” refers to a helicopter assault force operation, and “DDO” refers to a deliberate detention operation.

Rule H: Attacks on individuals directly participating in hostilities

[65] Rule H of the rules of engagement provided:¹¹⁵

Attack on individuals, forces or groups directly participating in hostilities in Afghanistan against the legitimate Afghan government, including [redacted] is permitted.

[66] The rule further required:

- (a) authorisation at a certain level for planned attacks;¹¹⁶ and
- (b) positive confirmation that a target was directly participating in hostilities.

[67] As we discuss further in chapter 8, rule H was the primary rule relied on in planning and conducting attacks against targets on the Joint Prioritised Effects List (JPEL). It also permitted attacks against people who were not JPEL targets but who, during an operation, were identified as directly participating in hostilities.¹¹⁷

[68] Rule H reflects the principle of distinction under International Humanitarian Law, expressly adopting the term “direct participation in hostilities” that is used in that context. Given our conclusion that rule C could only permit the use of force against an individual if they were directly participating in hostilities, the practical effect of rules C and H was very similar—at least insofar as rule C relates to the use of force against individuals (as opposed to property).

[69] In practice, it appears that NZDF’s interpretation of “directly participating in hostilities” at the relevant time was similar to the test in rule A (self-defence). The term is not defined in rule H. However, in her presentation at the Inquiry’s public hearing on module 3, Brigadier Ferris stated:¹¹⁸

... in Afghanistan at the time relevant to this Inquiry, New Zealand considered that a civilian could lose protection by [directly participating in hostilities] through:

- (a) demonstrating hostile intent or engaging in a specific hostile act; or
- (b) being a member of an Organised Armed Group (OAG) that was collectively and continuously taking part in hostilities against the Government of Afghanistan.

[70] In relation to people subjected to force during Operation Burnham, the first category is most relevant. As noted above, the identity of these people was not known during the operation, so they could not be identified as known members of a specific organised armed group. The criteria for determining membership are discussed in chapter 7 in relation to the predetermined and offensive use of lethal force.

¹¹⁵ Inquiry doc 04/04, above n 3, at [3H].

¹¹⁶ The specific level of authorisation required is redacted from the public version of the rules of engagement.

¹¹⁷ This is clear from the fact that the rule provides for a specific level of authorisation in the case of pre-planned attacks only. Given this, it must have been anticipated that the rule might also be used in attacks that were not pre-planned.

¹¹⁸ Brigadier Lisa Ferris “Presentation of the New Zealand Defence Force” (Inquiry Public Hearing Module 3, 30 July 2019) at [28].

[71] The terms “hostile act” and “hostile intent” are defined in the rules of engagement, although they are not used in rule H. Brigadier Ferris noted that rule A of the rules of engagement (self-defence)—which did use these terms—was usually relied on to justify the use of force against people identified as directly participating in hostilities during the course of an operation.¹¹⁹ It appears, then, that NZDF personnel likely understood the concepts of “direct participation in hostilities” and “hostile act”/“hostile intent” as being similar, if not identical, in scope. We note that the presentation used to train TF81 personnel on the rules of engagement and International Humanitarian Law support this conclusion.¹²⁰

Rule I: Actions that could result in incidental casualties and collateral damage

[72] Rule I of the rules of engagement sets out when force could be used that might have the *incidental* effect of harming civilians or civilian property, even though they are not the target. It provided:¹²¹

Actions which could result in **incidental casualties** and **collateral damage** are permitted if the action is essential for mission accomplishment and the expected **incidental casualties** and **collateral damage** are proportionate to the concrete and direct military advantage anticipated.

[73] “Incidental casualties” and “collateral damage” were defined in the rules of engagement as follows:¹²²

Collateral damage means the unintended destruction of property, which occurs incidental to the authorised and legitimate use of force.

Incidental casualties means the unintended death or injury of civilians, which occurs incidental to the authorised and legitimate use of force.

[74] We make three points about this rule:

- (a) First, it required that the casualties or damage be “proportionate to the concrete and direct military advantage anticipated”. This is consistent with the International Humanitarian Law principle of proportionality.
- (b) Second, it required the action in question to be “essential for mission accomplishment”. As discussed in relation to rule C above, in the case of force directed against an individual this would not in itself have been sufficient under International Humanitarian Law. The principle of distinction would also require that for an individual to be a legitimate target they must be directly participating in hostilities.
- (c) Third, the definitions of collateral damage and incidental casualties only cover casualties or damage that are incidental to the *authorised and legitimate* use of force. Therefore, any actions involving the *illegitimate* use of force that resulted in civilian casualties or damage to civilian property would not be permitted. This would include force directed against a civilian who was not directly participating in hostilities.

¹¹⁹ At [45].

¹²⁰ Inquiry doc 04/02, above n 5, at 35–36.

¹²¹ Inquiry doc 04/04, above n 3, at [31] (bold in original).

¹²² At [2] (bold in original). We note that, while given a more specific meaning in the rules of engagement, the term “collateral damage” is often used as an umbrella term for both civilian casualties and damage to civilian property.

- [75] Despite the positive way in which the rule is framed, we see it operating (like the proportionality principle) as a limit on the use of force where collateral damage might be expected to result. The relevant use of force would still need to be permitted by a separate rule or principle of International Humanitarian Law (for instance, on the basis that it was directed against a military objective or a person directly participating in hostilities).

Relationship between rules C and H and the ICRC’s test for direct participation in hostilities

