Government Inquiry into Operation Burnham and Related Matters

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1. Predetermined and offensive use of force

1.1. The main focus of this Inquiry is civilian casualties. However, there is also the subject of mistreatment of a prisoner and, our subject today, NZSAS troops in Afghanistan joining in the secret US military campaign of "kill-capture" missions. Known as targeted killing, kinetic strikes and extra-judicial killing – and more precisely in this Inquiry as the "predetermined and offensive use of force" – the tactic aimed to suppress the Afghan insurgency by tracking and killing the Taliban leadership, including medium- and low-level figures.

1.2. This approach is foreign to New Zealand values, of doubtful effectiveness (notably in the operations covered by this Inquiry) and also of dubious legality.

1.3. I will attempt to contribute to this question of legality.

1.4. Professor Akande ended his presentation this morning with the following words:

> *It is within the human rights law that a distinction may begin to be drawn between acts carried out in the context of active hostilities where there is sustained and concerted fighting and/or the state lacks effective territorial control (on the one hand) and security operations where there are no active hostilities (on the other hand). (pp.28-29)*

1.5. Those words are the starting point for what I have to say. They mean it may make a crucial legal difference whether the NZSAS troops were engaged in "security operations", meaning some kind of military policing role, or they were involved in "sustained and concerted fighting".

1.6. This question is directly relevant to this Inquiry because, in August 2010, the NZSAS applied for and got three local insurgents placed on the US military kill-capture list, the so-called Joint Prioritised Effects List or JPEL. Abdullah Kalta, Maulawi Naimatullah and Qari Miraj were three of the main insurgents suspected of being behind the fatal attack on a New Zealand military patrol earlier that month. They were targeted during Operation Burnham later in August 2010; Qari Miraj was captured in an operation in January 2011; and Abdullah Kalta and two other insurgent suspects were killed in targeted attacks later in 2011 and in 2012.

1.7. These could seem like clear examples of the JPEL system being used, but it is much less clear than it appears.

1.8. The key question is that raised by Professor Akande is: what kind of operations were these and what international law applies?

2. Hostilities paradigm vs law enforcement paradigm

2.1. The difference between "security operations" and "sustained and concerted fighting" is similar to the difference discussed in international law writing between use of force in a law enforcement paradigm and in a hostilities paradigm. Professor Akande notes this idea but says he does not think it illuminates the problems. However, when we look at the particular nature on the operations being considered by this Inquiry, the dichotomy seems helpful and highly relevant.

2.2. The law enforcement paradigm-hostilities paradigm idea has been developed by international law academic Nils Melzer (currently the United Nations Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment). His book *Targeted Killing in International Law* argues that the "hostilities paradigm" covers the targeted killing, as an integral part of the conduct of hostilities, of any person "not entitled to protection against direct attack"; meaning a combatant or a civilian directly participating in hostilities. All other targeted killings, whether at home or abroad, are governed by the "law enforcement paradigm". I spoke to a New Zealand human rights professional who had worked in Afghanistan and she said Melzer's *Targeted Killing in International Law* was the main text she and her colleagues referred to on this subject.

2.3. Melzer writes that a targeted killing within the law enforcement paradigm must have a legal basis in domestic law, be preventative rather than punitive, have protecting human life from unlawful attack by the target as its exclusive purpose, "be absolutely necessary in qualitative, quantitative and temporal terms for the achievement of this purpose", and be the undesired outcome of an operation planned and conducted to minimise recourse to lethal force. In contrast, a targeted killing within the hostilities paradigm must be "likely to contribute effectively to the achievement of a concrete and direct military advantage without there being an equivalent non-lethal alternative".

2.4. He concludes that law enforcement operations need to be planned and conducted

with the constant aim of avoiding the use of even potentially lethal force. Therefore the intentional, premeditated, and deliberate deprivation of life characteristic of a targeted killing is nearly always – though not invariably – irreconcilable with the human rights law framework under the law enforcement paradigm.[1]

2.5. In short, the types of force that are legitimate and legal, according to Melzer, including targeted killing, depend on the context, including whether it is all-out fighting or law enforcement-style security operations.

2.6. Professor Akande's paper references an ICRC Experts Meeting report called "The Use of Force in Armed Conflicts: The Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms" (2013). It addresses the question of which of these paradigms should be applied to what circumstances. Some of the unidentified experts said that, in deciding the appropriate legal paradigm to use, one should identify the rules having the (quote) "greatest common contact surface area" with the facts.

2.7. When we look at the facts of most NZSAS operations in Afghanistan at that time, including against JPEL-authorised target people, the greatest common contact surface area is with the law enforcement paradigm.

