UNDER THE INQUIRIES ACT 2003

IN THE MATTER **A GOVERNMENT INQUIRY INTO OPERATION BURNHAM AND RELATED MATTERS**

Date of hearing: 30 July 2019, commenced at 10am

TRANSCRIPT OF PROCEEDINGS

I N D E X

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TOPIC 2 - PREDETERMINED AND OFFENSIVE USE OF FORCE

EXPERT PRESENTATION ON JOINT PRIORITISED EFFECTS LIST (JPEL) BY PROFESSOR DAPO AKANDE, UNIVERSITY OF OXFORD

SIR TERENCE: Good morning, everybody. We will resume the hearing, beginning with professor Akande.

PROFESSOR AKANDE: Good morning. It is an honour to be asked to address the Inquiry and I begin by expressing my thanks to the Inquiry members for inviting me. I also would like to convey my deep appreciation to the Inquiry staff for how well they've looked after me since I arrived in New Zealand.

I have been asked to provide an expert opinion on the international law issues arising from the use of the Joint Prioritised Effects List (JPEL) to identify insurgents who could be killed or captured in the non-international armed conflict in Afghanistan in 2010-2012. In particular, I have been asked to advise on the international legal principles and rules that govern predetermined and offensive use of force against identified individuals in the context of that armed conflict.

It has been reported that the JPEL is a list of individuals that coalition forces in Afghanistan were authorised to capture or to target with lethal force. In other words, to place a person on the list opens up the possibility that the individual in question may be subject to a targeted killing, a targeted killing being

defined by me for this purpose as a predetermined and offensive use of lethal force against an individual who was identified in advance of the operation and specifically selected as being liable to have such force used against him or her.

Now, whether a targeted killing is lawful as a matter of international law will depend on a number of considerations. In the first place, it will depend on the law that is applicable to such an operation. And there are two bodies of international law that are potentially applicable in determining whether a State can subject an individual to lethal force in the context of an armed conflict such as that which the New Zealand Defence Force were engaged in in 2010. First of all, there is the Law of Armed Conflict which is also referred to as International Humanitarian Law (IHL). That is the law that is specifically designed to govern the conduct of participants in an armed conflict. Secondly, it is possible that International Human Rights Law (IHRL) applies in the context of an armed conflict, and, if so, the State would be bound to respect the right to life of individuals. I will consider what these bodies of law provide for, the extent to which they apply in a situation of armed conflict such as existed in Afghanistan, and the relationship between them.

The first part of the opinion will provide an overview of the rules relating to targeting that are contained in IHL. After setting out the basic rules with regard to who may and may not be targeted as a matter of IHL, Part I will consider the precautions which ought to be taken in making those determinations, before engaging in a more extensive discussion of who is and is not a civilian in a non-international armed conflict. In this

part of the presentation I will consider the criteria for determining membership of an organised group and examine the notion of direct participation in hostilities. And with regard to the latter, that is direct participation in hostilities, I will consider both the material and the temporal dimensions of direct participation in hostilities, i.e, what amounts to direct participation in hostilities, and how should it be considered that a person is taking such a direct part in such hostilities? And the last two sections of the first part of the presentation apply the relevant principles of IHL to the hypothetical scenario that was provided for in my brief and consider whether IHL requires a "capture rather than kill" approach.

In the second part of the presentation I consider the application of Human Rights Law in the conflict in Afghanistan, and there I examine three critical questions. First of all, does Human Rights Law apply in armed conflict situations? Secondly, do human rights Treaty obligations apply extraterritorially? And thirdly, what is the relationship between IHL and International Human Rights Law? And I conclude with a brief examination of Human Rights Law and targeted killings in armed conflict.

So, to the first part that deals with IHL. IHL applies to armed conflicts. In my written presentation I have a quote from the International Criminal Tribunal for the former Yugoslavia which defines armed conflict and I propose not to read that out.

As the ICTY suggests in that quote, it is important to distinguish between a conflict between States (an international armed conflict) and between a state and a non-State group or between non-State groups (a

non-international armed conflict). And this distinction is important because the rules of IHL that apply in an international armed conflict are sometimes different from those applicable in a non-international conflict. I think it's common ground that the conflict in Afghanistan in 2010 was a non-international armed conflict. This is because it was a conflict between: the Government of that State and coalition partners including New Zealand on the one hand, and insurgent groups on the other hand.

In general, the relevant rules with regard to targeting of persons in a non-international armed conflict are to be found in the Second Additional Protocol to the Geneva Conventions of 1949 and in customary International Humanitarian Law. For the reasons that were discussed by Sir Kenneth Keith yesterday, as compared to the law that's applicable in international armed conflicts, the relevant Treaty rules regarding targeting in a non-international armed conflict are very limited and most of the relevant applicable rules are to be found in customary international law. In addition, the limited rules to be found in Additional Protocol II regarding targeting are now regarded as reflecting customary international law.

Under International Humanitarian Law, the principle of distinction requires that parties to an armed conflict, whether international or non-international, must distinguish between civilians and combatants. They must not make civilians the object of an attack, and attacks must only be directed at combatants (the principle of distinction). The prohibition on subjecting civilians to direct attacks applies "unless and for such time as they take a direct part in hostilities". That is a quote from Additional Protocol II.

Thus, there are two grounds on which it would be permissible under IHL to subject a person to predetermined and offensive use of force.

First, that the person is not a civilian. Or second, that the person is a civilian but is taking a direct part in hostilities at the time when they are the object of the attack.

So, I turn to the precautions to be taken in attack. IHL imposes an obligation on those involved in compiling the JPEL to make determinations as to the status or the conduct of the persons under consideration for inclusion in that list. The obligation to refrain from subjecting civilians to direct attack (unless they are taking a direct part in hostilities) is one that applies at the moment when the attack is conducted. Thus, there is an obligation to ensure that these determinations are kept up-to-date such that at the time when force is actually applied the State can satisfy itself that the individual concerned is not a civilian, or if they are, is taking a direct part in hostilities at that time.

Customary International Law applicable in non-international armed conflict imposes obligations on the parties to a conflict to take these precautions in attack. This includes the obligation to do everything feasible to verify that the targets are military objectives. In other words, there is an obligation to verify, while planning for, and at the moment of attack, that a target is not a civilian protected from direct attack. There is also an obligation to do everything feasible to cancel or suspend an attack if it becomes apparent that the target is not a military objective (for example, because it turns out that the person to be attacked is a civilian).

Thus, right up to the moment when an attack is being carried out against a person on the JPEL, there is an obligation to reassess whether that person is a civilian who benefits from the protections of IHL.

The obligation will require an assessment of the most recent intelligence regarding the individual in question. Where there is doubt as to whether a person is a civilian or not or as to whether they are taking a direct part in hostilities, they are to be presumed to be civilians and not taking a direct part in hostilities.

I turn to the question of: who is or who is not a civilian in a non-international armed conflict?

Determining whether an individual is a civilian, and thus protected from direct attack, or not, is usually more complicated in a non-international armed conflict. This is because the law regarding the principle of distinction is less clear in such conflicts and also because the factual matrix of such conflicts is usually more complex than international (or inter-State) conflicts. 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, so the so-called farmer by day and fighter by night. Also, many such groups do not wear uniforms or have other fixed distinctive signs or indicia which make members of the group easily distinguishable from the general civilian population.

The legal criteria for assessing who is a civilian in a non-international armed conflict is not clearly set out in any treaty text. Although Additional Protocol II uses the term "civilian" in a number of its provisions,

no definition is provided. There are two possible approaches to determining who is a civilian in a non-international armed conflict, with the second approach capable of being subdivided into two variants.

The first approach suggests that in a manner similar to the position in international armed conflicts, where a distinction is made between civilians and combatants, a distinction is to be made in non-international armed conflicts between civilians on the one hand and "members of organised armed groups" or "fighters" on the other.

Members of organised armed groups (or fighters as I will refer to them) are those individuals who are not protected by law from direct attack. So, they may be made the object of attack without an inquiry being conducted into whether the individual is at that moment taking a direct part in hostilities. So, this first approach is that which is adopted by the ICRC in its interpretive guidance on the notion of direct participation in hostilities under International Humanitarian Law.

The second approach is to consider in a non-international armed conflict all persons other than the members of state's armed forces are civilians. Thus, those who fight for the non-State armed group are civilians. However, such persons may be attacked when they are taking a direct part in hostilities. As I indicated earlier, there are then two variations of this approach which depend on how broadly or narrowly the concept of direct participation in hostilities is construed.

In the first variation, membership in an organised armed group means that the individual is taking a direct part in hostilities continuously. This is the continuous

direct participation in hostilities approach. As I understand it, this is the approach taken by the New Zealand Defence Force in Afghanistan. On this approach, a person who is a member of such a group can be targeted for as long as they remain a member of that group.

The second variant would stipulate that mere membership of a group does not in and of itself amount to direct participation in hostilities. On this second variant, it will need to be shown that the individual has engaged in specific acts during hostilities, and, if so, the individual can only be targeted while they engage in such acts, perhaps immediately before and after. This variation is the most restrictive of the possible approaches as it would only permit targeting at the point where an individual is actually engaged in hostilities and not simply on the basis of membership of an insurgent group and possibly not even on the basis of future engagement in hostilities.

Although the first approach and the first variant of the second approach are conceptually distinct, in my view in practice they lead to practically equivalent results. On both approaches a member of an organised armed group may be subjected to attack simply on the basis of membership in that armed group. On both approaches, there is no requirement that the individual be attacked at the moment when he or she is engaging in a specific act that forms part of the hostilities. Taking either of these two approaches would require answering the difficult question of when does a person become a member of an organised armed group and when does he or she cease to be so.

In my view, the position that members of an organised armed group are not civilians and thus do not benefit from protections against direct attack (so that's the first approach) is preferable to the view that such persons are civilians but are taking a direct part in hostilities continuously. I take this view because it has a greater degree of conceptual coherence with the structure of the Law of Armed Conflict since, first, the concept of armed conflict implies an activity with opposing parties, rather than with civilians; second, the text and the structure of the provisions that deal with direct participation in hostilities suggest a narrow approach to that concept; and third, once the concept of continuous direct participation - maybe I should say if the concept of continuous direct participation is adopted, there is the danger that this wide approach will bleed into an extensive approach to the concept even in non-membership cases.

To adopt the second variant of the second approach - that is the variant that says that all who fight on the non-State side are civilians but they can only be targeted in the narrow circumstances in which they engage in specific acts which amount to direct participation in hostilities - would be unduly restrictive for the State. While such an approach would accord with the ICRC's narrow view of direct participation in hostilities, unlike the ICRC's approach with regard to membership of a non-State group, this approach would essentially restrict the State to taking defensive action. The State would be unable to take offensive action against members of an organised armed group who have committed to fighting for such a group. While it would minimise the possibility of error with regard to targeting of individuals, it would

severely limit the ability of the state to defeat non-State groups putting it (that's the State) on the back foot. This is not an approach that seems to have found favour in State practice or in the literature, and indeed the ICRC rejects this approach.

I now turn to the question of membership of an armed group as a basis for direct attack.

Whether one takes the ICRC approach, which is the one that I favour, which deems that members of an organised armed group are not civilians, or one takes the approach of the NZDF that members of the organised armed groups are civilians who are taking a direct part in hostilities continuously, the consequence of membership is loss of protection from direct attack. On either approach it would be lawful to put such a person on the JPEL once it is determined that they are a member of the organised armed group. However, on both approaches the difficult question that must be answered is how should it be determined that a person is a member of such a group? The critical questions are what are the criteria for membership and how should an assessment be made on the facts when, unlike the case of membership of a State's armed forces, there will usually be no formal indicia of membership?

Now, while Article 3 common to all four Geneva Conventions and Article 1(1) of Additional Protocol II - my presentation says I but it should say II - while those provisions refer in the context of non-international armed conflict to "members of armed forces", "dissident armed forces" and "organised groups", they neither provide a definition of such forces or groups, nor do they provide criteria for membership. This means that membership of an organised armed group

has to be determined on the basis of Customary International Law, aided by reference to the relevant literature. The most extensive study that has been conducted into this question was carried out by the ICRC in the Interpretive Guidance on Direct Participation in Hostilities. The ICRC notes, and I quote:

"It is crucial for the protection of the civilian population to distinguish a non-State party to a conflict (e.g. an insurgency, a rebellion, or a secessionist movement) from its armed forces, i.e. an organised armed group. As with State parties to armed conflicts, non-State parties comprise both fighting forces and supportive segments of the civilian population, such as political and humanitarian wings. The term organised armed group, however, refers exclusively to the armed or military wing of a non-State party. Its armed forces in a functional sense. This distinction has important consequences for the determination of membership in an organised armed group, as opposed to other forms of affiliation with, or support for, the non-State party to the conflict."