- [76] We consider that in the context of Operation Burnham, the test for direct participation in hostilities set out by the ICRC (discussed at [43]) can be used to assess compliance with both rules C and H of the rules of engagement and the principle of distinction under International Humanitarian Law, insofar as they relate to the determination of whether an individual was a lawful target of attack. The rules of engagement must be interpreted consistently with the principles of International Humanitarian Law; they cannot be more permissive. As we have said, this meant rule C could only be used to justify the use of force against individuals who were directly participating in hostilities. Rule H explicitly incorporated the concept of direct participation in hostilities.
- [77] Rule C did impose an additional “minimum force” requirement, which we do not consider was required under International Humanitarian Law.¹²³ However, rule H did not include such a requirement. Taking account of the effect of the principle of distinction, we consider rule H would also have been available to TF81 in the same situations as rule C where the use of force against individuals was concerned. For this reason, it is unnecessary to apply a minimum force requirement when assessing compliance with the rules of engagement in relation to attacks on individuals who were directly participating in hostilities (the use of force in self-defence is a different matter, as discussed below).
- [78] We acknowledge that the ICRC guidance was relatively new at the time of Operation Burnham, so TF81 personnel may not have adopted the same test when applying their rules of engagement. Indeed, as we have said, it appears that at the relevant time TF81 personnel understood the test for “direct participation in hostilities” would be met where there was a “hostile act” or “hostile intent” (similarly to rule A). The key differences between that approach and the test set out above are that the definition of “hostile act”:
- (a) Only applied to acts *against* members of TF81 or designated persons/property likely to cause *serious injury or death*. This is a higher threshold to meet than limb (a) of the test for direct participation in hostilities in paragraph [43] above (which only requires the act to be likely to adversely affect TF81’s military operations).
 - (b) Did not explicitly require that the act be designed to support one party to the conflict (as is required by paragraph [41](c)). In this sense, it permitted a potentially broader range of people to be subject to attack.

¹²³ As we discuss in chapter 7 (at [23]–[25]), there is significant disagreement over whether force used against people who are directly participating in hostilities must be limited to the minimum degree necessary (which might, for example, require them to be captured rather than killed where possible). We proceed on the basis that there is no such a requirement under the current law.

- [79] The main area of contention in relation to Operation Burnham relates to paragraph (a) of the test for direct participation in hostilities—that is, whether individuals were acting or preparing to act in a manner likely to adversely affect the operation. This threshold would be satisfied wherever the definition of “hostile act” or “hostile intent” applied.¹²⁴
- [80] In relation to paragraph (c) of the test, we take the approach that if the definitions of “hostile act” or “hostile intent” were met but there was no basis for determining that the relevant act was designed to support a party to the conflict, force could only be used in accordance with rule A of the rules of engagement (self-defence). As noted above, rule A imposed a “minimum force” requirement, which would apply in such a situation. Given that TF81 generally relied on rule A rather than rule H when using force against individuals identified as hostile during operations, this approach should not represent a significant departure from how the rules of engagement were applied in most cases.
- [81] This approach is necessary to give effect to the plain wording of “direct participation in hostilities”. As the ICRC guidance notes, “armed violence which is not designed to harm a party to an armed conflict, or which is not designed to do so in support of another party, cannot amount to any form of “participation” in hostilities taking place between these parties”.¹²⁵
- [82] It also reflects the different purposes of the self-defence rule and the direct participation in hostilities test. The self-defence rule serves the limited purpose of permitting soldiers to defend themselves and their units against imminent attack. On the other hand, the direct participation in hostilities test dictates when a civilian loses the protection against attack to which they are normally otherwise entitled. A civilian who directly participates in hostilities can be subject to attack in a broader range of circumstances; it is sufficient if their conduct is likely to adversely affect military operations. The requirement that the civilian’s actions be designed to support a party to the conflict is a key factor that justifies this loss of protection from attack.

Summary of the principles to be applied

- [83] Drawing on the discussion above, in the context of Operation Burnham we consider compliance with the applicable rules of engagement and the principles of International Humanitarian Law can be assessed against the following criteria.

Use of force against individuals

- [84] For the use of force against individuals to be lawful, the individual had to be either a) directly participating in hostilities; or b) acting in a manner that justified the use of force by TF81 in self-defence.

A. Direct participation in hostilities

- [85] Having regard to the circumstances at the time, did the relevant TF81 personnel:

¹²⁴ Professor Akande, above n 6, at [32]. The definition of “hostile act” was, in fact, narrower in terms of the type of harm required than the ICRC’s test for direct participation in hostilities.

¹²⁵ ICRC *Interpretive Guidance*, above n 29, at 59.

- (a) reasonably perceive that the individual(s) were acting or about to act in a manner designed to support the insurgency by causing harm to the military operations of TF81 or coalition partners? (**Direct participation in hostilities**)
- (b) properly determine that any incidental civilian casualties or damage to civilian property that could reasonably be expected were proportionate to the concrete and direct military advantage anticipated? (**Proportionality**)
- (c) take all feasible precautions to avoid and minimise incidental civilian casualties and damage to civilian property? (**Precaution**)

B. Self-defence (rule A)

[86] Having regard to the circumstances at the time, did the relevant TF81 personnel:

- (a) reasonably determine that:
 - (i) the individual(s) were using, or had an imminent intent to use, force against members of TF81, the unit or designated persons; and
 - (ii) serious injury or death was likely to result? (**Hostile act / hostile intent**)
- (b) use the minimum degree of force that was necessary, reasonable and lawful under the circumstances? (**Minimum force/necessity**)
- (c) use a level of force that was proportionate to the level of attack being defended against? (**Proportionality**)

Use of force against property

[87] Having regard to the circumstances at the time, did the relevant TF81 personnel:

- (a) reasonably determine that:
 - (i) the property was making an effective contribution to military action; and
 - (ii) the partial or total destruction, capture or neutralisation of the property would offer TF81 a definite military advantage? (**Military objective**)
- (b) use the minimum degree of force that was necessary, reasonable and lawful under the circumstances to achieve the objective?¹²⁶ (**Minimum force**)
- (c) determine that any incidental civilian casualties or damage to civilian property that could reasonably be expected were proportionate to the concrete and direct military advantage anticipated? (**Proportionality**)
- (d) take all feasible precautions to avoid and minimise incidental civilian casualties and damage to civilian property? (**Precaution**)

¹²⁶ Required by rule C of the rules of engagement. This is not a general requirement under International Humanitarian Law.

Actions following the use of force

- [88] Having regard to the circumstances at the time, did the relevant TF81 personnel:
- (a) take all possible measures to search for the dead and wounded?
 - (b) provide medical care to the fullest extent practicable?