3. The nature of the operations under investigation

3.1. Indeed, what we find, when we look at the detail of the NZSAS operations (including the ones covered by this Inquiry) is that most of them were literally like law enforcement operations.

3.2. The documents declassified by the Inquiry on Operation Burnham and the operation to capture Qari Miraj (eg documents 06/06 and 06/04) state that the operations were what they called "Deliberate Detention Operations". Deliberate Detention Operations are a distinctly different process, practically and legally, to JPEL. There were actually two different and not very compatible systems in play at once.

3.3. When Operation Burnham troops flew into the Tirgiran Valley on a Deliberate Detention Operation, which is what their planning documents called it, they took with them arrest warrants for the named insurgents issued by the Ministry of Interior of the Afghan Government. If any of the named insurgents were located, the plan was that they would be formally arrested by the Afghan police commandos and

1 Nils Melzer, "Targeted Killing in International Law", Oxford University Press, Oxford, 2008; summarised by William Abresch, European Journal of International Law.

delivered into the Afghan judicial system. Once in the judicial system, evidence would be placed before a court by Afghan prosecutors and an Afghan judge would decide whether they should be punished by imprisonment.

3.4. At the same time, there was also a JPEL side the mission. But the point now is that the primary mission was occurring under the authority and laws of the Afghan Government.

3.5. It was the same again with the capture of Qari Miraj five months later. That was also called a Deliberate Detention Operation. There was a Ministry of Interior warrant for Qari Miraj's arrest and Qari Miraj was later convicted in court under Afghan law and given a prison sentence. In other words, it was primarily an operation under Afghan law.

3.6. When the then Minister of Defence Wayne Mapp and Chief of Defence Force Jerry Mateparae visited the NZSAS troops in August 2010, they were given a briefing on the NZSAS operations. This briefing has been declassified by the Inquiry as document 06/05. The briefing covers two NZSAS areas of activity:

3.6.1. Mentoring and training of the Afghan Crisis Response Unit; and

3.6.2. "Detention Operations".

3.7. The detention operations were described to the minister and CDF as follows:

> Current TF81 SOP is to not assist in conducting a detention operation without an arrest warrant signed by an MOI prosecutor who is satisfied that there is enough evidence to judicially prosecute an individual.

3.8. The briefing also said:

> IAW GIRoA [Government of Islamic Republic of Afghanistan] criminal law only a state prosecutor or a judge may issue an arrest warrant.

3.9. In other words, the SAS presenter(s) assured the minister and the chief of defence force that they conducted their operations strictly under the auspices of the Afghan government judicial system. JPEL was not mentioned at all in the section of the briefing on detention operations.

3.10. The briefing includes an example of a "Warrant of Arrest" for a "GIRoA / ISAF Partnering Operation". It reads, "This arrest warrant is served on the above named person for suspicion of terrorist activities within the Islamic Republic of

Afghanistan". Note that the warrant is for the very serious offence of terrorist activities – ie it is about insurgent activities – but nonetheless it is about arresting not killing and only claims "suspicion" of these crimes, since the guilt would need to be decided by a court (not New Zealand and US intelligence officers).

3.11. The NZDF Narrative prepared for this Inquiry added some detail to this picture. It said:

> The NZSAS contingent in Afghanistan, amongst other responsibilities, carried out approximately 56 operations in eleven months from October 2009 to the beginning of August 2010. These operations had the purpose of assisting the Afghan Government and CRU to disrupt or apprehend known Taliban or other insurgents leaders. Of the many operations planned around particular persons ('objectives'), more than half of the operations resulted in the detention of 75 persons by Afghan partners.... In the vast majority of the operations... the NZSAS did not fire a single shot to achieve their objectives.

3.12. Again: "these operations had the purpose of assisting the Afghan Government and CRU"; "more than half the operations resulted in detention of 75 persons by Afghan partners". Even though they are playing down the NZSAS's role in the detentions (to play down New Zealand responsibility for the detainees) there is a clear picture about the legal framework that applied; ie an Afghan government legal framework.

3.13. The NZSAS did some operations in Afghanistan that definitely involved full-on fighting. That was the hostilities paradigm. But as these sources show the vast majority of operations were assisting Afghan Government processes and did not involve a single shot being fired.

3.14. So, where do JPEL kill-capture missions fit into this? The answer seems to be that the legal situation was incoherent. A judicial process for dealing with insurgents and the JPEL system do not sit easily together. This is the kind of incoherence made possible by secret operations.