So, it is membership in the armed or fighting or the military wing of a non-State party - the organised armed group in the narrow sense - which would justify making an individual the object of an attack. Affiliation with the insurgency, or membership in the broader group that is in opposition to the Government, does not take a person out of the category of being a civilian, nor does it constitute direct participation in hostilities. As I read it, the approach of the NZDF seems to be broadly in line with this approach, though as I pointed out earlier, the NZDF takes the view that a member of an organised

armed group is a civilian who's taking a direct part in hostilities continuously.

So, the NZDF appears to consider an individual to be taking a direct part in hostilities on the basis of membership, where the individual, and I am quoting from one of the legal briefs on the Inquiry's website, where the individual "is a member of an organised armed group that collectively takes a direct part in hostilities". Thus, the group itself must be an armed one and the group must itself take a direct part in hostilities. This would appear, correctly, to exclude subjecting to direct attack those who are only part of the political group that an armed group is part of.

However, identifying that a person must be part of the armed or the fighting wing of a non-State party before they can be subjected to direct attack still leaves open the question of how membership of that narrow group will be determined. So, again, the ICRC's interpretive guidance on direct participation in hostilities takes the view that:

"In non-international armed conflict, organised armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function is to take a direct part in hostilities ('continuous combat function')".

The ICRC goes on to state:

"Continuous combat function requires lasting integration into an organised armed group acting as the armed forces of a non-State party to an armed conflict. Thus, 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."

Now, this approach to membership of a group is a narrow one because it essentially confines membership of the organised armed group to those who fight. Those who do not have a fighting role are not regarded as members of the organised armed group. This approach has been the subject of criticism. I might even say much criticism.

One of the main criticisms of this approach is that it introduces inequality into the law regarding targeting in non-international armed conflicts. So, all members of the State's armed forces, with the exception of chaplains and medical personnel, may be targeted (as they are not civilians) whether they take a direct part in hostilities or not. However, the State's armed forces will include personnel who do not have a fighting function lawyers, cooks… While those persons may be targeted as members of State's armed forces, the approach taken by the ICRC's with respect to membership of organised armed groups means that the cook affiliated with that group is not considered a member and thus may not be targeted.

While the ICRC "continuous combat function" approach has been criticised, in my view it can provide a useful working definition of membership which can guide the assessment of armed forces. It should be borne in mind that the ICRC approach does not require that a person has actually taken a direct part in hostilities, only that they have such a role within the group. Thus, and to quote them again, "an individual recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf can be considered to assume a continuous combat function even before he or she first carries out a hostile act".

It is also worth noting that since the ICRC approach is narrow (perhaps the narrowest definition of

membership), anyone who falls within membership of a group by reference to this definition will almost certainly be a member of the group under other definitions. Problems only arise in cases where a person might fall outside membership of the group under this definition but would be regarded as a member under other definitions.

In particular, what the ICRC definition does not countenance is that there may be other ways in which membership of the organised armed group may come to exist, that is other than being assigned a continuous combat function. This may include *de jure* membership (cases where the group has rules regarding membership and where such are fulfilled). Other such criteria have been to consider membership or other suggested criteria, I apologise, other suggested criteria have been to consider membership in the group by analogy with the position of State armed forces such that persons who perform functions analogous to that which would be performed in a State armed force would be a member. However, such an approach requires one to identify the sorts of functions carried out by armed forces and assumes that there will be consistency or uniformity so as to be able to generalise as to the functions that are performed by members.

And I should say that it's for that reason that I myself don't favour that last suggestion.

On the ICRC approach to membership of an armed group, an individual can only be placed on the JPEL and a subsequent operation conducted to target them if the person has a role within an organised armed group which involves taking a direct part in hostilities, whether or not the person has actually done so. Thus, the State

must have evidence of the functions that the individual performs or is tasked with performing within and by the organised armed group. In addition, it would need to be worked out which of those rules amounts to taking a direct part in hostilities.

The question of what amounts to direct participation in hostilities I will come on to but for now it's worth recalling that the ICRC states that individuals whose continuous function involves the preparation, the execution or the command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function.

So now I turn to the notion of direct participation in hostilities. As I stated earlier, individuals can be made the object of an attack either because they are not civilians, or where they are civilians, because they are taking a direct part in hostilities. And I have considered the possibility that an individual can be targeted on the basis of status, i.e. they are not a civilian. So, now I consider the possibility of subjecting an individual to the use of force because they are a civilian but they are taking a direct part in hostilities, so this is targeting on the basis of conduct as opposed to targeting on the basis of status.

Specifically, it is possible that an individual may be placed on the JPEL on the basis of direct participation in hostilities and that subsequently an operation is mounted to use lethal force against that person on this same basis. Consideration of the notion of direct participation in hostilities is important not merely because the relevant IHL rules requires consideration of the issue but also because the Rules of

Engagement applicable to the NZDF at the time refers to this notion. In particular Rule H stated that:

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

There are two relevant questions that arise with regard to the concept of direct participation in hostilities. First, what amounts to taking a direct part in hostilities? Since the protection from direct attack is only removed "for such time" as the individual is taking a direct part in hostilities, the temporal dimension of direct participation in hostilities becomes relevant. So, the second question to be asked is, when does a person begin or cease to take a direct part in hostilities?

This latter question is particularly important with regard to the JPEL because the operation to use force against the individual is likely to occur at a significantly later point from the point in time when a determination is made that they should be placed on the list because they have or are taking a direct part in hostilities.

So, the first question, what amounts to taking a direct part in hostilities? Now, the first way to consider that the individual is taking a direct part in hostilities, sorry the first ways to consider that the individual is taking a direct part in hostilities continuously where the individual is a member of an organised armed group. As I discussed earlier, that is an approach that appears to have been taken by the NZDF in Afghanistan. As I have explained, in my view the concept of continuous direct participation in hostilities

does not accord with the structure of IHL. Again, I explain though the approach is conceptually different from the approach that I take, in practice the two approaches lead to the same result.

So, the effect of saying that an individual while a civilian is taking a direct part in hostilities continuously, on account of membership of an organised armed group, is effectively to say that the individual may be targeted at all times. In theory, it is an approach to targeting based on the conduct of the individuals but in practice it's to give the individual a status which exposes them to the lethal force on a long-term basis.

However, it should be noted that the same difficulties that arise with regard to targeting on the basis of the individual not being a civilian, that is on account of membership of the group, arises here too. Thus, the same issues with regard to the definition of the group, definition of membership of the group, have to be dealt with on this approach as well. And, in my view, the same solutions that were adopted above, principally the ICRC approach with some modification that would permit de jure membership of groups are open here too.

The second approach, and in my view the proper basis on which it can be said that an individual has taken a direct part in hostilities, is by examining specific acts that the individual has performed. So, if one adopts either the ICRC approach or the continuous direct participation approach, the specific acts approach provides an additional basis on which individuals may be subjected to lethal force. So, even if an individual is not a member of an organised armed group and subject to targeting on that basis, one may examine the particular

acts to see whether they would constitute direct participation in hostilities.

Now, the NZDF at the relevant time took the view that a person was taking a direct part in hostilities when he or she engages in "hostile acts which are likely to cause actual harm to the personnel and equipment of coalition forces". That definition was taken more or less from the ICRC's commentary on Additional Protocol I. It is worth noting that this is a narrow definition of hostile acts that can be justified by state practice. As the Israel Supreme Court has noted, acts which are intended to cause damage to civilians should also be regarded as hostile acts. State practice would seem to accord with this because it seems to be the case that those persons who engage in suicide or other attacks against civilians are regarded as taking a direct part in hostilities.

And I think I should note that the current New Zealand Defence Force LOAC Manual I think also takes this approach.

The ICRC's Interpretive Guidance on Direct Participation in Hostilities sets out three constitutive elements for the notion of direct participation in hostilities. And permit me to read the quote in full because I think it's important.

"In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria:

1. The Act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm);

2. There must be a direct causal link between the act and the harm likely to result either from the act, or from a co-ordinated military operation of which that act constitutes an integral part. (This is called direct causation.)

And 3. The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another." (And this is the belligerent nexus.)

The first of these three cumulative criteria is similar to the NZDF's definition of hostile acts except that it includes, as I stated earlier, the broader view of the sorts of harm that would count towards direct participation in hostilities.

The third criterion makes clear that the harm caused by the hostile act must be directed at having an impact on the armed conflict, either in support of one party or by causing detriment to a party. So, not all violence that occurs in the context of an armed conflict is to be regarded as taking part in hostilities. Acts of self-defence by civilians against unlawful acts by members of armed forces will not constitute direct participation in hostilities that mean that those civilians may be the object of direct attack. Likewise, general civil unrest or looting will not be considered as having a belligerent nexus, third criterion, which deprives those participating in them of their protections under IHL from direct attack.

It is the second criterion of a direct causal link between the act and the harm that is the most difficult to apply of these three criterion.

Clearly, making arms and using them defensively against members of the state's armed forces will

constitute direct participation in hostilities. However, it has been unclear whether activities such as providing finance to a non-state armed group, recruiting individuals for the group's operations, making improvised explosive devices, whether all of these would count as direct participation in hostilities.

The ICRC suggests that direct causation means "that the harm in question must be brought about in one causal step" from the relevant act or the integrated military operation of which the act is a part. Thus, financing would not constitute direct participation in hostilities given that it merely builds up the capacity of a party to cause harm, and the harm that may result from it will be more than one causal step from the provision of the finance.

Controversially, the ICRC's criteria suggest that the making of a weapon, like an improvised explosive device, will not in and of itself amount to direct participation. Whether it does will depend on whether the weapons are made for storage and for building up the armoury of the group, on the one hand, or for use in a specific operation on the other hand. If the latter, then the harm would result in one causal step from an integrated military operation of which the act forms a part. However, if the former, this would be indirect rather than direct participation in hostilities.

And I will come back to this when I apply the criteria to the scenario that I was provided. I say controversially just to note that it's been subjected to criticism. I should say, I don't say it in the written presentation but I, myself, agree with the ICRC approach.

Although the one causal step criterion has been subjected to criticism, it provides a useful analytical

tool for making determinations as to direct participation in hostilities. The text and the structure of the provisions in the Additional Protocols dealing with direct participation in hostilities do suggest that it should be given a narrow interpretation. The text speaks not of participation in armed conflict, which would be very broad, but of participation in hostilities, which is narrower than being involved in the conflict in general. Also, the participation must be direct, meaning that not all participation in military activities would suffice.

So, now I turn to the temporal dimension of direct participation in hostilities. Individuals who take a direct part in hostilities will lose their protection from direct attack only "for such time" as they take a direct part in hostilities. And the question that then arises is for how long should an individual be regarded as taking a direct part in hostilities? This is relevant to the JPEL in that if an individual is placed on that list because they are considered to be a civilian taking a direct part in hostilities, an operation may only be carried out to kill that individual if he or she is still taking a direct part in hostilities at the time of the operation.

The continuous direct participation approach suggests that the individual will be regarded as taking a direct part in hostilities for such time as they continue to be a member of the group. And I've already expressed my views on this. And if a person is placed on the JPEL as a result of membership of the group, then they may be targeted for as long as they remain a member of that group.

Although the specific acts approach to the notion of direct participation in hostilities focuses on particular

acts which constitute the participation in hostilities, it is commonly accepted that the temporal scope of such participation is broader than the phase of execution of those specific acts. So as the ICRC's Interpretive Guidance states:

"Measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act."

So, if a person were to be placed on the JPEL as a result of engagement in specific hostile acts which amount to direct participation in hostilities, as opposed to being placed on the list because of membership of a group that is engaging in hostilities, an operation may only be carried out to use force against that person if at the time of the operation they were either preparing for another specific act of direct participation, executing such an act or return from that act. It would be contrary to IHL to target the person simply on the basis of the prior act of direct participation in hostilities.