Part II: Our assessment of conduct during Operation Burnham

Approach

- [89] In this section we consider the “assessment made by NZDF as to whether or not Afghan nationals in the area of Operation Burnham were taking direct part in hostilities or were otherwise legitimate targets”.¹²⁷ As this emphasises, it is NZDF’s assessment *at the time of the relevant engagements* that matters.¹²⁸ In considering the propriety of that assessment, we must guard against allowing our consideration of the “on the ground” decision-making to be influenced by the outcome of the engagements (in other words, we must guard against “outcome bias”).¹²⁹

Engagement by the marksman at the overwatch position

- [90] We begin with the engagement by the marksman at the overwatch position because it was the only one ordered (as opposed to cleared) by the Ground Force Commander and carried out by TF81 personnel. Any breaches of International Humanitarian Law or the rules of engagement in relation to this engagement would therefore be clearly attributable to NZDF.
- [91] As discussed in chapter 5, the man killed in this engagement is likely to have been Abdul Qayoom, son of Sakhi Dad.¹³⁰ We have seen some information that indicates he may have been an insurgent, or at least armed on the night of the operation, although the information is limited. As far as we know, Abdul Qayoom was not on the JPEL and TF81 was unaware of his identity at the time. Accordingly, the question is whether, based on his conduct at the time, the engagement was consistent with the rules of engagement and International Humanitarian Law.
- [92] Following the engagements of men carrying weapons from the cache house, the Joint Tactical Air Controller (JTAC) received information that the insurgents may have been aware of the location of the ground forces. Shortly after this, one of the air assets told him that a “mover” was coming up the ridge from the north towards the overwatch position. In addition, the Ground Force Commander said in his evidence that he received information from the TF81 base in Kabul, where TF81 personnel were watching the drone footage, that an “insurgent” was coming up the ridge towards the overwatch position.¹³¹ The Ground Force Commander knew that an armed

¹²⁷ *Terms of Reference*, above n 1, cl 7.2.

¹²⁸ The relevant engagements are those carried out, ordered or cleared by NZDF personnel.

¹²⁹ “Outcome bias” has been defined as “the tendency to evaluate decisions in light of their outcome”: see Tomer Broude and Inbar Levy *Outcome Bias and Expertise in Investigations under International Humanitarian Law* (Melbourne Legal Studies Research Paper Series No 862, 26 November 2019) at 7.

¹³⁰ Chapter 5 at [67] and [97].

¹³¹ The drone was following the man’s progress.

group had been engaged further down the ridge and understood this person had broken away from that group. This understanding is supported by several summaries of the operation produced immediately after it, which record that the man had broken away from the group engaged by the AH-64 Apaches.¹³²

- [93] A supporting air asset followed the man's progress up the ridge and indicated his position to ground forces from time to time. The man was difficult to see due to the light conditions. One of the marksmen was able to view the figure advancing through his night vision sight, but only fleetingly every 50 metres or so. He could not determine whether the man was armed. The marksman was in regular dialogue with the Ground Force Commander. At 1.21am, when the advancing figure was within 50 metres of the overwatch position, the Ground Force Commander ordered the marksman to shoot the man. The marksman fired two shots. Both marksmen proceeded to search for the man and found him dead, having rolled 20–30 metres downhill.
- [94] The Ground Force Commander gave the order because he was concerned that the man was about to move into "dead ground" where he would not be visible to the marksmen, and could outflank the command group, thereby compromising their helicopter extraction site.¹³³
- [95] In considering the Ground Force Commander's assessment, both the general circumstances of the operation and the particular circumstances of the engagement must be taken into account. Beginning with the general circumstances, as we described in chapter 3, in his orders for the operation the Ground Force Commander undertook a risk assessment.¹³⁴ In that context, he referred to intelligence which indicated that the two objectives of the operation, Kalta and Neimatullah, were confident, that Kalta led 14–20 fighters and that Taliban fighters were visible in the area, walking about armed. The risk assessment also identified the possibility that insurgent reinforcements might come from the surrounding area. As soon as the helicopters arrived in the area, this risk assessment appeared to materialise, as the Apaches advised the Ground Force Commander that men with weapons were seen moving from Khak Khuday Dad up the side of the ridge, in twos or threes. Two men with weapons were also seen in close proximity to the assault force as it moved towards A1. As the pre-operation intelligence had indicated, then, there appeared to be a significant armed Taliban presence in the area.
- [96] Turning to the particular circumstances of the engagement, given the timing (shortly after the engagements near the cache building), the man's general direction of travel (climbing along and up towards the top of the ridge), and the advice received from Camp Warehouse (that the man was an "insurgent") and from the air assets (that the man was a "mover"), it was a reasonable conclusion that the man had come from the same general area where men had been seen with weapons. Like the armed men, he appeared to be moving towards high ground. The advice to the Ground Force Commander from personnel at Camp Warehouse that the man was an insurgent tended to indicate that they had observed him splitting off from the armed group, as did the advice from the air assets that he was a "mover".¹³⁵ By the time of the engagement, the man had been under observation by the air assets for over 20 minutes. The Ground Force Commander

¹³² Summary of Incident (Inquiry doc 02/10); 4x contacts during obj BURNHAM (Inquiry doc 02/08) at [3]; OP-RAHBARI-OBJ-BURNHAM-OPSUM (22 August 2010) (Inquiry doc 02/14) at [5].

¹³³ Inquiry doc 02/08, above n 132, at [3].

¹³⁴ Chapter 3 at [47].

¹³⁵ In fact, the air assets only began tracking the man when he was part way up the ridge. Given this, it is not possible to discern from the footage whether the man was part of that group. However, that assessment would not have been clear to the Ground Force Commander based on the communications he received. We accept that he was justified in thinking that the man had come from the group that the Apaches had previously fired on.

had been unable during that period to confirm whether or not the man was armed. The man's close proximity to the overwatch position meant there was an immediate potential threat to the command group if he was armed or had access to a weapon or weapons cache and became aware of their presence.¹³⁶ The Commander had to make a decision quickly or the marksmen may have lost sight of the man in the "dead ground" and been unable to take defensive action.

[97] On the other hand, the man was alone and the Ground Force Commander was unable to confirm whether or not he was armed (either from the air assets or the marksman who was monitoring the man).¹³⁷ It is unlikely the man would have been aware of the location of the overwatch position or the command group, and the drone footage showed no obvious signs that he was aware of their presence. His direction of travel may have been coincidental and he may simply have been fleeing the village (although the route he was following was odd if his objective was simply to leave the area).

