

Inquiry into Operation Burnham and Related Matters

Public Hearing Module 3

Presentation of the New Zealand Defence Force

Brigadier Lisa Ferris – 30 July 2019

Introduction

1. The Joint Prioritised Effects List, or JPEL, has sometimes been characterised as a 'kill list'. This characterisation is inaccurate.
2. In any armed conflict, parties will determine strategy and use tools to achieve their objectives. These will be more or less 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 (TCNs) working in multiple regional commands across Afghanistan. On a given day, there would be multiple operations undertaken with assets worth hundreds of millions of dollars. In this context, the JPEL was an operational planning tool to coordinate 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 coalition or local national forces. The JPEL's purpose and application was precisely as set out in its name: a **list** by which the **joint** coalition forces recorded and **prioritised** various **effects** that were sought in relation to specific targets, mostly individuals.
3. At Module 1, Sir Angus Houston's description of JPEL highlighted that it allowed both for the prioritisation of scarce resources and gave rigour to the process of ensuring those added to the list were lawful targets.¹
4. It is important to note that the JPEL has no independent legal status. The JPEL was a product in the process of determining, in accordance with International Humanitarian Law (**IHL**) also known as the Law of Armed Conflict (**LOAC**), whether a person is a legitimate target for a particular effect. The appropriate question, therefore, is whether

¹ Sir Angus Houston, transcript from Inquiry Public Hearing Module 1, from page 38 onwards.

someone is a legitimate target under IHL, rather than whether they can or should be placed on the JPEL.

5. As requested by the Inquiry, in this presentation I will discuss:
 - the specific legal principles relevant to targeting and the JPEL, and the concept of DPH;
 - The process by which individuals were placed on and kept on the JPEL; and how it applied in practice, including safeguards, training, and Afghan involvement.
6. While I will address all of the matters the Inquiry has requested in Minute 13 that NZDF speak to, I will take some liberty in the *order* in which I will do so for today's presentation.
7. 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 or kept on the JPEL. I will show some slides that contain some of that material in its declassified form, but will not be able to speak to any information that has been redacted from those slides as it remains classified.

The specific legal principles relevant to targeting and the JPEL

8. I will now set out the legal principles relevant to targeting and 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 the legal principles, and then describe how they were 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.
9. The primary body of law applicable in armed conflict is **IHL**,² otherwise labelled **LOAC**. At the time relevant to this Inquiry, and as Professor Akande noted, Afghanistan was

² See Ruling No 1 at [35].

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. While many of these principles and rules are now considered applicable also to a NIAC by virtue of their status as customary international law, the detail of what it means to implement them in a NIAC is less clear. Almost all conflicts ongoing today – and indeed almost all conflicts in recent times – are NIACs. 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 where it is relevant to some of the principles that I will discuss below.

10. The **principle of distinction** is a well-established norm that applies to IAC and NIAC, stipulating that only lawful targets may be intentionally attacked.³ 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.⁴
11. Strictly speaking, members of armed insurgent groups in Afghanistan were not *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 IAC, combatants may lawfully be targeted, even if they are not directly taking part in the hostilities at the moment they are targeted. They also enjoy combatant immunity meaning that they will not face charges for acts which are lawful under IHL.
12. In a NIAC, the adversary is not a soldier in uniform. Civilians may not be subject to attack. However, if a civilian takes a direct part in hostilities, they lose protection from attack for such time as they are taking a direct part in hostilities.⁵ Their acts are likely to be unlawful under domestic law and they may face criminal charges for those acts.

³ Article 13(2) of Additional Protocol II, 8 June 1977. A prohibition on direct attacks against civilians is also contained in Amended Protocol II to the Convention on Certain Conventional Weapons, and Protocol III to the Convention on Certain Conventional Weapons. See also Rome Statute, Article 8(2)(e)(i).

⁴ New Zealand Defence Force Te Ope Kaatua o Aotearoa Manual of Armed Forces Law Volume 4 Law of Armed Conflict, DM 69 (2 ed) at 4.5.1.

⁵ Article 13(3), Additional Protocol II, *ICRC Customary IHL Study*, Rule 6.

13. Other than coalition forces or members of the government-sanctioned Afghan armed forces, because Afghanistan at the relevant time was a NIAC, then, legally speaking, there were two categories of people: civilians - who could not be targeted; and, those who were taking a direct part in hostilities and thus could lawfully be targeted.⁶
14. The obligation of distinction is dependent upon the information available to the commander at the time an attack is decided upon or launched.⁷ Commanders have a legal duty to take practicable steps 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.⁸
15. As an example of how, in practical terms, NZDF are 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, ahead of the approval of this operation, there were 44 total intelligence reports from 23 different sources corroborating information relating to this individual and his activities. The letter and numbers associated with each report showed its level of reliability and credibility, and, for robustness, a certain number of reports above a particular level of reliability and credibility was needed. This was far from the full extent of what was required in planning an operation, but 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 DPH through their acts at a given moment, without ever having been listed on the JPEL or without NZDF having ever been previously aware of them.
16. The **principle of proportionality** also applies to IAC and NIAC. Proportionality does not govern the level of force used per se, but rather governs the decision to launch an attack. Attacks only become unlawful when the force used against combatants is so great that it would offend against the rule prohibiting indiscriminate attacks or causes disproportionate incidental civilian casualties and damage.⁹ For example, the International Criminal Tribunal for the Former Yugoslavia (**ICTY**) held in the *Galić* case that:

⁶ DPH applies only to civilians, and although it deprives them of immunity from attack for such time as the participation lasts, they do not lose protected status as civilians per se.