The NZDF appear to take the view that another way in which a person may be found to be taking a direct part in hostilities is by being in the so-called "revolving door". The NZDF legal brief states that "those attempting to be 'farmers by day and fighters by night' lose protection from attack even in the periods between hostile acts". Adoption of this approach would significantly broaden the temporal scope of direct participation in hostilities. Though put forward as an independent basis for targeting, in my view this approach is best considered to be an application of the membership approach in the case of an individual who is affiliated

with a group. Here, the suggestion is that by constantly taking part in hostile acts the individual has, in reality, joined the group and thus may be attacked at all times, even when not taking a direct part in hostilities.

However, where the individual is not affiliated with any group and acts on their own, extending the temporal scope of direct participation in hostilities in "revolving door" cases would be contrary to the specific acts approach which suggests that an individual only loses protection for such time as they engage in specific acts of direct participation. This application of the continuous direct participation approach beyond situations of membership of a group would, in my opinion, be contrary to the narrow approach to direct participation in hostilities.

Would you like me to turn to the bit where I apply these IHL principles to the hypothetical scenario?

SIR TERENCE: Yes.

PROFESSOR AKANDE: In the hypothetical scenario that I have been provided with, the questions that I am to address are:

One, whether individuals who have been identified as insurgents, or leaders of insurgents, who have conducted attacks with improvised explosive devices in Bamyan Province in Afghanistan and who are planning to carry out further attacks should be placed on the JPEL list; and

Two, whether an operation may lawfully be mounted to kill or capture such individuals when the opportunity arises.

In assessing whether lethal force may be used against these leaders, I will assume that these attacks have occurred in the context of the non-international

armed conflict that has been occurring in Afghanistan for several years.

In order for these individuals to be placed on the JPEL list and, more importantly, to be targeted, it would have to be established that either they are not civilians or that they are civilians who are taking a direct part in hostilities at the time when it is sought to target them.

If all of these individuals are part of an organised armed group that is engaged in the conflict, there would be two possible bases for making them the object of attack. One, that they are members of the group and thus not civilians protected by IHL from direct attack; or two, that on the basis of their membership of the group they are civilians but taking a direct part in hostilities on a continuous basis. On either theory, these persons would be open to direct attack at any time, even in periods when they are not engaged in specific hostile acts.

For either of these theories to be invoked, it would need to be established that these individuals are "members" of the group. Taking the approach adopted by the ICRC's Interpretive Guidance, all those who have a continuous combat function, i.e. they have as part of their role within the group the function of taking a direct part in hostilities, will be members of the group and thus liable to direct attack at all times.

The following summarises the conclusions to be reached adopting this approach.

So, first, those insurgents who plant improvised explosive devices have a function of taking a direct part in hostilities since that act fulfils the criteria for direct participation in hostilities. On the basis of

their membership in the organised armed group, they are liable to attack at all times.

Second, those who command the operation of the insurgents that plant the improvised explosive devices also have the function of taking a direct part in hostilities since those people who take part in co-ordinated military operations that cause harm to opposing forces or to civilians. On the basis of their membership in the organised group, they are liable to attack at all times.

Third, in neither of the foregoing cases does it even have to be shown that the person concerned is planning a further attack, though this is helpful in establishing that they have a function within the group that includes taking a direct part in hostilities.

It is more difficult to assess the liability of those who make and prepare the improvised explosive devices. Where the person makes the device for a particular operation, the person is taking part in a co-ordinated military operation that causes harm and is therefore in a role that entails taking a direct part in hostilities. Such a person is a member of the armed group and can be targeted at all times.

Where the person makes the improvised explosive device not for use in a particular operation but for storage and to build up the capacity of the armed group, that person is not engaging in activities that amount to direct participation in hostilities. And thus, on the ICRC test, such a person remains a civilian protected from direct attack.

However, and this is number VI, if one accepts that the test for membership can be broader than that proposed by the ICRC, one may assess whether these individuals are

members of the group on the basis that they fulfil the membership rules of the organisation in question. On this basis, individuals would be members whether or not they engage in acts which show that they have a combat function. Thus, a maker of an improvised explosive device for storage may qualify for membership where there is evidence to that effect.

SIR TERENCE: I wonder if I could just intervene at that point? When you were talking earlier at paragraph 33 about the IED situation and the difference between a person who makes it for immediate use and the person who's making it simply for future use, and you commented on the fact that the ICRC distinguishes those two situations, it did seem to me a very fine grain sort of analysis to apply and I wondered really how realistic an approach like that is when the state force is trying to make a decision about a particular person and the approach that you've just outlined, the membership one in your VI, it seems a much more pragmatic approach but I wondered if you have any further comment about that?

PROFESSOR AKANDE: I think to start from where the ICRC starts from and to maybe try to explain why they make this distinction. So, here they make this distinction essentially by analogy with what we would do with a state. So, with a state we wouldn't take the view that people who engage in making weapons are open to direct attack and are no longer civilians or are civilians taking direct part in hostilities.

So, because you work, for example, for an arms manufacturer does not make you a member of the state

armed forces nor does it mean you're taking a direct part in hostilities. I think that is pretty clear.

So, the very act of making weapons is, in the ICRC's view, and I think correctly, that in and of itself cannot be taking a direct part in hostilities because if that is right, then you would have to extend that more broadly to others who do it also, even for state armed forces, and that's a dangerous place to go.

That's why they start from that position.

And because they, on their approach, regard membership as essentially limited to those who are taking a direct part, who have this function of taking a direct part in hostilities, because these people do not have that function they say, well, we have to leave them out.

However, of course, if you are making it as part of a particular operation to be used immediately, then in that case what you're doing is sort of one causal step away. And so, there you come into the fold. I think that's the reason why they take that. And conceptually, I think that is correct.

But I think it's also correct, as you indicate, that this is very difficult to apply in practice, and I think this is why, in my view, the ICRC's approach, the continuous combat approach is in my view a bit too narrow. There are other indicia that you might be able to look at to see whether or not an individual is a member of a group.

And so, for example, the group might have certain rules, however one establishes that, that indicate that, you know, if you do certain things, you take an oath or you do something, you are a member of the armed group. Then in those cases, one might say a person is a member of the group. And there it would not be the making of

the IED, whether it's for storage or for use immediately that would open you up to immediate attack, it would just be because you are a member of that group.

So, one can, for example, take a practical example. Let's say you had an organised armed group that had a camp somewhere and, you know, one of the indicia being a member of that organised armed group is that you've been inducted into the group in this camp, you've been given training in this camp. And then at that point it's decided what do you do? On my view, if that is the indicia and criteria for members of the group, then everyone going through that process is a member of the group. Then whether or not they have this continuous combat function or not is not so important.

But I think, in principle, the position taken by the ICRC that simply making arms does not mean you are taking direct part in hostilities, I think must be right. That is in and of itself.

SIR TERENCE: Yes, you can certainly understand that in a conventional warfare situation because civilians are often involved in ammunitions factories and so on in conventional warfare. Perhaps the difference is that it lies in the nature of an insurgency and the fact that those activities do tend to be, building ammunitions, obtaining them and so on, do tend to be carried out by members of the group, rather than by others, as part of the group activity.

PROFESSOR AKANDE: Yes.

SIR TERENCE: And that's what differentiates it, yes, I can see that.

PROFESSOR AKANDE: I think that's right. The ICRC distinction between those who make to store and

those who don't, if one takes for example, as the situation in Lebanon, it's well-known that they have thousands of rockets and things, they do build up an armoury and there are people who do that, and then you really do have this tricky question of where do you put these people, into which category do you put them and how can one put them in a category that says simply engaging in this act automatically opens you up to direct attack? But to then say for others, if you're doing it for the state, you are not in that category, it becomes very difficult.

SIR TERENCE: Yes.

SIR GEOFFREY: I wonder if I could take you back to the beginning of your excellent, logical, clearly expressed opinion, for which we are very grateful.

The question of who is or who is not a civilian in a non-international armed conflict, you've basically set out a variety of tests that are available and I take it that they are all available to us because the law is not sufficiently definite as to which test is accepted; is that right?

PROFESSOR AKANDE: That's right. I mean, that's why I've tried to set out the different tests. I have tried to express an opinion as to which ones I prefer.

SIR GEOFFREY: Yes.

PROFESSOR AKANDE: But these are all, sort of, within the range of, you know, the places where reasonable people can disagree, let's put it that way.

SIR GEOFFREY: So, is it possible, on any given set of facts, that you may satisfy one test? Or on

another set of facts you may satisfy two tests or all of the tests, depending on the facts?

PROFESSOR AKANDE: Yes, I think that's right, that you may have an individual - on this question that we've just been discussing as to who is a member of an armed group, one of the points that I tried to make is that anybody who satisfies the ICRC's test as to membership of an organised armed group will almost certainly satisfy all the other tests that have been suggested.

SIR GEOFFREY: Yes.

PROFESSOR AKANDE: Because it's probably the narrowest of those. But then there will be those who satisfy that test, satisfy the other tests, and then there will be those who satisfy that test but don't satisfy the other tests.

SIR GEOFFREY: Yes. And all of this is highly fact dependent as to what intelligence and information you have to be able to make those decisions?

PROFESSOR AKANDE: Yes, I think that's right, that it's all highly fact dependent and intelligence led. And I think this is what makes the precautions in attack particularly important, the idea that the armed forces have an obligation actually to continue to assess, particularly in this case we're talking about the JPEL, that it's an assessment that's done at the time when the decision is made to place the individual on the list. But then an assessment still needs to be done later on to ensure that the relevant intelligence is still up-to-date and still accurate.

SIR GEOFFREY: Thank you very much. I am sorry to have interrupted.

PROFESSOR AKANDE: So, I've just finished the section dealing with application of the IHL principles to the hypothetical scenario.

If I turn to paragraph 46 and begin consideration of whether IHL requires a capture rather than kill approach.

So, where a party to an armed conflict has come to the conclusion that a person that it wishes to target with lethal force is not a civilian or is a civilian taking a direct part in hostilities, the question may still be raised whether that party is permitted, as a matter of IHL, to target the person where it is possible or even reasonable to use lesser means to disable the threat posed by that person, and this question is often asked whether IHL requires a capture rather than kill approach.

So, one of the most controversial aspects of the ICRC's Interpretive Guidance on direct participation in hostilities is the penultimate principle, I think it was referred to yesterday by I think Mr Humphrey, it's Principle IX:

"**Restraints on the use of force in direct attack:** In addition to the restraints imposed by International Humanitarian Law on specific means and methods of warfare...", the "In addition" is important, "In addition to these restraints", "...and without prejudice to further restrictions that may arise under other applicable branches of international law".

Just to interject, what they're saying without prejudice, for example, to what human rights law might say, "the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to

accomplish a legitimate military purpose in the prevailing circumstances".

So, what this is saying, is that even if one reaches the conclusion that a person is one of those that IHL says may be targeted, a party to a conflict must, as a general matter, consider whether it is necessary to do so. In other words, where it is possible to disable the threat from that person by several means, the party to the conflict should use the least harmful means that can be employed taking the circumstances into account.

And this principle is said to be based on a general principle of military necessity which stipulates that belligerent parties can only take such action as is necessary to overcome the other party, even if the proposed action is not prohibited by principles of IHL. So, if a person can be captured rather than killed, there is an obligation to do so even in cases where the person is not a civilian or where he is a civilian taking a direct part in hostilities.

Now, this view of the law finds support in targeted killings cases. This is the case of the Israel Supreme Court. However, it is not certain that the Israel Supreme Court was seeking to apply principles of IHL in this part of their decision. The Court cited the European Court of Human Right's decision in the McCann case and it is therefore likely that this least harmful means approach was an importation from human rights law.

The argument that IHL does take this approach is made by the author of the ICRC's Interpretive Guidance, Dr Nils Melzer in his monograph written about the same time. In Melzer's view, the principle of military necessity not only has a permissive function but also has a restrictive function. In his view, this restrictive

function is a general principle which underlies all of IHL and which means that even when specific principles of IHL do not forbid action, that action is forbidden where it is not justified by military necessity. Thus, military necessity acts as an additional level of restraint on belligerents in addition to specific rules of IHL.

There is some support for this general view of military necessity in military manuals, military manuals of states. However, there seems to be no practice of states in which it is contended that the targeting of individuals who are members of armed forces or civilians taking a direct part in hostilities are nevertheless unlawful because such targeting was not necessary in the particular.

Given that there is a principle which specifically prohibits the use of weapons which causes unnecessary suffering to combatants, it appears strange that no specific principle has emerged prohibiting unnecessary targeting if the view is taken that the general doctrine of military necessity leads to such a conclusion.