[98] Although there are arguments either way and reaching a view is not straightforward, we consider that the Ground Force Commander's decision was justified in the circumstances as he understood them to be. The Ground Force Commander was operating in a challenging environment, based on information coming to him from a variety of sources. The risk he perceived was that the man would locate himself on high ground between the command group and the place where they were to be picked up by their helicopter. If the man had a weapon, or had access to a weapons cache, he would have been a threat to the group's ability to leave. That consideration, together with the apparent consistency of the man's behaviour with what the air assets had perceived shortly before (that is, men with weapons climbing the ridge behind the cache house) and the advice from Camp Warehouse and from the air assets, meant that the man could reasonably be perceived directly participating in hostilities and as threat to the safety of the command group, which needed to be addressed. In the particular circumstances, we consider that the Ground Force Commander did not have other viable alternatives.¹³⁸

Clearance of air asset engagements

[99] The Inquiry's focus is on the conduct of (and assessments made by) NZDF during the operation, not on the actions of the United States air assets (which are outside our jurisdiction).¹³⁹ The actions of the air assets were the subject of United States Army AR 15-6 investigation and were found to comply with applicable rules of engagement and tactical directive.¹⁴⁰

[100] As we have described in earlier chapters, the air assets were subject to their own rules of engagement and were not under the command or control of the TF81 Ground Force Commander. They were, however, there to support TF81's mission and sought to act in accordance with the Ground Force Commander's intent. To ensure that occurred, and to ensure friendly forces were not endangered by fire, they generally sought clearance from the JTAC to engage before firing.

¹³⁶ Although the man would not have had night vision goggles, the moon was almost full.

¹³⁷ As noted in chapter 4, our imagery and geospatial analyst was also unable to reach a conclusive view based on the video footage. He said it was possible the man was carrying a weapon slung over his shoulder, although, as also noted in chapter 4, the marksmen did not find a weapon when they checked on the man: see chapter 4 at [25] and footnote 28.

¹³⁸ It was suggested to us that the Ground Force Commander had alternatives such as calling for further monitoring of the man by the air assets, doing something in an effort to warn him off or at least questioning the air crews to get a better picture of what he was doing. In the circumstances as they were at the time, we do not agree that these were viable alternatives.

¹³⁹ *Terms of Reference*, above n 1, cls 7.1–7.2 and cl 9.

¹⁴⁰ Headquarters United States Forces—Afghanistan "Findings and Recommendations" *AR 15-6 Investigation—Tigiran Village* (30 September 2010) (Inquiry doc: United States Government FOIA release).

- [101] The primary concern of the JTAC and the Ground Force Commander when the air assets sought clearance to engage was to ensure ground forces were not put at risk. But they also considered, to the extent possible based on the information they had, whether the proposed engagement was consistent with the applicable rules of engagement¹⁴¹ and with International Humanitarian Law. While the rules of engagement applying to the air assets and the New Zealand rules of engagement may have differed, it was still necessary to comply with the principles of International Humanitarian Law. If clearance was sought for an engagement that the JTAC or Ground Force Commander suspected would not comply with International Humanitarian Law (for example, if the targets were civilians who were not directly participating in hostilities), the Inquiry considers they had a responsibility either to refuse clearance for that engagement, to seek further clarification, or to specify conditions on the clearance to ensure compliance. Although the operation was an ISAF one, it was New Zealand-led. NZDF personnel therefore bore some responsibility for ensuring, to the extent within their control, that any use of force in support of the operation was lawful and appropriate. We recognise they could not control the actions of other forces, but any requests they made would, presumably, have been persuasive.
- [102] As we have discussed, the Ground Force Commander and the JTAC were bound to comply by the principles of distinction, proportionality and precaution when clearing the air assets to engage. In considering those principles and making the necessary assessments, they had to rely on the information available to them, much of which came, of necessity, from the air assets (which were, in any event, bound by their own rules of engagement).

Engagements near Khak Khuday Dad

- [103] The Inquiry has concluded that the clearances of the engagements near Khak Khuday Dad, in which air assets targeted the men seen removing weapons from the cache house, were consistent with the rules of engagement and International Humanitarian Law.
- [104] As we discussed in some detail in chapter 5, the men seen removing weapons from the cache house were acting in a manner inconsistent with them being innocent civilians, irrespective of whether they were accustomed to ISAF operations. The air assets informed the Ground Force Commander and JTAC that these individuals had weapons and were moving to high ground. An apparently tactical response of this type was consistent with the intelligence TF81 had received before the operation, to the effect that Taliban fighters in the area were confident, walked around fully armed and had access to rocket-propelled grenades (RPGs) and PK machine guns.¹⁴² Further, the men were within firing range of TF81 personnel.
- [105] In those circumstances, it was reasonable for the Ground Force Commander to conclude either that the men had hostile intent and TF81 and/or CRU or other ISAF personnel were at risk of serious harm, or that the men were directly participating in hostilities. His clearance of the first engagement was conditional on weapons being confirmed and the individuals being clear of friendly forces and any collateral damage issues. Our understanding is that the Ground Force Commander saw these conditions as applying to the series of engagements that ensued near Khak

¹⁴¹ Our understanding is that the ISAF rules of engagement were largely relied on in this context, as they applied to both TF81 and the supporting air assets contributed by ISAF. The air assets would also have been subject to their own national rules of engagement (that is, United States rules of engagement). While the ISAF rules of engagement remain classified, the Inquiry has had access to them and can confirm that any differences between the ISAF and New Zealand rules of engagement would not affect the outcome of our analysis in relation to the clearance of the air asset engagements.

¹⁴² Inquiry doc 09/39, above n 114, at 31–32.

Khuday Dad. Each subsequent engagement in the area was also cleared by the JTAC once he was satisfied that ground troops would not be placed at risk. The JTAC gave clearance based on information he was continuing to receive from the air assets indicating that the targets were part of the same group that had been seen with weapons at the cache house (in respect of whom clearance to engage had previously been given).