3.15. On a single mission, including for instance Operation Burnham, the NZSAS was supposed to arrest named people under an Afghan government warrant but also had sought permission from the ISAF commanders to kill or capture them.[2]

2The incoherence of having Afghan arrest warrants and JPEL kill/capture authorisations covering the same operations was, in part, the result of a more fundamental incoherence in Afghanistan at that time. Afghanistan was supposedly being run by a sovereign government, with police, laws, courts and so on, where insurgents were criminals to be arrested and imprisoned. But at the same time US-led forces were running a semi-autonomous war, separate from ISAF, under the auspices of Operation Enduring Freedom and the CIA was running its own largely autonomous war as well. Declassified document 06/14 states that the NZSAS was assisting operations of three main types:

3.16. Declassified document 07/11, written by the NZSAS Senior National Officer in Afghanistan ten days before Operation Burnham, said the SAS staff were "making plans to effect a Kill/Capture on the INS [insurgents] responsible for the IED attack on the NZPRT," including "narrowing down the target set and working through JPEL packs on Key INS". There was no mention of Afghan government warrants and judicial processes. The SAS commander said someone (named redacted) was "very keen to assert an offensive posture and not to be seen as impotent or backing down from the INS"; and, he wrote, "we are more than willing to help". This was exactly the wrong attitude for NZSAS forces heading into a civilian villages.

3.17. None of the declassified operational documents include any guidance on how to reconcile the two different instructions and sources of authority: Afghan judicial and JPEL. The answer isn't that they could kill when it was required in self-defence, because the troops were already permitted to do that under their ROE and international law without any kill-capture designations.

3.18. Digressing for a moment, it is also worth noting that the supposedly rigorous ROE were not, in practice, rigorous. The new US military investigation documents declassified since the last hearing reveal that during the pre-operation brief for Operation Burnham (quote) "it was stated that anyone leaving the objective was declared hostile" – and that is how the New Zealand and US troops acted. This is the same sort of unlawfully loose licence to kill as JPEL.

3.19. Legal advice written during the NZSAS deployment by NZDF's Director General of Defence Legal Services, Kevin Riordan (declassified document 06/09), highlights the incoherence. He wrote that "it is important to note that the people picked up by the CRU [meaning with NZSAS assistance] are actually arrested pursuant to an arrest warrant issued by the Attorney General of Afghanistan [and] so enter the Afghan judicial system from the outset". Then he wrote:

> Because the arrest warrant is issued to the CRU, NZDF staff have no legal power to conduct the arrest. They also have no authority to interfere with the judicial system. (emphasis added)

3.20. Clearly, it would interfere with the judicial system if they kill the suspects named on the warrants, based on JPEL authorisations.

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a. ISAF-led /ANSF [Afghan National Security Force] partnered;
b. OEF/OGA led, with ANSF partner (where the initials OGA refer to the CIA); and
c. ANSF-led.

3.21. Looked at this way, the factual situation is very consistent with a law enforcement paradigm – indeed it is a law enforcement regime. It therefore makes sense primarily to apply international human rights law.

3.22. If Professor Akande had been given, as his hypothetical JPEL scenario, these assisted Afghan government detention operations – with the Afghan Ministry of Interior warrant, Afghan judicial processes and all – he may have reached a similar conclusion.

3.23. Indeed, it appears the Inquiry was wondering about this point when it asked in Minute 17: "What is the relevance of any involvement of the Afghanistan government in the process of compiling and using JPEL? For example, what difference would it make to the analysis if JPEL targets were the subject of arrest warrants issued by the appropriate Afghan authorities?"

3.24. The answer to this, according to the analysis here, is that you can't sensibly or lawfully have it both ways.

3.25. This is the reason for distinguishing between a hostilities paradigm and the law enforcement paradigm. The hostilities paradigm applies to situations where two sides are engaged in sustained combat and primarily International Humanitarian Law applies. The law enforcement paradigm covers situations without sustained conflict where primarily the troops are in a law enforcement-support role. There may be occasions of sustained conflict where the LOAC/IHL are applicable. However, largely the right to life obligations of International Human Rights Law should apply.

3.26. In that case, as Melzer wrote, the use of potentially lethal force must have a legal basis in domestic law, be preventative rather than punitive, have protecting human life from unlawful attack by the target as its exclusive purpose, "be absolutely necessary in qualitative, quantitative and temporal terms for the achievement of this purpose", and be the undesired outcome of an operation planned and conducted to minimise recourse to lethal force. That is not the JPEL system.

3.27. We should also remember that deciding to use targeted killing as a tactic has consequences, including of course when it ends up being civilians killed and injured as well as, or instead of, the designated people – as happened repeatedly in Afghanistan and happened during Operation Burnham. These predictable effects have international law implications. Choosing to capture rather than kill reduces

civilian casualties, which relates to the law of precaution.