What is strange is that the general doctrine of military necessity has led to the development of a specific principle with regard to weaponry and suffering caused by weaponry but states have refrained from elucidating a specific principle about the act of targeting of combatants or fighters when such targeting is not necessary. It would seem, to me at least, that this silence is not accidental.

In the context of targeting of persons, the view may be taken that IHL has already made the calculation as to what is necessary from the military perspective. In other words, the view may be taken that IHL has already

determined the range of persons against whom lethal force may be used and this determination is already based on the grounds of military necessity. Therefore, no further and more specific restraints exist with regard to who is subject to lethal force.

In addition, application of a more specific capture rather than kill approach may be difficult to apply, given that those engaged in the conduct of hostilities may not be in a position to know that it is possible to disable a threat by capturing rather than by killing.

In the more traditional battlefield situations, soldiers may not be aware that if they refrain from targeting members of the opposing force in their sight, it would be possible (perhaps even easier) for colleagues placed elsewhere to capture those opposing belligerents.

What I mean by this, just to explain, I realise it's not as clear as I intended it to be, is that if this obligation exists, it would be an obligation that is incumbent on the state. However, in reality, it could only be carried out actually by individual members of the armed forces but those individual members of the armed forces may not actually be in a position to know that it is unnecessary for them to use lethal force because it may be unnecessary for them to do so because other members of the state's armed forces may be in a position where they can use lesser means but they may not actually, they may not know that. And so I think it would be very difficult to apply this -

SIR TERENCE: So, you'd have to introduce some concept of did they think it was necessary to use lethal force on the basis of the facts known to them at the time?

PROFESSOR AKANDE: Exactly. It would have to be something like that. My point is if you take say the traditional battlefield where you have troops from one side, there may be, they think they need to target this person but they don't know actually that they have another platoon who is somewhere else who may be able to disable the threat. It's difficult to say from the perspective of the state as an entity it was unnecessary to kill this person. But on the battlefield, they may not know that.

If I now turn to, if that's all right, "Application of Human Rights Law to the Conflict in Afghanistan", paragraph 56.

So, although IHL is that part of international law that is specifically designed for application in conflict, it is not the only part of international law that applies during armed conflict. Human rights law, in particular, a state's obligations under international human rights treaties are also potentially applicable in armed conflicts.

So, here three questions arise with regard to the application of international human rights in armed conflict.

First, does International Human Rights Law apply at all in situations of armed conflict?

Second, does a state have obligations under international human rights treaties when its armed forces act outside its territory?

And third, if human rights law applies to an armed conflict, what is the relationship between that body of law and International Humanitarian Law?

The answer to the first question is clear. Every international tribunal that has considered the question has held that human rights law continues to apply in armed conflict. The International Court of Justice has stated that:

"... the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights".

Extensive state practice, including the practice of states through international bodies such as the UN Security Council, the UN Human Rights Council, the UN General Assembly confirms this position.

The second question, that is the question of extraterritorial application of human rights treaties, is more difficult. This is because a number of treaties, including the international covenant on civil and political rights, include provisions which limit their application to individuals within the jurisdiction or territory of state parties. So, I quote paragraph 2(1) of the ICCPR provides that:

"Each state party to the present covenant undertakes to respect and to ensure respect to all individuals within its territory and subject to its jurisdiction the rights recognised in the present covenant..."

However, despite such provisions, human rights courts and treaty monitoring bodies, such as the UN Human Rights Committee, have held that a person is within the jurisdiction of a state when such a person is subject to state authority or control. Thus, a state party will have obligations to ensure the rights of persons within their power or effective control. And in interpreting

Article 2 that I have just quoted on of the ICCPR, the UN Human Rights Committee, which is charged with monitoring compliance with the ICCPR, stated in general comment number 31:

"A state party must respect and ensure the rights laid down in the covenant to anyone within the power or effective control of that state party, even if not situated within the territory of the state party. ... This principle also applies to those within the power or effective control of the forces of a state party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained..."

So, where a state is in control of territory that an individual is located in, the state will have obligations to respect the right to life. Likewise, where the individual is in a location e.g. a military base, a ship or plane, over which a state has effectively control, the state will have the obligation to respect the right to life of that individual.

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. Arguably, where the state does not exercise control over the territory but does exercise control over a person, the state has a duty to respect the rights of that person. And it may be argued that what greater control can be exercised over a person than the ability to take that person's life. Thus, it may be argued that if the state has the ability to take the individual's life, it has sufficient control to trigger the state's human rights obligations.

The European Court of Human Rights in its decision in Al Skeini v United Kingdom nearly went this far. However, it pulled back and based its decision that the UK owed human rights obligation in Iraq on the ground that it, the UK, was exercising "some of the public powers normally to be exercised by a Sovereign Government".

Maybe I should pause there actually to explain a bit more in full what I meant by nearly went this far and then it pulled back.

When one reads that decision in Al Skeini, the logic of the decision is that jurisdiction under the International Covenant on Civil and Political Rights means control. And that once you exercise control over the individual, you have jurisdiction.

And, in fact, in the decision the Court in a passage that I quoted in the footnote, they explicitly rejected the suggestion that in earlier cases the UK owed human rights obligations because the individual was in a location that was under the control of the UK, whether it be a plane, a building, they rejected that as the basis. And almost all of that decision is actually based on this idea that control equals jurisdiction, in fact in the quote I have in the footnote of paragraph 137, they say, "It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction", and that word "thus" is important "the State is under an obligation under Article 1 to secure to that individual the rights and freedoms..."

However, in the very last paragraph, they didn't base their actual decision in that case on that reasoning which they had developed extensively. And they introduced this idea of exercising some of the public powers

normally to be exercised by the Sovereign Government, without actually explaining what that means and without explaining the relationship between that concept and what they had discussed earlier.

Yesterday, Mr Humphrey referred to the Jaloud case which is the next case where the European Court developed this idea and expressed the view. There you have a very lengthy quote from Al Skeini, I think it's about two pages actually they quote, about two pages of Al Skeini, but they do not quote actually the bit that says the UK was exercising some of the public powers normally to be exercised by the Sovereign Government, they don't quote that.

So, you have, in effect, I think, a decision that expresses a certain logic but where that logic is not necessarily applied to the facts of the case, and I think essentially the question is whether you go with the logic that they express in the decision or whether you go with that final paragraph where they seem to come up with a different concept that is narrower than the logic they express.

SIR TERENCE: So, how would the logic apply in a partnering situation where you had elements of the local government and the foreign force assisting the local government?

PROFESSOR AKANDE: So, I think the logic in right to life cases essentially takes you to the point of view, to the position that whenever the state has the ability to take life, it owes those obligations. I think that's where the logic takes you. And I think the reason that the logic takes you there, is because it becomes almost impossible

to divorce scenarios where you say you have some lesser control or a greater control.

So, imagine the Jaloud scenario where the person is at a checkpoint and the person is shot passing through the checkpoint. The question is, is it because the person is passing through the checkpoint? Okay, what if you don't actually hold the person physically but the person is shot by the soldier who sees this person passing through the checkpoint, so they don't hold him physically but he's 10 metres away. Okay. Why would that be any less control?

What if they're not 10 metres away but it is a sniper who is, you know, 100 metres away? It becomes really arbitrary to say why in one scenario those forces have control over that person. Whereas, in another scenario they don't.

And I think that's where the logic takes you. It's expansive but I think that's where the logic actually does take you.

In fact, the very next paragraph that I have, I think that's where the Human Rights Committee has ended up essentially.

So, in paragraph 64, this is a more recent general comment by the Human Rights Committee on the right to life, they say:

"In light of article 2, paragraph 1, of the Covenant, a State party has an obligation to respect and to ensure the rights under Article 6 [the right to life] of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control. This includes persons located outside any territory effectively controlled by

the state, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner".

So, it's interesting here, that paragraph appears to hold what is important is the enjoyment of the right to life that is within the power or the effective control of the state. And as the last sentence from that quote demonstrates, there is an obligation to respect the right to life even when the person is not in a territory that is controlled by the state.

So, I think this really takes us to the third of the three questions that I talked about. If you accept that human rights law applies, if you accept that it applies extraterritorially, the real question then becomes the third, which is the relationship. So, that's why I say since both human rights and International Human Rights Law applies in situations of armed conflict, perhaps the most difficult questions that arises is what is the relationship between both bodies of law?

It is sometimes argued that this question is to be answered by reference to the concept of lex specialis. However, whether this is correct depends on what that context is taken to mean. And there are three possible meanings of the expression. It's one of those areas of law where we're all familiar with, where we hide behind the Latin term and the question is what does it actually mean?

So, first of all, lex specialis could mean that one body of law totally displaces another body of law. And given the jurisprudence that I have referred to above, this is clearly incorrect.

Secondly, lex specialis could operate as what I've termed a principle of "co-ordinated interpretation". So,

this is the idea that a concept or a rule in one area of law can be used to interpret or to give meaning to a concept or a rule in another area of law. So, in this way, both principles or concepts are given the same meaning. And this principle can be justified by reference to the Vienna Convention of the Law of Treaties which says when interpreting a Treaty, the interpreter is to take into account any relevant rules of international law applicable in the relations between the parties.

And the ICJ has applied this concept of lex specialis and this idea of co-ordinated interpretation in the *Nuclear Weapons Advisory Opinion* when it said that the right not to be arbitrarily deprived of one's life under the ICCPR is to be interpreted in situations of armed conflict by reference to IHL, such that a loss of life, contrary to IHL, it is a loss of life that is contrary to IHL that will be regarded as arbitrary under human rights law.

Now, a third way of understanding the lex specialis principle is to regard it as operating as an arbiter of conflict. And on this view, one accepts that both humanitarian law and human rights law may apply in armed conflict but one says that in cases where two principles are in conflict from each area of law, one uses lex specialis, the lex specialis concept as the arbiter of the conflict. In this case, the principle derived from the lex specialis applies and the other principle is displaced and does not apply.

And it is often said that it is IHL that is lex specialis and that it will displace human rights law obligations in situations of armed conflict, though I think it is worth noting that if one accepts the

conception of lex specialis, IHL actually need not necessarily be the lex specialis in all cases.

So, this contention of lex specialis is a partial displacement theory of the relationship between the two bodies of law. So, unlike the first of my three ways, one body of law is not completely displaced, it is only partially displaced where there is a conflict.

Now, in my view, this conception, I mean the third one, this third conception of the relationship between the two bodies of law is not consistent with general international law. So, this third view assumes that states may not assume or undertake inconsistent obligations under international law. However, though it may not be desirable, states do on occasion undertake obligations that may require them to act differently or even inconsistently with prior or other obligations.

So now to try to apply all of this to human rights law and targeted killing. If one takes the second meaning of lex specialis, the one that I prefer and I think the meaning given to it by the ICJ, it would lead to the result that, even if one comes to the conclusion that the state has the obligation to respect the right to life in conflict outside its territory, the right is respected in situations of armed conflict as long as the state acts in conformity with IHL. On this view, where there is no violation of IHL there is no violation of human rights law.

There have been discussions in the literature as to the relationship between the use of force under the conduct of hostilities paradigm and the law enforcement paradigm. In my opinion, this way of addressing matters does not illuminate the problems. It is not clear whether the conduct of hostilities paradigm is just

another way of referring to IHL and the law enforcement paradigm just a way of referring to international human rights law. It is not clear what brings a matter within the conduct of hostilities paradigm, except to say it is governed by IHL. There are no objective factors that seem to have been developed to distinguish between these paradigms except a circular reference to the bodies of law that apply within those paradigms.

Two critical questions that arise in this area are first, whether IHL applies to govern all targeting of legitimate military objectives in the context of an armed conflict. Or whether, by contrast, there are some principles that limit the application of IHL to particular geographical areas (e.g. conflict zones or zones where a party does not have effective control). The question of whether IHL requires a party to adopt a capture rather than kill approach has already been discussed and, in my opinion, it does not do so. It is also difficult to point to practise that limits the application of IHL to the targeting of legitimate military objectives.

The second question is whether it - and this in a way points the other way - whether it is really correct to say that with respect to the arbitrary deprivation of life, what is lawful under IHL will always be lawful under IHRL, as the ICJ suggested.