- [106] The final engagement in Khak Khuday Dad presents the most difficulty. In it, the Apache helicopters targeted a man moving towards the building neighbouring the cache house, apparently injured and unarmed. There was a group of people including women and children sheltering behind the building on the side nearest to the man.
- [107] As we have said, it is outside our terms of reference to determine whether the air assets acted lawfully in conducting that engagement; what is important for our purposes is the knowledge and actions of NZDF personnel. The JTAC provided clearance for this engagement.¹⁴³ However, before doing so he was told that the man had a weapon. We consider he was entitled to rely on that information from the air assets. He had no reason to doubt it was correct, particularly given this was part of a series of engagements targeting armed men in the same area, and no other realistic means of confirming whether the man was armed. Further, there was some urgency to the situation. The man, if armed, would have presented an imminent threat to ground troops.
- [108] We are also satisfied, based on the evidence of communications between the air assets and the JTAC and our interviews with the JTAC and Ground Force Commander, that they were unaware the man was apparently injured. Furthermore, although the air assets did tell the JTAC (after he had provided clearance and the engagement was underway) that there was a group of five people next to a building approximately 200 metres from the ground patrol, we are satisfied that the JTAC did not appreciate the true nature of the situation. As we said in chapter 4, when interviewed by the Inquiry the JTAC had no recollection of being told about the huddled group.¹⁴⁴ In any event, he was not told that the group and the building they were huddled next to were in close proximity to the target. In light of the limited information available to the JTAC, we consider he had a sufficient basis for clearing the engagement and could not have been expected to intervene after the engagement had begun.

Engagements south of A3

- [109] The air assets were involved in two engagements south of A3. The first of those engagements was not cleared by the Ground Force Commander or the JTAC, and they were unaware of the engagement until shortly after it had occurred. As such, there is no issue about the conduct of NZDF personnel in relation to that engagement, and we do not need to consider it. The Ground Force Commander did, however, grant clearance for the second of the southern engagements, which was also the final engagement of the operation. As is apparent from the video footage available to us, that engagement targeted members of a group moving east up a ridge, more than a kilometre south of A3. In the engagement, four men were killed.

¹⁴³ This is recorded in a transcript of communications between the JTAC and the air assets in the AR 15-6 Report: "Exhibit 18" in Inquiry doc: FOIA release, above n 140, at 63.

¹⁴⁴ See chapter 4 at [18].

[110] Before providing our assessment of this engagement, it is important to make three points:

- (a) First, we reiterate the point made earlier that it is the Ground Force Commander's understanding of the position at the time he cleared the engagement that matters, and that understanding is most likely to be reflected in the contemporaneous material. Given the nature of operations such as Operation Burnham, a commander is likely to be making decisions based on information that is incomplete and sometimes confusing.
- (b) Second, the basis for the Ground Force Commander's clearance of the engagement was that the men were directly participating in hostilities: that is, that they were acting or preparing to act in a manner likely to adversely affect the operation.
- (c) Third, the context within which the engagement occurred is noteworthy. Several witnesses told us that, before the operation, they were aware of intelligence indicating that there was an insurgent training camp somewhere to the south of Naik and expected that reinforcements might come from that area. While troops were at A3, the drone began tracking a group of three people who were moving at speed up a valley southeast of A3 towards ground troops (although still some distance away). This was reported to the troops at A3, some of whom moved to the south of A3 as a blocking force to provide protection for the rest of the assault group. The Ground Force Commander said in evidence that the ground force set up the block because he was concerned that people were coming from the south, apparently armed, and were a threat to the ground troops, being in relatively close proximity to them.

[111] Around the same time as ground troops finished clearing A3, at approximately 2.10am, the three people moving up the valley reached the village about 500 metres south of A3. They stopped in the village for five minutes or so, where they met up with others to form a larger group. The group (now totalling eight people) then headed south out of the village and continued south along the valley floor. By about 2.25am, shortly before ground troops left A3, the group was about a kilometre south of A3. At that point the group began climbing up a hillside towards the east.

[112] It does not appear that ground forces at A3 were informed the group had stopped in the village or (later) that they had started moving south. Witnesses interviewed by the Inquiry who were positioned at A3 remained under the mistaken impression that possible insurgents were moving towards their position. This impression was shared by the Ground Force Commander at the time. A note that he prepared immediately after the operation described this engagement as follows:¹⁴⁵

... 8 MAMs [military age males] seen moving by foot N towards FF [friendly forces] along bottom of valley at speed. Suspected pos Villagers approaching due to fire. Stopped short then began to climb above FF on ridge to E [East]. FF withdrawn AC-130 stated pers manoeuvring in tactical manner. Delayed engagement until better able to confirm intent.

Tgt split into smaller parties and continued to climb. NE direction of route confirmed to take pers above FF A1 and overwatch of HLZ [helicopter landing zone]. Progress meant suspected INS would arrive in position prior to exfil. INS shown TTP [tactics, techniques and procedures] of using cache. Made decision to engage. Integrated engagement by AC-130 and AWT [air weapons team] on tgt. Did not engage all aircraft requested another engagement to eliminate movers, request denied due to threat neutralised.

¹⁴⁵ Inquiry doc 02/08, above n 132, at [4]–[5].

[113] This account indicates that the Ground Force Commander thought the group was further north than it in fact was, and was climbing towards the northeast.¹⁴⁶ It appears this was communicated to troops at A1 at the time, some of whom told the Inquiry they were sent up behind A1 to monitor the high ground towards the east for approaching insurgents. An operation summary prepared shortly after the operation indicates the same error. It records that as the assault force was preparing to leave A3, people began to infiltrate from the south.¹⁴⁷ It says:

A blocking position was established to interdict the pers infiltrating from the south but they manoeuvred around the high ground and were engaged by AC-130.

[114] Unlike in previous engagements near Khak Khuday Dad, the air assets did not positively identify the targets as insurgents, nor, on the material available to us, did they actively seek clearance to engage in the period immediately before the engagement. The JTAC initially requested that the air assets continue to monitor the group and advise if they were positively identified with weapons. The air assets were not able to confirm that the group had weapons or were moving towards a cache. Then, as the group was nearing the top of the ridgeline and the ground forces were about to make their way back towards their pick-up points for extraction, the JTAC told the air assets that the Ground Force Commander had cleared them to engage the group. Before they engaged, the air assets asked the JTAC if the targets had been “declared hostile”. Only when the JTAC confirmed that they had been did the air assets begin the engagement.

[115] It will be apparent that the “clearance” of this engagement was of a different nature to the earlier engagements. Usually, the air assets sought clearance to engage targets they had determined to be hostile and the Ground Force Commander granted that clearance (or declined to grant it), sometimes conditionally, based on advice from the air assets and any other available information. In this instance, the Ground Force Commander assessed the situation, determined that the targets were hostile and cleared the air assets to engage on his own initiative. In a technical sense, however, he was still “clearing” the engagement, as he did not have authority over the air assets and could not require them to engage. We therefore use the term “clearance” in the discussion below.