3.28. The incoherence of JPEL killings is reinforced by the fact that New Zealand troops were required to use "Minimum Force", which means using only the minimum force required to achieve the military objective. It is a good question whether that is consistent with the JPEL kill-capture designations.

3.29. When Qari Miraj was captured by the NZSAS and local forces, his crimes still had to be proven in court and then he was put in prison. However, under JPEL he could just have been killed as soon as he was located. If he hadn't been staying the night in a mosque, that might have been what happened. That's what happened later to other NZDF JPEL targets. There is no moral or legal consistency.

3.30. As noted, the 2010 Operation Burnham and the 2011 capture of Qari Miraj were conducted against people designated as JPEL targets. The other JPEL operations relevant to this Inquiry occurred later in 2011 and in 2012: the lethal attacks on three suspected insurgents as described on pages 91-93 of *Hit & Run*. They were a man named Alawuddin killed in his garden on 20 May 2011; a prominent local Taliban man named Qari Musa killed with several other people in a US air strike on the house where he was staying on 23 May 2011; and Abdullah Kalta, one of the original Operation Burnham JPEL targets, killed in an air strike on 21 November 2012. All were suspects for the 3 August 2010 attack on the New Zealand patrol.

3.31. Declassified document 07/07 adds some important information on this subject. The document is an email sent to various relevant NZDF intelligence staff by the officer in command of the NZDF intelligence centre located at Burnham Camp on 8 May 2012.

3.32. By that time the NZSAS had ended its deployment to Afghanistan and the Provincial Reconstruction Team was counting down the months before it left for ever as well. New Zealand's major deployments to Afghanistan were coming to an end. However, at this point, the document shows, the Provincial Reconstruction Team officers decided to seek JPEL kill-capture designations for more of the insurgents in their region. The OC of the Burnham Intelligence Fusion Centre questioned the point of applying for the JPEL designations.

3.33. First he noted that (quote) "NZPRT is a relatively non-kinetic AO [Area of Operations]" and that (quote) "If key INS within the NZ AO are not actually

conducting kinetic events it is hard to justify a JPEL". Which leads him to his main question:

> To the best of my knowledge NZPRT can't detain, capture or have kinetic effect on any INS [insurgents], therefore: What is the effect CRIB [the provincial reconstruction team] is seeking to achieve by continuing [to] submit JPEL's, especially with the announced CRIB withdrawal and no NZ SOF element (that could action JPEL)?

3.34. It was a good question. It is not clear if the JPEL applications went ahead. However, the JPEL action continued later that year when Abdullah Kalta was killed by the air strike, by then only a short time before the New Zealand troops permanently left Afghanistan.

3.35. The declassified documents do not reveal whether Afghan arrest warrants were sought for the 2011 and 2012 JPEL targets who were killed – it would be good for the Inquiry to clarify this – but bombs don't try to arrest suspects. NZDF was clearly responsible for these deaths after pushing for the JPEL authorisations. They can't say it was the Afghan government. The suspects were people who could potentially have been arrested – by watching and waiting for the right time as with Qari Miraj – but NZDF opted to for extra-judicial killings.

3.36. It is also noteworthy that New Zealand troops in Afghanistan very rarely applied for JPEL designations. They did this for a Bamiyan province Taliban leader named Mullah Borhan; but he was arrested in August 2009 and tried and imprisoned according to Afghan government judicial processes. The NZSAS (TF81) arranged for another insurgent suspect to be added to the JPEL list in April 2010, someone designated Objective Mordor, although the JPEL list recorded that it was only for (quote) "Intel Collection. Kinetic Action or Capture Prohibited" (H&R p. 26). Recall also the NZDF quote about how "In the vast majority of the operations... the NZSAS did not fire a single shot to achieve their objectives".

3.37. Thus, the five people covered by this Inquiry were rare exceptions. So, for the three later 2011 and 2012 targets, why, after avoiding offensive operations for nine years and as the end of their deployment approached, did the NZDF opt for placing them on the secret kill lists, compiled and executed in secret and with no due process?

3.38. This was New Zealand that is opposed to the death penalty. The JPEL designations were arranged by provincial reconstruction team staff who were not even supposed to be doing offensive operations. It was also occurring in an unusually peaceful part of

the country, effectively under a law enforcement paradigm, where Afghan government arrest operations were safer and more viable than in most of the country.

3.39. In conclusion, a collection of factors coincide: the legal implications of a law enforcement paradigm, the incompatibility of JPEL with the Afghan legal and judicial system, the additional risks of civilian casualties, the requirement to use minimum force and the uncomfortable similarity to a death penalty. They all argue that, at least on the occasions being considered by this Inquiry, it was legally unsound and morally wrong for the New Zealand military to use the JPEL kill-capture regime.