

UNDER

THE INQUIRIES ACT 2013

IN THE MATTER OF

**A GOVERNMENT INQUIRY INTO
OPERATION BURNHAM AND
RELATED MATTERS**

Date of Minute: 27 March 2019

MINUTE No 13 OF INQUIRY

Introduction

[1] This minute sets out the features of the third of the Inquiry's planned public hearings (Module 3) that will take place in Wellington on 29 and 30 July 2019. Module 3 has an emphasis on the applicable law. First, it will cover the legal tests relating to the Law of Armed Conflict and International Humanitarian Law that arise under the Inquiry's Terms of Reference. Secondly, it will cover issues that arise from operations involving the predetermined and offensive use of force. These are capture or kill operations, involving the use of the Joint Prioritised Effects List (JPEL).

[2] For the avoidance of doubt, nothing in the public presentations, or in material prepared for them, should breach the Government's Protective Security Requirements.

Applicable international law

[3] Two expert witnesses will appear at Module 3. They will provide written reports (which will be published on the Inquiry's website at least one month in advance of the hearing) for consideration at the hearing. The first of these is Professor Emeritus Sir Kenneth Keith QC, a former Judge of the International Court of Justice. The second expert is Professor Dapo Akande of the University of Oxford.

[4] Professor Keith will deliver a presentation at the hearing on the international legal framework. The advice will cover the applicable sources of law, including International Humanitarian Law, International Human Rights Law, customary international law and the United Nations Charter. He will explain the role and impact of United Nations Security Council resolutions.

[5] Among the items Professor Keith will cover are the following:

- (a) Law of distinction.
- (b) Law on proportionality.
- (c) Law on precaution.
- (d) Law on humane treatment of persons who are not directly taking part in hostilities.
- (e) The application of the relevant provisions of the 1949 Geneva Conventions to the situation in Afghanistan and the additional Protocol to the Convention.

[6] The legal analysis will deal with such matters as the obligations on combatants in non-international armed conflict, the duties to avoid civilian casualties, the requirements to render aid to the injured, including medical care and attention, and the checks and balances on the use of lethal force.

[7] Many of the topics dealt with by Professor Keith will also be relevant to that part of the hearing dealing with JPEL.

[8] Professor Keith's presentation will be followed by the Crown agencies (Department of the Prime Minister and Cabinet, New Zealand Defence Force, Ministry of Foreign Affairs and Trade) which will have an hour to present their joint view on the applicable law.

[9] Following the Crown agencies' presentation, the non-government core participants will share two and a half hours to make their legal submissions on the issues. They will have received the Inquiry's expert material well in advance of the hearing. Those submissions should be presented to the Inquiry in writing on the day and spoken to in an oral presentation.

Expert presentation on Joint Priorities Effects List

[10] At the beginning of the second day of Module 3, Professor Dapo Akande, Professor of Public International Law and Fellow of Exeter College at the University of Oxford, will deliver a presentation on the legal issues involved in the predetermined and offensive use of force. The Inquiry has sought Professor Akande's expert view on the international law issues that arise from the use of the JPEL to capture or kill insurgents in the context of non-international armed conflict.

[11] The broad topics that Professor Akande will consider include:

- (a) the applicable law with respect to JPEL and what constitutes lawful authority for the conduct of such operations;
- (b) the requirements the law imposes on the planning of JPEL operations, including the means by which individuals are placed on the list; and
- (c) The implementation of JPEL operations.

For each of these topics, Professor Akande will consider a number of supplementary questions.

Hypothetical JPEL scenario

[12] In order to give some context to the discussion of the issues, the Inquiry considers it would be useful to take a hypothetical fact situation, as other bodies

which are required to consider sensitive issues have done.¹ The hypothetical is drafted so as to enable analysis to focus on the legal principles at issue. Accordingly, in a factual sense the hypothetical is anodyne, in that it assumes a set of facts in which no misjudgements or errors have been made by the responsible authorities. As a result, the hypothetical is not intended to reflect the facts of Operation Burnham as the Inquiry has not yet reached a view about what actually happened in relation to that operation. Against that background:

Imagine the New Zealand deployment in Bamyán Province after a long period of comparative peace has been the subject of violent attacks by insurgents through Improvised Explosive Devices, rocket-propelled grenades and shootings. Casualties have resulted. It is decided that the security situation has deteriorated, and action needs to be taken to restore order so as to provide some tranquillity for the local population and protection for the deployment.

Assume there is intelligence available as to the identity of the leaders of the insurgents who have conducted the attacks and the fact that they are planning to carry out further attacks.

Assume further that it is decided that the identified insurgents should be placed on the JPEL and that operations should be mounted to kill or capture them whenever the opportunity arises.

[13] Professor Akande's presentation will be followed by the New Zealand Defence Force (NZDF), which will have one and a half hours to present its legal view on JPEL, and in particular, in reference to the Afghanistan conflict. Those submissions should be presented to the Inquiry in writing on the day of the hearing and spoken to in an oral presentation.