[116] Both the Ground Force Commander and the JTAC gave evidence that the engagement was cleared on the basis that the men posed a threat to the safe extraction of ground forces by helicopter, rather than because they posed an imminent threat to troops on the ground. This was against the background that at the outset of the operation the second CH-64 Chinook had been told to abort its landing initially, given the apparent insurgent activity in Khak Khuday Dad. Although the Ground Force Commander told us that his decision to clear the engagement was not based primarily on the group’s direction of travel but rather on the fact that the group was climbing towards high ground and the air corridor for the helicopters, he also said that his understanding of their direction of travel was relevant to his assessment. From his perspective, the fact that he understood that members of the group had broken off and were climbing to the north was important for two reasons. First, it meant that the men were moving towards the area of conflict, rather than away from it as might be expected if they were civilians. Second, the fact that the men were climbing presented a threat because, militarily, gaining elevation above an opposing force can make the position of the opposing force untenable.

¹⁴⁶ The Ground Force Commander seems to have realised his mistake within a day or two. A Summary of Incident provided to the ISAF Incident Assessment Team, which appears likely to have been drafted by the Ground Force Commander, records that the group was “massing on hill South East from compound A3”: Inquiry doc 02/10, above n 132.

¹⁴⁷ OP SUMMARY (Inquiry doc 02/03).

- [117] The targets of the final engagement were not known to be armed. Rather, the Ground Force Commander and the JTAC explained the reasons for the engagement by reference to the intelligence reporting indicating that insurgents in the area had access to heavy machine guns,¹⁴⁸ intelligence which appeared to be confirmed by what was seen to occur in Khak Khuday Dad as the first Chinook arrived. Previous experience in Afghanistan was that weapons capable of bringing down helicopters (such as RPGs and heavy machine guns) were sometimes kept on high ground ready for use against helicopters. The Ground Force Commander had been personally involved in an operation some years earlier in which a helicopter with troops on board was shot down in similar terrain, with significant loss of life. He was concerned that the group could be moving towards weapon emplacements and would pose a threat to the extraction of ground forces by helicopter, given the helicopters' likely evacuation route. By this stage, ground troops were preparing for pick up and there was some pressure to leave quickly before dawn (at which stage the helicopters—their only method of transport—would have to depart).
- [118] By way of summary, the Ground Force Commander based his decision to clear the engagement on the following information:
- (a) pre-operation intelligence indicating that (i) there was a significant insurgent presence in the villages; (ii) the insurgents had access to anti-aircraft weaponry; and (iii) insurgent reinforcements might well come up from the south;
 - (b) the air assets' observation of men removing weapons from the cache house then moving to high ground early in the operation, which supported the accuracy of the intelligence;
 - (c) his previous experience of a helicopter being shot down by insurgents in similar terrain;
 - (d) the fact that (consistently with the intelligence) a group of people, who were described to him as being military age males, had come up from the south towards the area of conflict on a path on the valley floor, had then made a sudden change of direction from their path along the valley floor by turning to move up to high ground and were, as the Ground Force Commander understood it (albeit incorrectly), climbing to the northeast towards the area of conflict; and
 - (e) the lack of any obvious innocent explanation for the behaviour of the men, who were described to him by the air assets as "moving tactically" and who were also (as he understood it) accessing a tactical position (that is, high ground, from which there was a risk that the evacuating helicopters could be engaged).
- [119] In addition, the JTAC said he recalled the Apaches carried out "shows of force" some time before the group was engaged. This involved flying low over the individuals at speed as a form of warning. The group hid when the helicopters flew overhead but then continued to move in what the JTAC described as a purposeful way, initially to the south then towards high ground, splitting into smaller groups as they climbed in a similar fashion to the men engaged above the cache house. The Ground Force Commander said he could not now recall whether the JTAC advised him of the shows of force and the men's reactions, but thinks it almost certain that he would have. Obviously, the fact that people take cover when two armed helicopters "buzz" them is not necessarily a sign that they are insurgents. However, the JTAC said that the men broke cover when the helicopters finished buzzing them and continued to climb the side of the ridge, which

¹⁴⁸ This reporting was summarised in the orders for the operation: Inquiry doc 09/39, above n 114, at 31–33.

is uncharacteristic of civilians. Moreover, as they did so, they dispersed. Both the Ground Force Commander and the JTAC said that dispersal in this type of situation is a well-known military tactic and was a tactic commonly used by insurgents in Afghanistan.

- [120] The Inquiry has viewed video footage of this engagement. It is clear from the footage that, consistent with the JTAC's evidence, the group split into pairs as they climbed the hill and hid when helicopters flew overhead. The men do not appear to show any specific signs of approaching a weapons cache or machine gun emplacement and the pairs travelled in slightly different directions, although that is consistent with use of the dispersal technique.
- [121] The JTAC may have had a better appreciation than the Ground Force Commander of exactly where the climbing men were located. His evidence indicated that he understood that the men were some distance away from ground troops to the south. Although the exact location of the final engagement may not have been clear to him, the JTAC was aware that the targets had gathered in the village south of A3 and had travelled further south for a time (rather than north) before climbing the ridge. In addition, the JTAC's communications with the air assets indicate that he knew the group was moving east (as opposed to north or northeast, towards ground troops).
- [122] We understand that part of the JTAC's role was to keep the Ground Force Commander informed of people's movements and any associated concerns, and to advise him on decisions regarding clearance of air asset engagements. Apparently, they had some discussion before the Ground Force Commander gave his clearance of the final engagement, although it is not now possible to reconstruct that. We also note that once the engagement began, the rounds would have been visible from the overwatch position, impacting across the valley, which would have indicated that the engagement was to the south of A3.¹⁴⁹ However, we are satisfied anything the Ground Force Commander might have seen then did not change his appreciation of the position. This is understandable given all that was happening at that stage of the operation and the Ground Force Commander's concern to ensure the safe extraction of the troops from what appeared to be a dangerous environment as soon as possible.
- [123] The engagement continued for about seven minutes and culminated in the use of a hellfire missile. The AC-130 estimated that four people were killed.¹⁵⁰ Following this, one further "mover" was identified but the JTAC asked the air assets not to engage the person as they no longer presented a threat.¹⁵¹
- [124] If we were to assess this engagement based on all the information now available to the Inquiry (in particular, the video and audio evidence to which we have had access), there is a significant question as to whether the Ground Force Commander could properly have cleared it. The men were climbing a ridge about a kilometre to the south of A3, so they were well away from the villages and the ground forces. There was no obvious indication that they were armed. While there was some intelligence about the targets of the operation having access to weapons that could threaten helicopters, it was relatively general. The Inquiry has had access to the relevant reporting and there is nothing in it to indicate that machine guns were being stored in that particular location, or even on hills around Tirgiran Valley more generally. On the other hand, we accept that the men's movements were puzzling. There is no obvious reason why, if they were innocent civilians, they

¹⁴⁹ We heard evidence that the general location of the engagement was apparent from the overwatch position once the firing began.