⁷ DM 69 at 4.5.2.

⁸ DM 69 at 4.5.2.

⁹ DM 69 at 4.4.5.

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.¹⁰

17. 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.

18. **Precaution** is 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...¹¹

19. 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. New Zealand's 1992 Military Manual, which was in effect at the time of the events relevant to this Inquiry, included this exact wording from Additional Protocol I. This slide also shows *some* of the risk assessments that were undertaken ahead of operations, as part of general obligations relating to precaution.

20. In yesterday's presentations, there was discussion about the source and content of the IHL obligations related to **persons who are wounded or sick in armed conflict**. As a practical illustration of how that obligation is complied with, this slide records some of the relevant planning undertaken ahead of an operation. You can see from the slide that there were, 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.

21. Medical treatment or evacuation could be provided to all without distinction – that is to civilians, to insurgents who were *hors de combat* (meaning they were no longer

¹⁰ *Prosecutor v. Galić (Judgment)* ICTY Trial Chamber IT-98-29-T, 5 December 2003, at [58].

¹¹ Article 57(2)(a) of the 1977 Additional Protocol I.

taking part in hostilities), as well as to our own forces, coalition forces and Afghan partners. In situations where multiple casualties have occurred, priority in treatment would be accorded based on medical need meaning that, when necessary, medical aid for civilians and insurgents was 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.

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

How does the concept of “direct participation in hostilities” work?

23. I will now address the concept of **direct participation in hostilities** or DPH. As I noted above when discussing the principle of distinction, DPH entails a loss of civilian immunity from attack in a NIAC. That is, civilians – who would normally be protected from 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 as DPH without ever being listed on the JPEL. It was also possible that individuals could be designated on the JPEL for effects where being DPH was not relevant. Objectives other than individuals – such as structures or places – could also be listed for certain effects. I will not address those other matters in any detail: as requested by the Inquiry, this presentation focusses on the process by which *individuals* were placed on the JPEL, and on *the concept of DPH*.

24. The notion of DPH has evolved from the phrase ‘*taking no active part in the hostilities*’ used in Common Article III of the Geneva Conventions.¹² However, neither the 1949 Geneva Conventions nor the 1977 Additional Protocols provide a definition of DPH. Because the concept of DPH implies loss of immunity from attack for civilians, it has

¹² Common Article 3: “Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any similar criteria.”

received much attention in legal and academic commentary. However, no uniform definition of DPH has yet developed in state practice.¹³

25. In 2009, the ICRC released non-binding Interpretive Guidance on DPH. As I have mentioned, many IHL rules and principles were developed to apply in an *IAC*, and there can be differences in implementing those rules and principles in a *NIAC*. The ICRC's Interpretive Guidance was part of its efforts to bring greater clarity. There is a good deal of consensus on many aspects of the ICRC's Interpretive Guidance, however, and as Professor Akande notes, certain key aspects of it have not been accepted by states.¹⁴
26. That there is not 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 the principle of distinction has always been a feature of IHL.
27. NZDF's current Manual on LOAC was promulgated in 2017 and has detailed guidance for NZDF personnel on DPH.¹⁵ 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 advisors, 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.

¹³ See ICRC Database, Rule 6; Andrew Clapham, Paola Gaeta & Marco Sassòli (eds) *The 1949 Geneva Conventions A Commentary* (Oxford University Press, Oxford, 2015) at 937.

¹⁴ For the ICRC, simple membership in such groups does not amount to a continuous form of DPH. That is, an OAG is the armed or military wing of a non-state party to a *NIAC*. It may be comprised either of dissident armed forces, or other organised armed groups which recruit their members primarily from the civilian population but have developed a sufficient degree of military organisation to conduct hostilities on behalf of a party to the conflict. See <https://casebook.icrc.org/glossary/armed-groups>.

¹⁵ See DM 69 at 6.5.12 and DM 69 at 6.5.13. For NZDF forces, the question of whether a person is taking a direct part in hostilities is to be determined in good faith on the basis of information available to the decision-maker at the time. This includes:

- a) information or intelligence on the methods of attack armament, movement, manoeuvre and deployment, motivation or activity consistent with an intention and capability to carry out an attack in the context of the operation;
- b) the activity, weapons (if visible), clothing, gender and age of the individual; and/or
- c) known membership of an armed group which engages in combat operations in a persistent campaign.