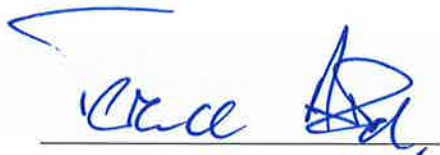
[14] Following the NZDF presentation, the non-government core participants will share two and a half hours to make their legal submissions on the issues. They

¹ For example, this approach has been adopted by the Investigatory Powers Tribunal (UK) (*Frank-Steiner v The Secret Intelligence Service* (26 February 2008, IPT/06/81) at [5]).

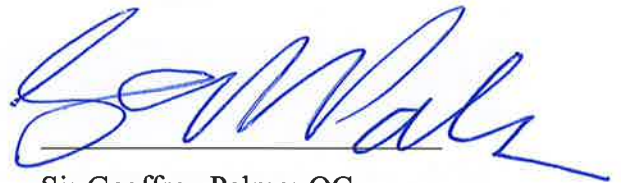
will have received Professor Akande's material well in advance of the hearing. Those submissions should be presented to the Inquiry in writing on the day and spoken to in an oral presentation.

[15] As with other Modules, the core participants will be able to file written submissions in response within two weeks of the conclusion of the Module.

[16] Attached is a timetable for the hearing.

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

Sir Terence Arnold QC

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

Sir Geoffrey Palmer QC

Parties:
Mr McLeod for the Afghan Villagers
Mr Radich QC for New Zealand Defence Force
Mr Hager
Mr Salmon for Mr Stephenson



Government Inquiry into Operation Burnham Public Hearing 3 - Agenda

Venue: Mercy Conference Centre, 15 Guildford St, Thorndon, Wellington

Day 1 - Monday 29 July 2019

Time	Content	Presenter	Dur
1000-1010	<p>Opening remarks</p> <ul style="list-style-type: none"> • Objectives of Hearing 3 • Key issues to be discussed and why they matter 	Inquiry Chair	10 mins
Topic 1 – The Legal Framework			
1010-1140	<p>Expert presentation on applicable law</p> <ul style="list-style-type: none"> • Legal framework (application / intersection of International Humanitarian Law (IHL), International Human Rights Law, United Nations Charter, Customary International Law, domestic law) • Role and impact of United Nations Security Council resolutions • Law on detention (to extent not covered in Hearing 2) under IHL, Convention against Torture, other relevant law • Law of distinction • Law on proportionality • Law on precaution • Law on humane treatment of non-Direct Participation in Hostilities 	Emeritus Professor Sir Kenneth Keith ONZ, QC, former Judge of the International Court of Justice	1.5 hours
1140-1155	Adjournment		15 mins
1155-1255	<p>Crown agencies joint presentation</p> <ul style="list-style-type: none"> • Legal issues on the applicable law on points above with reference to the expert view 		1 hour
1255-1355	Lunch		1 hour

1355	Non-government core participants presentation <ul style="list-style-type: none"> Legal issues on the applicable law on points above with reference to the expert view 		2.5 hours
1355-1455	Presentation	Counsel for Jon Stephenson	1 hour
1455-1555	Presentation	Counsel for Afghan Villagers	1 hour
1555-1610	Adjournment		15 mins
1610-1640	Presentation	Nicky Hager	30 mins
1640	Closing remarks	Inquiry Chair	5 mins

Day 2 – Tuesday 30 July 2019

Time	Content	Presenter	Dur
1000-1005	Opening remarks	Chair	5 mins
Topic 2 – Predetermined and offensive use of force			
1005-1135	<p>Expert presentation on Joint Priorities Effects List (JPEL) JPEL includes the deliberate use of lethal force against an individual who has been specifically identified in advance as a target to be captured or killed.</p> <ul style="list-style-type: none"> What are the legal principles relevant to the way in which JPEL was compiled and used? Is the use of JPEL justified, in principle, in an insurgency such as existed in Afghanistan? 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? 	Professor Dapo Akande, Oxford University	1.5 hours
1135-1150	Adjournment		15 mins

1150-1320	<p>NZDF presentation</p> <ul style="list-style-type: none"> • A general description of the process by which people were placed, and kept on, the JEPL during the NZDF deployment in Afghanistan. • How the policy applied in practice – how the NZDF trained and operated in relation to this issue. • The specific legal principles relevant to targeting and the JEPL process • How does the concept of “direct participation in hostilities” work? • What is the relevance of any involvement of the Afghanistan government in the process of compiling and using JEPL? For example, what difference would it make to the analysis if JEPL targets were the subject of arrest warrants issued by the appropriate Afghan authorities? How would this impact on the use of the JEPL targeting process? • A description of any checks or safeguards employed in relation to operations carried out on the basis of JEPL against specific targets. 		1.5 hours
1320-1420	Lunch		1 hour
1420	<p>Non-government core participants presentation</p> <ul style="list-style-type: none"> • With reference to the expert view 		2.5 hours
1420-1520	Presentation	Counsel for Jon Stephenson	1 hour
1520-1620	Presentation	Counsel for Afghan Villagers	1 hour
1620-1635	Adjournment		15 mins
1635-1705	Presentation	Nicky Hager	30 mins
1705	Closing remarks	Inquiry Chair	5 mins