And it is not clear that human rights bodies, human rights courts and tribunals, will always accept this position as a matter of human rights law, particularly in the case of non-international armed conflicts. There are many cases where human rights bodies have applied human rights law to act in non-international armed conflicts without having regard to IHL at all. While it is true

that in most of these cases, the state concerned has not even pleaded IHL (perhaps because it has not wished to admit that there was an armed conflict on its territory), I think it may be predicted that it will be difficult for some courts to turn the clock back and to ignore established principles of human rights law completely. And it is within human rights law, that a distinction may begin to be made or may begin to be drawn between acts carried out in the context of active hostilities where there is sustained and concerted fighting and/or a state lacks effective territorial control on the one hand, a distinction between those types of acts, and security operations where there are no active hostilities on the other hand.

I don't take it any further, but I note that yesterday Mr Rishworth took that analysis a bit further in the context of the situation in Afghanistan.

SIR TERENCE: Well, I had a couple of questions that I wanted to raise. One is really outside the context of the JPEL, and whether you feel able to answer it is entirely up to you.

As you've pointed out, there's this critical decision to be made as to whether somebody is a civilian or a member of an organised group, and you've set out, extremely helpfully, the test in relation to that.

The same issue, of course, also arises in effect on the battlefield but in the course of operations and so on.

And one of the points the Crown made yesterday by reference to the International Criminal Tribunal for the Former Yugoslavia, was the point that it is very difficult to distinguish who is a true civilian and who is an insurgent, and they talk about considering

clothing, activity, age, sex, amongst the things you have to think about.

My question is, how does the law accommodate mistakes? In a domestic situation, when the police make an arrest, they have to have reasonable grounds to believe the person has committed an offence. If it turns out that they're wrong, they're protected if they had reasonable grounds.

Now, in the context of deciding whether somebody is a civilian or a member of an insurgent group, to what extent does the law, if it does at all, accommodate errors or mistakes?

And if it does, what approach does it adopt to reaching a view about errors or mistakes?

PROFESSOR AKANDE: That's a tricky question. Maybe I should start by making a distinction between the position with regard to individual criminal liability in international criminal law and the position relating to state responsibility. And I am assuming we are talking about the latter with regard to state responsibility?

SIR TERENCE: Yes.

PROFESSOR AKANDE: Rather than individual criminal liability.

So, with regard to state responsibility, there are, just thinking about it, three relevant principles here. I think two of them explicitly accommodate mistakes and I think the third doesn't.

So, the first principle is the obligation to take feasible precautions, and that's an obligation to do what you can. So, feasible precautions to ensure that this person is a civilian. Do what's practically possible. And if you've done that and the person still happens to

have been a civilian when you thought they weren't, then that is not a breach of the obligation to take feasible precautions. There's no breach there.

The third principle, the principle of proportionality, so when you attack, you subject to attack something that's a military objective, then the civilian casualties must not be disproportionate when compared to the anticipated military advantage.

And there you look at it from the perspective of the reasonable commander and on the basis of the anticipated military advantage and on the basis of what was known.

And then it turns out there were more civilians there than you thought were there, you know. As long as your initial assessment was reasonable and it was not disproportionate on the basis of that initial assessment, then again there is no breach.

The more difficult case, as you ask the question, is the principle of distinction, the one in the middle, where it says civilians must not be the object of an attack. And it is not expressed in terms of feasibility, it's not expressed in terms of the information that's available to you. It just says that civilians must not be the object of an attack. It's a difficult one but my view is at the level of state responsibility, if you have made civilians the object of an attack, that is probably a violation, even if you've made it reasonably because some error has occurred. You bomb a building, and it turns out that you were completely wrong, even though maybe that's explainable, I think the state would be in breach of that obligation.

Of course, that's very different from international criminal responsibility. It doesn't suggest that any of

the individuals would be responsible. It would be very far away from that.

Yeah, that's my preliminary view, that there would be - that there would still be state responsibility in that case, but it is a difficult one.

SIR TERENCE: So, effectively, on the principle of distinction, it is effectively a kind of strict liability?

PROFESSOR AKANDE: Yeah, I think so.

SIR TERENCE: Okay, thank you.

SIR GEOFFREY: I just have one further question, and that is, at the end of your opinion I just want to see whether I've understood this application of international human rights law in this context.

Is it the case that if you comply with IHL, in many cases that might be the end of the matter but in some circumstances it might not be; is that really what you're saying?

PROFESSOR AKANDE: That's exactly what I'm saying, that if you've complied with IHL, that would in many cases be the end of the matter because it would not be an arbitrary deprivation of life under human rights law. The human rights law would refer to IHL and say it's okay.

The difficult case would be let's move away from Afghanistan, let's take a case that's involved in an internal civil war. The example that I usually give is you take, say, the Boko Haram conflict in Nigeria which is in the northeast of the region, northeast of Nigeria, 1,500 kilometres from Lagos. Let's say you find a Boko Haram member sitting in a restaurant in Lagos 1,500 kilometres away from where the insurgency is taking place. On the basis of the applications of all the

principles that we've been talking about, he's a member of the group and therefore subject to direct attack. This is an area of the state which is under the complete control of the state, there's no insurgency there.

The question that arises is, under human rights law is it possible to just shoot that person and say, well, he's not a civilian, he is a member of an organised armed group against the state, we can just shoot him. I think under IHL that would be lawful. The question is, would it be lawful under human rights law to do that, simply because it would be lawful under IHL?

And I think it's in those difficult cases where one might say, despite the fact that it conforms with International Humanitarian Law, it's not clear what human rights law would say. I am not confident that a Human Rights Court would say it is nonetheless lawful under human rights law.

But that is a scenario where I think the scenario where I think the state has control, they have complete control over that is area. Insurgency is not taking place there. That puts a question mark to this principle that if it conforms with IHL, it automatically conforms with human rights law.

SIR GEOFFREY: That's very illuminating, thank you.

SIR TERENCE: Thank you very much, Professor Akande, that's been fascinating from our point of view, it's very helpful, thank you.

Please be seated. We'll take a break now for 15 minutes, so we'll start again at 11.50.

Hearing adjourned from 11.35 a.m. until 11.50 a.m.

* * *

PRESENTATION NZDF BY BRIGADIER LISA FERRIS, DIRECTOR DEFENCE LEGAL SERVICES

SIR TERENCE: Just before we move on to the next submission, there is a non-publication order that affects it which I'll read out.

"In exercise of its powers under section 15(1) of the Inquiries Act 2013, the Inquiry makes a non-publication order in respect of the name, position and identifying particulars of the person accompanying Brigadier Lisa Ferris to give evidence on the JPEL process relating to intelligence issues on behalf of the New Zealand Defence Force at the hearing on 30 July 2019. The fact that another member of the New Zealand Defence Force accompanied Brigadier Ferris can be reported but no photographs or video images may be taken of the witness.

Members of the media may record the witness' evidence but may not broadcast it and may refer to it only by way of text or voice over summary.

This order is made to protect the legitimate anonymity concerns of the witness and applies to the public as well as to the media.

Thank you. Brigadier Ferris.

BRIGADIER FERRIS: Tena koutou, tena koutou, tena koutou, katoa.

Firstly, thanks to the Inquiry for this opportunity to present on the Joint Prioritised Effects List on behalf of the NZDF. I would like to particularly thank Professor Akande for his view

in traversing some pretty complex areas of international law so I don't have to.

So, this presentation really delves into more the operational and more doctrinal aspects of application of the JPEL.

As a consequence of this, I've brought along my colleague here, so if there are questions that go beyond the law and into more sort of operational or tactical matters, [*withheld*]should be able to speak to those if needed.

To begin from the outset, the Joint Prioritised Effects List, or JPEL, it has sometimes been characterised as a "kill list". This characterisation is inaccurate.

In any armed conflict, parties will determine strategy and use tools to achieve their objectives. These will more or less be formal, depending on the circumstances. At the time of the events relevant to this Inquiry, ISAF involved around 130,000 troops from some 50 troop contributing nations working in multiple regional commands across Afghanistan. In a given day, there would be multiple operations undertaken with assets worth hundreds of millions of dollars. In this context, the JPEL was an organisational planning tool to co-ordinate ISAF efforts. The individuals listed on the JPEL had been assessed, through credible and robust reporting, as presenting a threat to the Afghan civilian population, or indeed to coalition or local national forces. The JPEL's purpose and application is as precisely set out in its name; it is a list by which joint coalition forces recorded and prioritised various effects that were sought in relation to specific targets, and in this case mostly individuals.

At module one, Sir Angus Houston's description of the JPEL, as this slide highlights, I won't read it out in full, I will take it as read. What it does highlight is it allowed for both the prioritisation of scarce resources and also gave some rigour to the process of ensuring that those that were added to the list were lawful targets.

SIR TERENCE: Just give us a moment just to read it through. (Short pause). Thank you.

BRIGADIER FERRIS: I will delve into some of the specific issues he's highlighted later in my presentation.

It is important to note that the JPEL has no independent legal status. The JPEL is a product of a process in determining, in accordance with IHL, whether a person is a legitimate target for a particular effect. The appropriate question, therefore, is whether someone is a legitimate target under IHL. Rather than whether they can or should be placed on the JPEL.

As requested by the Inquiry, in this presentation I will discuss, as highlighted in the following slide, the specific legal principles relevant to targeting and the JPEL and the concept of DPH, which has already been covered in quite some detail by Professor Akande, and the process by which individuals were placed on and kept on the JPEL; how it applied in practice, including safeguards and training and of course Afghan involvement.

While I will address the matters that the Inquiry has asked me to speak on in Minute 13, I will beg the Inquiry's indulgence just to take some liberty with the order in which I will do so for today's presentation.

Finally, before beginning, I would like to note that as the JPEL was a classified product controlled by ISAF,

the level of detail that can be discussed in this forum is necessarily limited. The Inquiry has been provided with detailed documents, including at the classified level, regarding the processes governing the JPEL, and how individuals were placed on and kept on that list. I will show some slides that contain some of the material in its declassified form, but will not be able to speak to the information that has not been redacted and remains classified.

Turning now to the specific legal principles regarding -

SIR TERENCE: You say not be redacted?

BRIGADIER FERRIS: Sorry, have not been redacted.

SIR TERENCE: Will not be able to speak to any information that has been redacted?

BRIGADIER FERRIS: From those slides, yes.

I will now set out the legal principles relevant to targeting and the JPEL.

I do not intend to repeat the discussion of the relevant legal principles made in the Crown Agencies submissions yesterday; I will instead give a brief description of those legal principles, and then describe how they were actually applied in practice by New Zealand in operations involving individuals listed on the JPEL, using examples from the relevant time in documents which NZDF has agreed to declassify for the purposes of the Inquiry.

As has already been discussed in some length of detail, the primary body of law applicable in an armed conflict is that of IHL. And at the relevant time, at the time relevant to this Inquiry, and as Professor

Akande notes, Afghanistan was in a non-international armed conflict or NIAC.

The importance of this is that much of the content of IHL that is contained in treaty law was drafted to apply directly to international armed conflicts. Sir Kenneth addressed this point in his presentation.

While many of these principles and rules are now considered to also be applicable to a non-international armed conflict, by virtue of their status as customary international law, the detail of what it means to implement them in a non-international armed conflict is less clear.

Almost all of the conflicts ongoing today, and indeed almost all of the conflicts in recent times, have been or are non-international armed conflicts.

This means that when deployed to a conflict situation, New Zealand has to operate within rules that were designed for a different operating environment. I will come back to this point with some of the specific principles I am going to discuss below.

The principle of distinction is a well-established norm that applies to both international and non-international armed conflicts, stipulating that only lawful targets may be intentionally attacked. It requires personnel to distinguish between objects and people which may be attacked, and those which may not be attacked. For example, military objectives, combatants and persons taking a direct part in hostilities are lawful targets. Civilians, certain persons such as journalists or medical personnel, medical facilities and certain buildings such as mosques, churches, and schools are generally protected from attack.

Strictly speaking, members of armed insurgent groups in Afghanistan would not be considered combatants under IHL, as that status pertains to members of states' armed forces in an international armed conflict. This is not a matter of semantics. In an international armed conflict, combatants may be lawfully targeted, even if they are not directly taking a part in hostilities at the moment they were targeted. They also enjoy a form of what we call combatant immunity, meaning they will not face charges for acts which are considered lawful under International Humanitarian Law.

In a NIAC, the adversary is generally not considered a soldier in uniform. Rather, as we will discuss later, we're talking about the concept of civilians and generally they may not be subject to attack. However, what we do discuss is if a civilian takes a direct part in hostilities, they lose protection from attack for such time as they are taking that direct part in hostilities. Their acts are likely to be unlawful under the relevant domestic law and they may face criminal charges for those acts.

