

## **Government Inquiry into Operation Burnham**

### **Progress Report No 6**

**15 August 2019**

#### **Latest disclosure of classified documents**

Since the last [Progress Report](#), the Inquiry has published two tranches of documents that have been reviewed under the protocol for disclosure of classified material.

On [22 July 2019](#) documents relating to Operation Burnham, the Joint Prioritised Effects List (JPEL) and Rules of Engagement (ROE) were published. On [7 August 2019](#) the Inquiry published further documents relating to Operation Burnham. All disclosed documents can be found here. Further tranches will be published in coming weeks.

#### **Provision of information**

The Inquiry continues to receive material from Crown agencies relevant to the Terms of Reference. In July the Inquiry received more than 100 emails from the Ministry of Foreign Affairs and Trade. In June, the New Zealand Defence Force (NZDF) provided more than 1000 emails. The Inquiry still expects further material from Crown agencies.

#### **Public Hearing Module 3 – 29, 30 July 2019 - The international legal framework and the Joint Prioritised Effects List**

[Emeritus Professor Sir Kenneth Keith](#), a former judge of the International Court of Justice, presented on the application of, and relationship between different bodies of law, including International Humanitarian Law (IHL) / the Law of Armed Conflict, International Human Rights Law (IHRL), customary international law, the UN charter, and domestic law. He described the evolution of law relating to both international armed conflict and non-international armed conflict, the nature of the conflict in Afghanistan at the time of Operation Burnham, the application of the Geneva Conventions, and the impact of United Nations Security Council resolutions relating to that country. Professor Keith also examined key legal provisions relating to the protection of persons detained during armed conflict.

[Paul Rishworth QC](#) presented on behalf of Crown agencies. He explained the Crown's view of the international legal framework which both authorised the use of force against insurgents by New Zealand soldiers in Afghanistan, and which regulated their use of force. He examined the principles of IHL governing the use of force, with reference to responsibilities to distinguish between combatants and those not taking part in hostilities, proportionality, and precautions to be taken in attacks to minimise harm to civilians and property. He also discussed issues relating to detention, whether New Zealand forces had knowledge of the risks to those it assisted Afghan forces in detaining.

Sam Humphrey, counsel for *Hit & Run* co-author Jon Stephenson, presented submissions on IHL and IHRL in relation to allegations of wrongdoing during Operation Burnham. In particular, he emphasised the importance of the Inquiry considering the application of domestic law, such as the New Zealand Bill of Rights Act 1990, in overseas contexts when New Zealand personnel engage in partnering arrangements with local forces. He also discussed the law relating to civilians directly participating in hostilities.

*Hit & Run* co-author Nicky Hager presented his view that international law, and possibly New Zealand law, had been breached during Operation Burnham. In particular, he referred to the obligation of NZDF to conduct its own investigation into allegations that the actions of its personnel had caused civilian casualties, citing NZDF planning documents for operations in Afghanistan. He also examined the obligations of NZDF to safeguard those who had been detained by Afghan forces during partnered operations. He concluded that New Zealand forces had sidestepped their legal obligations in the detention of Taliban insurgent Qari Miraj and failed in their legal duty to investigate allegations of torture of this person in an Afghanistan detention centre.

On the second day, Professor Dapo Akande, Co-Director of the Oxford Institute for Ethics, Law and Armed Conflict, University of Oxford, presented on JPEL with reference to the international legal rules and principles that govern the predetermined and offensive use of force against identified individuals in the context of a non-international armed conflict. He also described the relationship between IHL and IHRL in this regard. Professor Akande also examined the tests to determine whether, and in what circumstances, a civilian could be regarded as directly participating in hostilities and could be targeted.

Brig. Lisa Ferris, Director of NZDF Legal Services, presented an NZDF perspective on the nature and use of JPEL in armed conflict. Brig. Ferris described JPEL as an operational planning tool to help coordinate the efforts of the International Security Assistance Force and prioritise the use of resources. She detailed the process by which NZDF put forward individuals for inclusion on the list, the reasons they were kept on the list and the safeguards that applied to targeted operations in terms of New Zealand's ROE. She also discussed NZDF's approach to defining combatants who could be placed on the JPEL in connection to their membership of an armed group, and in what circumstances they would be regarded as having met the test of directly participating in hostilities.

Nicky Hager outlined his view that the majority of NZSAS operations to target individuals were carried out in the context of partnered operations – that is, assisting local forces acting on arrest warrants issued by Afghan authorities. He submitted that the law enforcement paradigm, rather than the law of armed conflict paradigm, is the most appropriate lens through which to assess the lawfulness and propriety of the JPEL operations in which NZDF forces took part. Citing declassified information made available on the Inquiry's website, Mr Hager expressed the view that deliberate detention operations (such as the operation in which Taliban insurgent Qari Miraj was captured) were legally and practically different to other operations.

The presentations can be found [here](#).

## **Public Hearing Module 4 – 16-20 September 2019**

Minute No 19 (18 July 2019) sets out the Inquiry's approach to examining the public statements made by NZDF and the advice it provided ministers in relation to the issue of civilian casualties resulting from Operation Burnham. A public hearing will be held in Wellington on this issue in the week beginning 16 September 2019.

The Inquiry had signalled in Ruling No 1 that while most evidence would be taken in private, there would be occasions when witnesses could give evidence in public and be cross-examined.<sup>1</sup> In Minute No 19 the Inquiry explained that “(g)iven that the statements of NZDF and ministers were made publicly, the Inquiry considers that they should be explained publicly. The basic questions of what NZDF personnel knew, what they reported and what was said publicly, should, in the Inquiry’s view, be addressed in a public forum.”

The Minute contains a schedule of public statements made by ministers and NZDF in relation to civilian casualties before April 2018 when the Inquiry was established. This includes statements made in Parliament, and in media releases and interviews. This schedule has been updated and can be found [here](#).

A second schedule outlines written briefings given by NZDF to ministers that have been publicly disclosed.

### **Updated MOU with Inspector General of Intelligence Services**

The Inquiry signed a memorandum of understanding with the Inspector General of Intelligence Services (IGIS) on 16 November 2018 recognising the potential overlap between their respective inquiries into some of the events under scrutiny. The IGIS launched its inquiry in March 2018.

The MOU describes a range of matters, including an agreement to hold regular meetings, how information on potential witnesses may be shared, how discussions relating to classified information are to be held and a commitment not to share classified documents obtained from other agencies without the permission of that agency.

The MOU was updated with an addendum on 4 July 2019 which sets out an agreement to hold working-level meetings in addition to the agreed schedule of meetings between the IGIS and the Inquirers.

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<sup>1</sup> Ruling No 1 para [78]