¹⁵⁰ Inquiry doc 02/14, above n 132, at 2.

¹⁵¹ Inquiry doc 02/08, above n 132, at [4]: "... aircraft requested another engagement to eliminate movers, request denied due to threat neutralised."

would have come up from the south and suddenly started climbing a ridge at night in the middle of an operation with air assets overhead in the dispersed way they were climbing. Moreover, in this scenario, it would have been relevant to consider whether there was some other action that the Ground Force Commander could have requested, such as continued monitoring (the group had already been monitored by air assets for almost an hour).

- [125] However, as we have said, what is relevant is what the Ground Force Commander reasonably understood the position to be at the time he gave clearance, not what is now known based on evidence not available to him at the time. His contemporaneous understanding is recorded in the note quoted at paragraph [112], as he confirmed to us. The Ground Force Commander said that the purpose of documenting things at the time was to ensure an accurate, contemporaneous explanation of events as they were then understood, given the possibility of later confusion resulting from the number of operations TF81 was involved in and the passage of time.
- [126] On the basis of the Ground Force Commander's contemporaneous understanding, we consider that the engagement was justified in terms of International Humanitarian Law and rules of engagement. It was reasonable for the Ground Force Commander to conclude that the men were directly participating in hostilities because the information available to him indicated that they were preparing to take action that threatened the success of the operation. If the men had been acting as he set out in his note, they could legitimately have been seen as presenting an imminent threat to the operation, particularly against the background of (a) the pre-operation intelligence that there were armed Taliban in the area, that they had weapons capable of bringing down helicopters and that reinforcements might appear, and (b) what was seen to occur during the operation, which was consistent with the intelligence. Although the men appeared unarmed as they travelled, they were understood to be moving towards an area of conflict and to high ground and there was an obvious risk that they would access a weapons cache once in the vicinity of the villages. The group's movements (as the Ground Force Commander understood them) were unlikely for civilians but were consistent with insurgents trying to achieve a tactical advantage. We are confident that in clearing the engagement the Ground Force Commander and the JTAC genuinely thought the men presented a threat to the ground force which was about to evacuate and were seeking to protect it. In short, we accept that the considerations identified at paragraphs [118] and [119] justified the granting of clearance.
- [127] Finally, we note that post-operation intelligence indicated that the men killed in this engagement were insurgents, albeit that the intelligence was by no means conclusive.¹⁵² This does not affect our analysis of the justification for this engagement, however, which must be based on the information available to the Ground Force Commander/JTAC at the time.
- [128] We repeat for the avoidance of doubt that our observations about this engagement are limited to the actions of New Zealand personnel. They should not be taken as suggesting that the United States air crew acted improperly in conducting the engagement. As we have explained, the air assets did not engage until the targets had been declared hostile. They would not have had access to all the sources of information available to the Ground Force Commander (such as intelligence received before the operation and information coming in from ground troops and personnel at Camp Warehouse). They informed the Ground Force Commander of what they were observing and acted on his assessment of hostile intent, which was legitimately reached, based on the totality of the information available to him at the time.

¹⁵² Chapter 5 at [73].

Property damage

[129] We have described the damage caused to buildings during Operation Burnham in chapter 5.¹⁵³ We also concluded there that none of the damage to property resulting from the operation was deliberate or motivated by revenge. We now consider the role of TF81 personnel in causing or contributing to that damage, and whether they acted lawfully.

Damage to buildings as a result of air asset engagements

[130] The Inquiry found no cause for concern about the actions of TF81 personnel in relation to the damage caused by air asset engagements. TF81 had no knowledge of the factors that contributed to that damage—that is, the proximity of two of the engagements in Khak Khuday Dad to buildings and the misaligned weapon on one of the Apache helicopters. The command group could not see where the rounds were landing from their location, and were unaware of any damage until after the operation. The Ground Force Commander had cleared the engagements on the basis that there were no collateral damage concerns. At no point during the engagements were the JTAC or Commander given reason to question that. In that situation they were entitled to rely on the air assets to make the necessary assessments.

[131] We emphasise that this should not be taken as a criticism of the air assets. The AR 15-6 investigation inquired into their actions. It determined that the air crew were also unaware of the damage at the time and had acted consistently with their rules of engagement.¹⁵⁴

Damage caused during entry to A1 and A3

[132] We also conclude that the damage caused by TF81 personnel when entering the objective buildings was permitted under the rules of engagement and International Humanitarian Law.

[133] Both A1 and A3 were legitimate military objectives. There was intelligence indicating that the buildings were used by insurgents—the accuracy of which was supported by the discovery of weapons and ammunition upon entry. The buildings were, therefore, making an effective contribution to military action. Their capture or neutralisation would also offer a definite military advantage to TF81. Securing entry to the buildings was a key aspect of the mission and was necessary to determine whether the targets were present. It would also serve as a warning to insurgents that the buildings were not safe locations to meet or store weapons, which would have the effect (at least temporarily) of disrupting insurgent operations in the area. This was borne out in practice: as noted in chapter 4, Neimatullah and Kalta fled to Pakistan shortly after Operation Nova.¹⁵⁵

[134] We are satisfied that TF81 took appropriate precautions prior to entering the buildings. Call outs were used to alert any occupants to the intended entry and provide an opportunity for civilians to leave safely.

[135] As we explained in chapter 4, explosive entry was used rather than entering through a door as it was generally safer for troops—if insurgents were present in the building they could well

¹⁵³ Chapter 5 at [116]–[149].