Other than coalition forces or members of the government-sanctioned Afghanistan armed forces, legally speaking, they were two categories of people and I know this is where we diverge slightly from Professor Akande's perspective, but I note we end up at the same result.

First, we consider civilians who could not be targeted and those who are taking a direct part in hostilities and thus could lawfully be targeted.

The obligation of distinction is dependent upon the information available to a commander at the time the attack is decided upon or launched. Commanders have a legal duty to take practicable steps to gather

information and I believe, Sir Terence, you raised this question yesterday around a due diligence obligation and that is sourced from broadly the Galić case in the ICTY, whereby commanders have a legal duty, a reasonable duty to, gather information and intelligence about the targets they are about to attack and the likely incidental consequences of the means and methods of combat they intend to employ.

This is reflected in our current law of armed conflict manual as well.

As an example of how, in practical terms, the NZDF are able to distinguish -

SIR GEOFFREY: Can I interrupt for a minute because I've studied this. It is an extremely thorough detailed piece of work. It must have been very resource intensive.

BRIGADIER FERRIS: As you are aware, the original interim manual was 1992 and this manual was 2017. Over the course of a number of decades this was a significant work in development, yes.

SIR GEOFFREY: Thank you.

BRIGADIER FERRIS: As an example of how in practical terms the NZDF is able to distinguish between who is a civilian and who is taking part in hostilities, I will now show you a slide with declassified information from the planning stage of an operation in Afghanistan.

As you can see, and I apologise for the busyness of this slide, but hopefully you will be able to see ahead of the approval of this operation, there were 44 intelligence reports from 23 different sources corroborating information

regarding this particular individual and his activities.

The letter and numbers associated down the side of that table show the level of reliability and credibility of that information. And for robustness, a certain number of reports above a particular level of reliability and credibility was needed before anything was going to be approved.

This is far from the full extent of what is required in the planning of an operation. It is just a slice. And it gives an example of how obligations of distinction are satisfied in relation to an actual operation.

I would also note that persons could, of course, be assessed to be direct participants in hostilities through their acts at any given moment in time, without ever having been listed on the JPEL or without the NZDF having ever been previously aware of them.

As has already been discussed, the principle of proportionality also applies to both international and non-international armed conflict.

Proportionality does not govern the level of force used per se but rather governs the decision to launch an attack. Attacks may only become unlawful when the force used against combatants is so great it would offend against the rule prohibiting indiscriminate attacks or cause disproportionate incidental civilian casualties and damage. For example, the International Criminal Tribunal for the Former Yugoslavia held in the Galic case that:

"In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information

available to him or her, could have expected excessive civilian casualties to result from the attack".

As part of applying the principle of proportionality, ahead of an operation, an estimate of any incidental civilian casualties had to be considered, as this next slide shows.

Again, I apologise for the busyness of the slide but it shows the risk of civilian casualties is part and parcel of any plan process for any operation.

SIR TERENCE: So, if you look, so it's under "Overall Risk" the assessment down the left-hand side there?

BRIGADIER FERRIS: Yes. Precaution is also a feature of IHL generally and there are specific obligations to take precaution in attack. Additional Protocol I states that: "Those who plan or decide upon an attack shall do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives ..."

Additional Protocol I relates to an IAC but this provision on precaution is generally considered to apply to a NIAC by virtue of its status as a norm of customary international law.

Our previous manual, Interim Military Manual I should say, in 1992 which was in effect at the time of the events in question and included this exact wording from Additional Protocol I. The same slide on civilian casualties also shows some of the risk assessments that were undertaken ahead of operations, as part and parcel of the general obligations relating to precaution.

In yesterday's presentations, there was discussion around the source and content of IHL obligations relating to persons who were wounded or sick in times of armed

conflict. As a practical illustration of how this obligation is complied with, at least in terms of the planning of any operation, this slide records some of the relevant planning undertaken ahead of an operation in respect of wounded and sick. You can see there on this slide, for example, plans in place for how any necessary aid should be provided, as well as a medical evacuation plan with primary, alternate and secondary alternate locations for medical treatment.

SIR TERENCE: So, just take a moment, some people may not quite follow. So, we've got that box up at the top left-hand corner which talks about medical treatment and evacuation. And then the plans on the map itself or the little boxes, what exactly do they show?

BRIGADIER FERRIS: So, they are the locations of the different roles - medical treatment centres that people would be evacuated to. And they also align to obviously different treatment centres have different capacities and capabilities to be able to respond to. So, you have level 1 or role 1 treatments which is like the highest level of care basically available and it progresses downwards from there to basic first aid capability.

SIR TERENCE: Right, okay, thank you.

BRIGADIER FERRIS: Medical treatment or evacuation could be provided to all without distinction. That is to civilians, to insurgents, hors de combat, meaning they were no longer taking part in hostilities, as well as to our own forces, coalition forces and Afghan partners.

In situations where multiple casualties have occurred, priority and treatment would be accorded based

on medical need, meaning that where necessary medical aid for civilians and insurgents was to be prioritised over medical aid to NZDF personnel. There were also times during Operation Wātea where NZDF personnel provided medical assistance to Afghan civilians at great risk to their own personal safety.

As these slides have shown, in practical terms the consideration of these principles can overlap. For example, target verification relates both to the principles of precaution and distinction; and consideration of potential damage might relate to both precaution and proportionality.

Turning now to the concept of direct participation in hostilities. I think we were assisted greatly by Professor Akande's description.

I will now address the concept of DPH. As noted above, when discussing the principle of distinction, DPH entails a loss of civilian immunity for attack in a NIAC. This is civilians who would normally be protected from an attack, may lawfully be targeted for such time as they directly participate in hostilities. It should be noted that while the majority of those on the JPEL were assessed to be DPH, individuals could still be assessed to be DPH without ever having been listed on the JPEL. It was also possible that individuals could be designated on the JPEL for effects where being DPH was not necessarily relevant. Objectives other than individuals, such as structures or places, could also be listed for certain effects. I will not address those matters in any specific detail. As requested by the Inquiry, this presentation focuses on the process by which individuals were placed on the JPEL, and the concept of DPH.

The notion of DPH has evolved from the phrase "taking no active part in hostilities" used in common Article II of the Geneva Conventions. However, neither the 1949 Geneva Conventions nor the 1977 Additional Protocols provide a definition of DPH. Because the concept of DPH implies a loss of immunity from attack for civilians, it has received much attention in legal and academic commentary. However, even today no uniform definition of DPH has yet developed in state practice.

As its been discussed, in 2009 the ICRC released its non-binding Interpretive Guidance. As I've mentioned, many of the IHL rules and principles were developed to apply to international armed conflict and there can be difference in implementing those rules and principles in a NIAC. The ICRC's Guidance was part of its effort to attempt to bring greater clarity to this issue. There is a good deal of consensus on many of the aspects of the Interpretive Guidance. As Professor Akande notes, certain key aspects of it have not been accepted by states.

That there is no complete consensus among states and other actors like the ICRC should not be misunderstood. That is, the relatively recent discussions around DPH are intended to give greater clarity as to how the principle of distinction applies in a NIAC but of course the principle of distinction has always been a feature of IHL.

As I've discussed, our current manual on the LOAC was promulgated in 2017 and provides detailed guidance for New Zealand Defence Force personnel on DPH. It is important to note that in 2009 when Operation Wātea began, the ICRC's Guidance and its commentary had just been released and was still being considered by states,

militaries, and their legal advisers, including those of New Zealand. While the IHL principle of distinction formed part of the training given to all NZDF personnel, the views, terminology and phrasing used by the ICRC were still under consideration.

As this next slide shows, taken from some of the training material at the time, in Afghanistan at the time relevant to this Inquiry New Zealand considered that a civilian could lose protection by DPH through demonstrating hostile intent or engaging in a specific hostile act; or being a member of an organised armed group that was collectively and continuously taking part in hostilities against the Government of Afghanistan.

I would just like to point out there, this is not the holistic view. This is just one aspect of the training material. That doesn't necessarily represent the whole view undertaken by the New Zealand Defence Force.

SIR GEOFFREY: I think, Brigadier, you were one of the instructors in Afghanistan in these matters, weren't you?

BRIGADIER FERRIS: At the time in 2009, yes, Sir.

SIR GEOFFREY: And it struck me, reading the presentation, that the soldiers were almost in international law 101? It was a very long course of instruction, was it not?

BRIGADIER FERRIS: At the time, I would have to say it was one of the most intensive periods of training for IHL for soldiers that I've ever experienced in the course of my career. And it wasn't just a singular period of instruction. That period of instruction continued, you know, to build on over time as well.

SIR GEOFFREY: And is it fair to say that now it's standard for legal officers, such as you were then, to be deployed to give this instruction?

BRIGADIER FERRIS: I think in terms of New Zealand's deployment to Afghanistan, as we've already discussed, we were one of the first to deploy down to that tactical level. I think that was an acknowledgment by the Government of the day that it was such a complex environment, I think as we're all seeing here today. I can't predict what will happen in the future but my strong recommendation would be for complex scenarios a lawyer is deployed down to the tactical level.

SIR GEOFFREY: Thank you.

BRIGADIER FERRIS: To look at the two broad concepts, I will discuss the two broad categories in turn. Dealing with first those that were assessed as DPH through specific hostile acts or hostile intent. They lost their civilian protection for the duration of their direct participation in hostilities. When civilians ceased to be DPH, they could still face prosecution for violations of either domestic or international law committed while they were participating in hostilities, but they regained full civilian protection against direct attack.

Direct participation is not limited to the very instant of an attack; activities before and after the attack form part of what is known as a continuum of participation. Clearly included are planning, preparing and training for a hostile act, deployment to the scene of attack and return from it. The length of the continuum will depend on the nature of the action.

Actions that are geographically removed from the hostile act may still be a part of direct hostilities if they are an integral part of that act, such as intelligence gathering, command and control, or recruiting people to attack a force.

I will turn now to the issue of those who are DPH through membership of an organised armed group. NZDF's position is that, while civilians who are DPH lose immunity from attack only for such time as their participation lasts, in certain circumstances, members of an organised armed group may be regarded as being in a continuous DPH and thus legitimate targets for as long as they remain members of that group.

The current NZDF LOAC Manual defines an organised armed group as:

"A group of civilians who are armed and equipped for combat operations. The group must have a sufficient degree of military organisation to conduct sustained hostilities, even though it may not be as well armed, trained or capable as the forces of a state."

As noted by Professor Akande, on this approach, a member may be subject to attack on the basis of membership in that group. There is not a requirement that they be attacked only when they are engaging in a specific act that forms part of the hostilities. This is because, and it's the NZDF's interpretation, their role in the group is such that they are deemed to be continuously DPH, and analogous to members of the armed forces in an IAC. It would therefore be lawful to approve a nomination for a person on a JPEL once it's determined that they meet this criterion.

As to which members may be regarded as being involved in continuous DPH, the current manual considers

this to be a person whose integration into an armed group is of such a level that he or she can be regarded as making a direct contribution to the combat effectiveness of that group. The fact that a person is acting under effective command and control, and is subject to some form of discipline, is a strong indication that the person is taking a direct part in hostilities, even if the person is not actually fighting at that particular point in time.

For the ICRC, as we've been discussing, only those individuals with a "continuous combat function" are considered to be members of an OAG. As Professor Akande notes, this concept has been the subject of much criticism, particularly as it introduces inequality into the law of targeting between international and non-international armed conflicts.

This part of the interpretive guidance has not been met with acceptance by states as it takes a very narrow definition of the membership of an organised armed group and in requiring a functional analysis essentially replicates, in my view, the notion of DPH.

Touching now to defining who is a member of an organised armed group. The NZDF does not use the term 'continuous combat function' as used by the ICRC. However, of course, legal and training materials from the time of Operation Wātea, including some released as part of the Inquiry's classification review process, show that this term was being considered by legal advisors and used to provide a working definition, to the effect that only those who were sufficiently involved in the combat execution, effectiveness or capability of a group would be considered to be DPH by virtue of membership in that group, and thus could be subject to targeting under Rules

of Engagement, Rule H, which I will talk about a bit more in a moment, and of course nomination for the JPEL.

Different NZDF documents where Operation Wātea, such as ROE briefs, have phrased slightly differently the test regarding when a person is regarded as DPH by virtue of being a member of an OAG. There are also slightly different phrasing as to how the current LOAC Manual is phrased. This is to be expected. The ICRC's Guidance had just been released in 2009, and the position on DPH, and the ICRC's concept of continuous combat function would have been developing at the time the NZDF considered this guidance.