¹⁵⁴ “Findings and Recommendations” at 5–6, in Inquiry doc: FOIA release, above n 143, at 10–11.

¹⁵⁵ Chapter 4 at [52].

be waiting behind the door to shoot if entry was attempted. We accept that was appropriate. However, we questioned witnesses on whether the level of explosive charge at A1 was excessive, given it led to the collapse of a wall. While in retrospect a lesser degree of charge may have been adequate, we are satisfied this could not have been known to TF81 personnel at the time given the difficulty in determining how a particular wall was constructed (for example, its thickness). On balance, we consider the level of force used was the minimum necessary in the circumstances as they were known to TF81 personnel.

Failure to extinguish the fire at A3

[136] As we discussed in chapter 4,¹⁵⁶ the Troop Commander saw the beginnings of the fire when he was preparing to leave the area of A3 to move back to A1. He advised the Ground Force Commander of it but was told he did not need to do anything about it. This resulted, in part, from the Ground Force Commander's understanding about insurgent reinforcements coming from the south. We concluded that while a different decision could, in hindsight, have been made without undue risk to assault force personnel, the decision not to extinguish the fire was appropriate in the circumstances as the Ground Force Commander understood them to be at the time and was not motivated by a desire for revenge.

[137] We have already said that, in our view, TF81 personnel acted lawfully in using force to safely enter and clear the objective buildings. The fire in A3 was an incidental result of that (most likely caused by one of the flashbangs used to clear the building). The remaining question is whether there was an obligation on TF81 to attempt to extinguish the fire.

[138] Under International Humanitarian Law there is no obligation to minimise damage to military objectives (which we are satisfied A3 was). Further, while the rules of engagement did impose a "minimum force" requirement, provided that was met at the time of using the force, there was no additional requirement to minimise any resulting damage. On balance, we accept the decision not to extinguish the fire was lawful in the circumstances.

Detonation of weapons at A1

[139] As we have explained in chapter 5,¹⁵⁷ we consider the fire in A1 likely resulted from the detonation of weapons and ammunition outside (but in close proximity to) the building. It is clear that the destruction of the cache was justified: the weapons and ammunition were contributing to military action and their destruction would offer a concrete military advantage by diminishing the capacity of the insurgency to carry out attacks in future. Civilian casualties and damage to civilian property were unlikely, as A1 (a military objective) was used to shield the surrounding area from the impact.

[140] The remaining question is whether the level of force used was the "minimum necessary" as required by rule C. The degree of damage to A1—including the collapse of sections of the wall and roof where the explosion occurred—suggests the level of charge may have been greater than necessary. We questioned witnesses about this. Some indicated the explosion was larger than expected, although we heard mixed views on that. Taking everything into account, we are

¹⁵⁶ Chapter 4 at [33]. See also chapter 5 at [138]–[141].

¹⁵⁷ Chapter 5 at [126]–[134].

satisfied that the assessment made at the time about the level of charge required was a reasonable one in the circumstances. That is, it would not have been clear to those placing the charge that a lesser degree of force would have sufficed.

- [141] The explosion needed to be large enough to ensure that the weapons would be rendered useless. While the degree of damage to the building was significant, this was likely a result of the very close proximity of the detonation to the southern wall, as opposed to the explosion itself being excessive to achieve the objective. We are also satisfied that detonating the weapons close to the building was necessary to shield TF81 personnel and any villagers in the area from the explosion.

Failure to conduct battle damage assessment or render assistance before departing the site of the operation

- [142] The obligations to search for the dead and wounded to the extent possible and to provide assistance apply in respect of both civilians and combatants (or civilians directly participating in hostilities). TF81 had a medic with them during the operation, and the orders anticipated the medic would provide assistance in the event of civilian casualties.¹⁵⁸ In the event, the medic did not treat any non-TF81 individuals during the operation, because ground troops did not locate any of the apparent insurgents who were wounded in engagements and did not become aware of any possible civilian casualties until after the operation. The key question for the Inquiry is whether, in the circumstances, they ought to have searched for the dead and wounded.
- [143] TF81 was aware during the operation that individuals targeted in engagements (who they believed to be insurgents) were likely to have been killed or wounded. One of these was killed by a TF81 marksman. On that occasion, TF81 personnel did search for the man, but he was dead when they found him. International Humanitarian Law recognises a general duty to dispose of the dead in a respectful manner.¹⁵⁹ We accept, however, that this could not practically be done while the operation was in progress, especially in the context of a night operation where troops had to depart by dawn.
- [144] The other engagements were all conducted by air assets. No attempt was made by TF81 in the course of the operation to search for the dead and wounded as a result of those engagements. The reason for this was twofold: first, it would have placed troops at unnecessary risk; and second, in the case of the engagements south of A3, it would have been impossible in the timeframe given the remote location in which they occurred. We accept that there was no realistic way for TF81 to search for the dead and wounded from the southern engagements. The first of these engagements was arguably within a reachable distance (700 metres south of A3, in the valley), but by the time ground troops would have been in a position to depart from A3 to conduct a search, they had reports of people massing in the south. This would have made passing through the area a risky prospect. The second southern engagement occurred late in the operation, not long before troops were due to depart, over a kilometre south of ground troops and high up on a ridge. There was no time for ground troops to travel to the area before their extraction, even if they could have done so safely.

¹⁵⁸ Inquiry doc 09/39, above n 114, at 54; Accompanies OP RAHBARI ORDERS (Inquiry doc 09/38) at 41.

¹⁵⁹ Henckaerts and Doswald-Beck, above n 35, rule 115.

- [145] The engagements near Khak Khuday Dad present more difficulty. Ground troops had to pass near the area to get back to the helicopter landing zone for extraction. Accordingly, it has been suggested that it would not have been a significant detour to conduct a quick scan for any casualties in the area near the village. However, TF81 understood that there were armed insurgents in the area, so there was an obvious risk trying to conduct a search in or near Khak Khuday Dad. Moreover, TF81 personnel were not aware of the exact locations of the engagements, how near to the village they occurred, nor that civilian casualties were a possibility. Finding bodies on the hillside in the dark would likely have been unrealistic in the short time before extraction. In those circumstances, we consider the decision not to search the village was lawful.
- [146] We also note that some battle damage assessment was conducted by way of the drone, which continued to operate in the area until around 7am.