As you mentioned, Sir, I was in Afghanistan in 2009 and Nils Melzer, the author of the Guidance, gave his first briefing to the coalition at that point in time, so that's how new it was.

However, what remains common areas across all of the material, is that for the purposes of determining exactly who was to be regarded DPH, their membership of an organised armed group, the NZDF saw a distinction between those who made a direct contribution to the combat effectiveness or combat capability of the group and those who performed unrelated roles. The latter would not be considered DPH and would not be nominated to the JPEL.

As Professor Akande notes, it is often the case that persons will occasionally fight on behalf of an armed group but also engage in normal civilian activities which has been sometimes phrased as 'farmers by day and fighters by night'. The question of who is or who is not a member of an armed group is a critical and often difficult LOAC questions. As Professor Akande notes, the factual matrix in a NIAC is more complex than in an IAC. Members of armed groups in a NIAC will not normally have

uniforms, identification cards, authentic ranks or serial numbers and no formal enlistment. Their names and the groups to which they belong may also be doubtful. Such groups may not be clearly defined membership structures and they may also engage in normal civilian activities. However, determination of membership of an armed group is to be based on a good-faith interpretation of information and intelligence available to the decision-maker at the time.

SIR GEOFFREY: Can I just ask, you've already referred to the released part of this in which there are a large number of intelligence reports. I mean, the task of analysing those, presenting them, going through them, how is that done?

BRIGADIER FERRIS: I get to that a bit later in my presentation, Sir.

SIR TERENCE: Just on this point that you're just making in the last sentence, "determination of membership of an armed group based on a good-faith interpretation of information and intelligence available to the decision-maker at the time", if that information is in error, looking at the issue of state responsibility and not the issue of any criminal liability or other liability on the part of any individual, do you have a view on Professor Akande's comment earlier or is it something you would prefer to deal with in submissions in reply?

BRIGADIER FERRIS: Obviously, the lens that I look through matters is obviously one of individual criminal responsibility with matters of state responsibility being slightly out of my bailiwick. Of course I have a personal opinion, perhaps

Professor Akande was setting the bar a bit too high with his strict liability sort of test but obviously, that is a matter we can address in submissions at a later date.

SIR TERENCE: Okay, thank you.

BRIGADIER FERRIS: While an interesting theoretical question, in reality the 'farmer by day fighter by night' issue seldom arises, especially for the NZDF in Afghanistan. In Afghanistan at the relevant time, only the NZSAS members were participating in operations involving persons on the JPEL list. At any time during the armed conflict, there may have been hundreds of persons of interest to each coalition regional commander. That regional commander had to determine the prioritisation of military resources and, to use Sir Angus Houston's phrase, seeking to align the right asset to the right target at the right time. Due to their highly specialised skillset as Special Forces operators, the targeting operations which the NZSAS were asked to be involved with were focused on the higher-level members of OAGs whose roles in the group left little doubt that they were fighters.

Low-level OAG members who engaged in a specific hostile act could still be targeted as DPH during the act if necessary, but such persons would not be considered as continuously DPH and unlikely to be even on the JPEL or anywhere near it.

Before moving to speak specifically about targeting and JPEL, I would like to briefly mention New Zealand's Rules of Engagement and to use a scenario to illustrate their relationship with the concept of DPH.

New Zealand's ROE for Operation Wātea allowed for targeting, which could be done using the JPEL. As this slide shows, the most relevant Rules of Engagement were Rule H which authorised the use of offensive force against those individuals who were considered to be members of an organised armed group, sufficiently connected to the combat effectiveness or capabilities of that group, and who were considered by New Zealand to be in a state of continuous DPH until such time as their membership ceased. Rule H initially labelled certain specified groups but was later amended to include all groups directly participating in hostilities against the legitimate Afghan Government.

The Rules of Engagement also considered the definition of hostile act and hostile intent, which is primarily relevant to rule A, which permitted use of force against a hostile act or hostile intent. This rule quite deliberately did not include a definition of DPH. While the definitions of hostile act and hostile intent may have assisted in considering what amounted to be DPH, the precise legal threshold for action under Rule H was that the relevant individual group was directly participating in hostilities.

A scenario, based on actual operations New Zealand was involved in, is a useful means of explaining what this might have meant in the context of Afghanistan. Imagine an operation is planned in a location known to be sympathetic to insurgent groups and where insurgent commanders who were assessed as DPH are known to be located. It has been decided that an operation should be undertaken in respect of these individuals and, if possible to do so safely, that they should be arrested by

Afghan authorities and processed through the Afghan domestic criminal justice system.

How would it be determined that these individuals were DPH? For the targets of the operation, the relevant rule is Rule H. The assessment would have been based on information regarding their hostile activities built up over time. Sometimes even a period of years - and there would need to be satisfaction with regard to the reliability and credibility of this information. Through this process, it would have been assessed whether a person was a member of an organised armed group and, if so, whether their role in that armed group was such that it could be considered to amount to their being DPH. These assessments would be made in advance, in order for the operation to be approved.

What of those who may not be the targets of an operation but who nevertheless present as DPH during the operation? This would generally be relevant to rule A of the Rules of Engagement, that is the defensive use of force against individuals assessed as DPH through either a hostile act or hostile intent. Recall that IHL contains a presumption of civilian protection. If there is doubt about whether a person is DPH, the person may not be attacked until that doubt is resolved. The nature of an assessment of whether a person is DPH will obviously differ depending on whether it is being made in consideration of a planned operation for the use of force against an individual, or whether an assessment needs to be made, in the moment, as to whether an individual is DPH requiring the use of force in defence. The time to determine they are DPH may be very short, and the risks of hesitation fatal. The level of certainty required is not that of domestic criminal proceedings, but rather,

the standard must "reflect the level of certainty that can be reasonably achieved in the circumstances". Any assessment of DPH was to be made in good faith, on the basis of information available to the decision-maker at the time, including intelligence, manoeuvre, motivation, activity, weapons, age, and gender. Note this is not an exclusive list, it is just an example. It is often a combination of factors that will contribute to the judgement regarding an engagement.

Turning now to how the JPEL applied in practice. As I've said from the outset, the JPEL is not a kill list. Professor Akande has noted the question of whether LOAC requires a capture rather than kill approach. He concluded that there is no legal rule requiring capture rather than kill and that in any case a rule would be difficult to apply. The NZDF agrees with this position of the law.

However, despite this, as a matter of policy rather than legal obligation, during the course of Operation Wātea the preference was for individuals on the JPEL list to be arrested by the Afghan authorities and processed through the Afghan criminal justice system, where it was possible to do so safely.

In line with the ISAF's mandate, this meant that ISAF provided the support and resources necessary to enable Afghan authorities to manage the security of their own country, with a view to building up local capacity and capability in the maintenance of law and order and transitioning from an armed conflict.

Also from a military perspective, capturing a person where possible was preferable because of the potential for intelligence gathering. As such, in almost all of the operations involving individuals on the JPEL that the

NZDF participated in, the targets were captured rather than killed, notwithstanding that the latter would have been lawful under IHL.

To provide context and background to the creation, maintenance, and use of the JPEL, I would like to give an overview of the targeting doctrine more generally, before talking about JPEL specifically.

One of the most important methods whereby states seek to ensure their armed forces comply with IHL is the establishment and operation of targeting procedures. This involves a systematic approach to compliance by incorporating the requirements of the law as they relate to targeting and target evaluation and overall the decision-making process.

Decision-making in the context of targeting will traditionally be achieved through a targeting cycle which comprises several phases. Although the specific ISAF standard operating procedures on targeting in Afghanistan remain classified, NATO have released their current doctrine on targeting which dated from 2016 and this broadly describes the targeting process. As this slide shows, there are generally six phases to the operational targeting cycle.

This is the process that will be generally undertaken at the operational level of a combined joint operation, much like the ISAF coalition.

From the matters the Inquiry has requested to be covered in my presentation, the phase of the targeting cycle that appears to be of most interest is contained at phase 2. This phase concerns target development and this phase is where the target lists, such as the JPEL, are developed. Target development in itself involves its own set of processes. These processes may be undertaken at

the tactical level by troop-contributing nations or at the operational level by different component elements of a coalition.

First, there is a form of target analysis or identification analysis which is usually undertaken with a centre of gravity analysis involving identifying credible susceptibilities and vulnerabilities of an adversary and applying them against the lens of the commander's objectives. Following an initial assessment of those targets from the analysis process, targets are vetted from an intelligence perspective to ensure that they perform the specified function for an adversary. And then the target will go on to be validated. This ensures that there is a continued compliance with the commander's objective, guidance, intent and desired effects; there remains continued compliance with IHL and Rules of Engagement; as well as an assessment of the accuracy and credibility of the sources used to develop the target.

SIR TERENCE: Can I just ask you to stop there. Could you just unpack this paragraph for us a little bit? "Centre of gravity analysis", you describe that as "identifying existing critical susceptibilities and vulnerabilities of an adversary", can you just describe, perhaps make that a bit more concrete for us?

BRIGADIER FERRIS: I can do it in terms of a lawyer, I think we most likely ascribe it to the theory of the case, when you're considering litigation. That is what a centre of gravity analysis is. If you need a more doctrinal definition, my colleague can probably give a more military view.

SIR TERENCE: If he's happy to that would be useful from my point of view.

NZDF OFFICER: The way we would use that analysis, it can be used at multiple levels. In an operational sense, we would look at the adversary of the Taliban as a whole and we would consider all its component parts and then we would decide because we have limited resources that we want to interact with the smallest part of that to have the resolution that we're seeking.

In this case, in the Taliban as a whole, we would identify its leadership as the group that we want to target because we believe if we can take the leadership out of the operating environment, it fractures their coherence or consistency across the board, and we can overwhelm them through that means.

If we take it down to - we would also use a centre of gravity analysis for an individual operation, such as the Objective Burnham operation. In that case, we're looking at things, identifying the most vulnerable point that we can for them so that we can, as safely as possible, conduct our operation.

In this case, it is an operation by night, so that we can move up on their position, surround them. And at that critical point where they are choosing to fight or to give up, we can convince them that it is worthless to fight at that point in time and we can remove them from the operating environment which was our intent for that mission.

SIR TERENCE: Okay, thank you, that's helpful.

BRIGADIER FERRIS: Following this process, a target will be nominated for approval via a co-ordination

process and identified for inclusion and prioritisation on a target list. Following that, actual target prioritisation will occur. This means that targets will be prioritised against a commander's objectives in order to maximise the effective use of joint capabilities while minimising the likelihood of unintended and potentially undesired consequences.

All of these assessments and processes are undertaken through meetings called "boards". These boards are a relatively formal process that traditionally have their own standard operating procedures and will involve subject matter experts from the operational level of coalition such as intelligence and operational staff, and legal advisers.

So, if you are looking at a coalition battle rhythm, certainly decision-making boards are built into that battle rhythm process.

SIR GEOFFREY: So, can you tell us a little bit about the various skill sets that are on the boards?

BRIGADIER FERRIS: As I've said, you know, legal advisers are a key component of that. As it was done at the operational level, that would generally be a coalition legal adviser.

SIR GEOFFREY: So, it's not necessarily a New Zealand legal adviser at all?

BRIGADIER FERRIS: None of it will be New Zealand. At the operational level, it's all been made by coalition forces and I don't believe we had anyone at the operational level, no legal adviser at least at the operational level at that time.

SIR GEOFFREY: So, are you really saying there were checks and balances in this; you can propose but you don't necessarily dispose?

BRIGADIER FERRIS: Correct. We were not the approval process for the prioritised effects list.

The principal output of this phase is often called the joint prioritised target list, this is what the NATO doctrine refers to. However, in the context we are discussing, we can broadly equate this to the JPEL. Finally, once an individual has been through the target development process, additional procedures are undertaken at the operational level before a mission is approved or carried out at the tactical level.

I would just highlight, at the tactical level there was their own mission, planning and approval process that had to be undertaken before a mission actually commenced.

As my explanation of the targeting process generally shows, JPEL was specific to Afghanistan, but similar targeting methodologies and doctrine were common across military operations. In this way, JPEL operations were not substantively or qualitatively different because the objectives in question were JPEL targets. JPEL did not automatically order strikes, operations or engagements against those listed. Rather, it was a product of the process used in Afghanistan for determining, in accordance with IHL, whether a person was a legitimate target. As the JPEL had no independent legal status, the appropriate question therefore remains, whether a person was a legitimate target under IHL for the desired effect, and not whether someone can or should be placed on the JPEL.

Generally speaking, in respect of the JPEL, contributing nations put forward nominations for desired

effects against individuals. It was supported by relevant evidential reporting which specified the threat posed by the individual. Such reporting had to meet the standards of reliability and credibility prescribed by ISAF. Nominations were assessed and scrutinised, as I've discussed, by a range of personnel from different coalition forces, including intelligence and operational staff and legal advisers, including LOAC experts.

ISAF forces were generally bound by the same international legal obligations. Nevertheless, different coalition forces may have had slightly different interpretations of some aspects of their IHL obligations, and different forces may have had different motivations for prioritising targeting a person. In this context, the JPEL approval process helped to ensure that a JPEL listing should be considered reliable by all ISAF coalition forces.

Every individual nomination was subject to a high level of scrutiny, and all those involved at various stages of the vetting and approval process had to be satisfied before an individual would be approved for inclusion on the list. The NZDF legal advisors in theatre were involved with the JPEL at appropriate junctures. For example, they interacted with the ISAF Joint Command Legal Team, relayed relevant information, and trained NZDF forces.

Before participating in operations involving individuals who were already placed on the JPEL, New Zealand forces would additionally examine the intelligence and reporting relating to that target, before making their own operational decision that the target was a lawful one under LOAC or IHL. This provided another level of control and verification over operations

in relation to JPEL targets, specifically by New Zealand forces and legal advisers.

The process of placing an individual on the JPEL, therefore, is distinct from the planning for an operation involving such an individual. As such, there is an important distinction to be made between pre-authorised and pre-determined. While a person on a JPEL could be subjected to lethal force, a "kill" designation on the JPEL did not mean that they had to or would be killed. In this way, it is not correct to say that the JPEL predetermined the use of any force. Rather, it only predetermined a desired lawful effect, and the carrying out of that effect was still subject to all the usual checks and balances built into IHL.

There were also additional criteria, safeguards, tasks and processes that needed to be satisfied or fulfilled before actual operations could be carried out. Even if at the planning stages of an operation it seemed that the use of force was likely to be required, the actual use of force was determined at the time at which it is used. Those responsible for using force are required to determine that such force complies with IHL at the moment they use it.

SIR TERENCE: Does this mean that some operations are identified as deliberate detention operations and some are referred to as capture/kill, kill/capture? Does this mean that designation doesn't really matter or is a DDO different in nature from a kill/capture operation?

BRIGADIER FERRIS: What I think the distinction is, is reflecting what the commander's intent is. As my colleague was saying, what the best effect is for that particular operation. Some effects are best

achieved through a detention of an individual. Others may be best effected through removal of say a high-level commander from the battlefield entirely.

SIR TERENCE: So, where it's kill/capture, does that mean either option is available or is there one option preferred over the other, depending on the circumstances?

BRIGADIER FERRIS: That's exactly it. It would be factually dependent about what option would actually be engaged.

SIR GEOFFREY: Is it fair to say that if it's just an operation in which you're going to capture but the person you're trying to capture runs away, you may end up having to use force to prevent that? Lethal force even?

BRIGADIER FERRIS: Correct.

SIR GEOFFREY: So, the consequence could be very similar?

BRIGADIER FERRIS: Correct, yes. Any actual operation or engagements remains subject to the relevant prescriptions set out in ISAF Standard Operating Procedures which remain classified and are not able to be discussed here. Operation command orders and situational context, I think this is where the different types of operations are built into part of the planning process, and of course the Law of Armed Conflict or IHL.

Operationally, if members of the NZDF were carrying out an operation in relation to a person on the JPEL, they were at all times subject to New Zealand's own Rules of Engagement and the specific authorisations and caveats contained within it. For example, I note that Cabinet

places specific limits on New Zealand's participation in counter-narcotics operations.

Positively identifying the identity of a target before any engagement was also crucial to upholding the viability and effectiveness of the JPEL system. In this respect identification of targets had to be made consistently with Rule G of New Zealand's Rules of Engagement, part of which has been publicly released.

The next slide here shows New Zealand's Rule G along with Rule H and I.

In New Zealand operations involving direct action task, governed by Rule H, planned attacks on JPEL targets have to be approved at the specified authorisation level, and additionally, positive confirmation by a specified authority that the target was DPH was required by the authority specified in that Rule.

Reflecting the fundamental IHL principle of proportionality, all of the operations remained subject to Rule I which maintained that 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.

The question of temporality, as raised in Professor Akande's paper, is also an important one, both in regard to the list itself and any operation undertaken to target an individual on that list. If a nomination was approved and a person placed on the JPEL, regular review and ongoing relevant reporting was required for the person to remain on the list. If such reporting demonstrating that a person remained a credible threat and therefore a lawful target in IHL terms was not available, the listing

would lapse and individuals would be removed from the list.

In sum, operations involving individuals listed on the JPEL, irrespective of the means or methods of targeting used in the operation, were within the bounds of applicable IHL. Take for example the use of manned or unmanned aerial systems might be used in the context of a specific operation. Legally and operationally, these were not considered different to any other coalition air asset. International law does not contain any prohibition on the use of such systems in a NIAC, provided that IHL is adhered to. All legal checks and balances, including those of target identification, collateral damage estimates, proportionality, continue to apply to such operations.

Turning now to training as was discussed in module 2. Members of the NZDF, including those involved in preparing JPEL nominations and participating in operations involving those on the JPEL, had training in IHL prior to and during their deployment. NZDF personnel were trained in other safeguards and processes described by ISAF relating to JPEL targets.

Turning now to make some comments around the significance of the Afghan involvement in the JPEL. ISAF, broadly speaking, was mandated to combat the terrorist insurgency in order to assist the Afghan authorities establish a secure and stable environment. Generally, those on the JPEL had been assessed as members of Organised Armed Groups, such as Al Qaeda or the Taliban who were taking a direct part in hostilities. In IHL terms, this meant they had lost their civilian protection and were legitimate targets.

While the JPEL was an ISAF product, acts of DPH and involvement in the insurgency would generally also be contrary to Afghan domestic law. Because of this overlap where activity constituting DPH in the NIAC could also be contrary to Afghan domestic law, JPEL targets could simultaneously be the subject of an arrest warrant issued by appropriate Afghan authorities.

Generally, individuals on the JPEL were verified as being DPH and targetable on that basis under IHL. As noted, however, in this particular context in Afghanistan, and in the interests of developing the capacity of Afghan forces, if a JPEL target could, with coalition force support, be successfully arrested and then prosecuted under Afghan domestic law, this was preferable. Arresting an individual pursuant to an Afghan arrest warrant and processing through the Afghan criminal justice system could validly be a way of achieving an effect against the individual desired through the JPEL.

Nominations would be required to be sent to ISAF in an approved format and by implication only ISAF coalition forces could actually make the nominations. Coalition forces could, however, use the information sourced from Afghan authorities to inform any target nominations they submitted for approval. The hypothetical scenario proposed by the Inquiry includes the statement "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". Such intelligence could come to New Zealand via a range of different source, including Afghan sources. Coalition forces could also share information with Afghan authorities that would lead to the

authorities issuing a warrant. Over time, as the capacity of the Afghan authorities increased, their involvement in different stages of the operations involving individuals on the JPEL also increased.

As a final point, I would note that, at its peak, NZDF contingent in Afghanistan numbered around 300 personnel. Of those, only a fraction was able to participate in operations involving individuals on the JPEL. Partnering with Afghan forces allowed New Zealand to do its part in response to the request from UNSC to assist Afghanistan in the fight against terrorism. Doing this alongside others in the international community within the ISAF coalition allowed New Zealand to contribute to results that we did not have the resources to effect alone. New Zealand was a very small part of a very large ISAF coalition and this partnering activity and joint operations were really key to the effectiveness in Afghanistan.

SIR TERENCE: Thank you. I don't have any further questions, so thank you very much and thank you for coming.

We're a bit earlier than planned and we've basically got half an hour until we intended to take lunch, so that will enable us, Mr Hager, to hear your submission now and that will bring everything to a conclusion.

MR HAGER: Okay.

SIR TERENCE: Are you happy for that?

MR HAGER: I am slightly unprepared, but it should be alright.

* * *

PRESENTATION BY NON-GOVERNMENT CORE PARTICIPANTS

MR HAGER

MR HAGER: Kia ora tatou again.

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.

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

I will attempt to contribute to this question of legality.

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)."

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".

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 in 2012.

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

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

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.

The law enforcement paradigm/hostilities paradigm idea has been developed by international law academic Nils Melzer, you have already heard him mentioned twice today, (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.

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".

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.

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. We should also keep in mind his point that even under the hostilities paradigm an "equivalent non-lethal alternative" should be given preference.

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 "greatest common contact surface area" with the facts.

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.

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.

The documents declassified by the Inquiry on Operation Burnham and the operation to capture Qari Miraj (I'm talking for example of 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.

When Operation Burnham troops flew into the Tirgiran Valley on a Deliberate Detention Operation, which is what their planning documents called it, as we saw on the slide before, 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 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.

It could be argued that there was also a combat side to the mission (although I don't agree with that). But the point now is that the primary mission was occurring under the authority and laws of the Afghan Government.

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.

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:

- Mentoring and training of the Afghan Crisis Response Unit; and
- "Detention Operations".

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."

The briefing also said:

"In accordance with [Government of Islamic Republic of Afghanistan] criminal law only a state prosecutor or a judge may issue an arrest warrant".

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.

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, i.e. 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).

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 insurgent leaders. Of the many operations planned around particular persons (so called '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.

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; i.e. an Afghan government legal framework.

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.

So, where do the 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.

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

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 village.

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.

Digressing for a moment, it is also worth noting that the supposedly legally rigorous ROE were also much dodgier than can be acceptable. 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 was the same sort of unlawfully loose licence to kill as JPEL.

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."

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

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.

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.

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, they asked, "What difference would it make to the analysis if JPEL targets were the subject of arrest warrants issued by the appropriate Afghan authorities?"

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

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 conduct 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.

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.

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.

The incoherence of JPEL killings is reinforced by the fact that New Zealand troops were required to use "Minimum Force", that is the technical term of 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.

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.

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 in 2012: the lethal attacks on three suspected insurgents as described on pages 91-93 of *Hit & Run*.

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. The date is important.

By that time the NZSAS had ended its deployment to Afghanistan and returned home, and the Provincial

Reconstruction Team was counting down the months before it left forever 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 on three more of the people suspected of being part of the 3 August 2010 attack on the New Zealand patrol two years earlier. The OC of the Burnham Intelligence Fusion Centre questioned the point of applying for the JPEL designations.

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:

This is him writing to colleagues, "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 [that is the name of the Provincial Reconstruction Team] is seeking to achieve by continuing [to] submit JPELs, especially with the announced CRIB withdrawal and no NZ SOF element (that could action JPEL)?"

It was a good question. However, the JPEL applications went ahead and 12 days after this email, on 20 May 2012, the first of the three insurgent suspects, a man named Alawuddin, was killed in his garden. Three days later on 23 May 2012 a prominent local Taliban man named Qari Musa was killed with several other people in a US airstrike on the house where he was staying. Later that year on 21 November a third man, Abdullah Kalta, one of the original Operation Burnham JPEL targets, was killed in a further air strike, by then only a short time

before the New Zealand troops permanently left Afghanistan.

The declassified documents do not reveal whether Afghan arrest warrants were sought,; 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 had happened with Qari Miraj, but NZDF opted for extra-judicial killings.

It is noteworthy that New Zealand troops in Afghanistan very rarely applied for JPEL designations. I want to distinguish here, NZDF troops in Afghanistan very often implemented JPELs but that was in their work with the CRU, working in the provinces around Kabul but they didn't very often at all get their own ones for New Zealand-related targets.

They did this for a Bamyan 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".

Thus, the five people covered by this Inquiry were rare exceptions. So, for the three 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?

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.

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 in this Inquiry, it was legally unsound and morally wrong for the New Zealand military to use the JPEL kill-capture regime. Thank you.

SIR TERENCE: Thank you, Mr Hager.

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CLOSING REMARKS

SIR TERENCE: Well, that brings this third module to a conclusion. Could I again thank Professor Akande for his presentation and thank also Brigadier Ferris and her assistant and Mr Hager for their submissions. Thank you all for coming, I hope you've found it as interesting as we have and as useful.

So, we will bring the proceedings to an end.

Hearing concluded at 1.17 p.m.