The current NZDF Manual on the Law of Armed Conflict notes that DPH means any deliberate action of a fundamentally military nature, which is intended or likely to:

- a) cause death or injury to members of a New Zealand force or to coalition partners;
- b) destroy or damage the property of a New Zealand force, coalition partners, or any other military objective;
- c) substantially hinder the operations of a New Zealand force or its coalition partners;
- d) materially assist an opposing force; or
- e) cause death or injury to members of the civilian population or other protected persons, or destroy or damage civilian objects or other protected objects that it is the duty of the force to protect.

28. As this next slide shows, in Afghanistan at the time relevant to this Inquiry, New Zealand considered that a civilian could lose protection by DPH through:

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

29. I will address those two categories in turn. Dealing first with those who were assessed as DPH through a specific hostile act or hostile intent, they lost civilian protection for the duration of their direct participation in hostilities. When civilians ceased to take DPH, they could still face prosecution for violations of domestic and international law committed while they were participating in hostilities, but they regained full civilian protection against direct attack.

30. 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 the attack and return from it. The length of the continuum will depend on the nature of the action.¹⁶ 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.¹⁷

31. I will turn now to the issue of those who were DPH through membership of an Organised Armed Group. NZDF's position is that, while civilians who 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 **continuous DPH** and thus legitimate targets for as long as they remain members of the group.¹⁸

32. 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

¹⁶ DM 69 at 6.5.22

¹⁷ DM 69 at 6.5.14.

¹⁸ As such, the NZDF's ROE do not preclude the inclusion of named groups in targeting, DM 69 at 6.5.26 (emphasis added). ROE 'H' for Operation Wātea took this approach, where certain group or groups were named in the Rule governing targeting. In December 2009, it was amended to include, but not be limited to, membership of those group(s) named in the Rule.

hostilities, even though it may not be as well armed, trained or capable as the forces of a State".¹⁹

33. 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.²⁰ This is because their role in the group is such that they are deemed to be continuously DPH – analogous to members of armed forces in an IAC. It would therefore be lawful to approve a nomination of a person on the JPEL once it is determined that they meet this criterion.²¹
34. As to which members may be regarded as being involved in **continuous DPH**, NZDF's current LOAC 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.²² 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.
35. For the ICRC, only those individuals with a 'continuous combat function' are considered to be members of an OAG.²³ As Professor Akande notes, this concept has been the subject of much criticism, particularly as it introduces inequality into the law regarding targeting between NIACs and IACs.²⁴ This part of the Interpretive Guidance has not been met with acceptance by states in that it takes a very narrow definition of membership of an OAG, and, in requiring a functional analysis, essentially replicates the notion of DPH.
36. In defining who is a **member** of an OAG, NZDF does not use the term 'continuous combat function' used by the ICRC. However, legal and training materials from the time of Operation Wātea, including some released as part of the Inquiry's classification

¹⁹ DM 69 at 6.5.24.

²⁰ Opinion of Professor Dapo Akande, 18 June 2019 at [15].

²¹ Ibid at [18].

²² DM 69 at 6.5.25 (emphasis added).

²³ Under this view, the term 'OAG' refers exclusively to the armed or military wing of a non-State party: its armed forces in a functional sense (ie not that group's political or humanitarian wings). The ICRC notes that non-State parties in an armed conflict comprise both fighting forces and supportive segment of the civilian population, such as political and humanitarian wings. See *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC, Geneva, 2009) at [32].

²⁴ Opinion of Professor Dapo Akande, 18 June 2019 at [22].

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 therefore could be subject to targeting under Rule H, and nomination for the JPEL.

37. Different NZDF documents from Operation Wātea, such as legal ROE briefings, have phrased *slightly* differently the test regarding when a person was regarded DPH by virtue of being a member of an OAG. These are also slightly different to how the current NZDF 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 as NZDF considered this Guidance. However, what remains common across all the material is that for the purposes of determining exactly *who* was to be regarded as DPH via membership of an OAG, 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.
38. As Professor Akande notes, it is often the case that persons will occasionally fight on behalf of an OAG but also engage in normal civilian activities.²⁵ The issue is sometimes phrased as 'farmers by day, fighters by night'. The question of who is, or is not, a member of an armed group is a critical and often difficult LOAC decision. As Professor Akande notes, the factual matrix in a NIAC is more complex than in an IAC. Members of OAGs 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 be doubtful. Such groups will not have clearly defined membership structures, and 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.²⁶
39. While an interesting theoretical question, in reality the '*farmer by day, fighter by night*' issue seldom arises, especially for NZDF in Afghanistan. In Afghanistan at the relevant

²⁵ Opinion of Professor Dapo Akande, 18 June 2019 at [13].

²⁶ DM 69 at 6.5.27 – 6.5.28.

time, only 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: to use Sir Angus Houston's phrase – seeking to *assign the right asset to the right target at the right time*. Due to their highly specialised skill-set as Special Forces operators, the targeting operations which the NZSAS were asked to be involved with focussed on higher-level members of OAGs whose roles in the group left little doubt that they were fighters by day or night.

40. 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.
41. Before moving to speak more specifically about targeting and JPEL, I would like to mention New Zealand's Rules of Engagement (ROE) and use a scenario to illustrate their relationship with the concept of DPH.
42. New Zealand ROE for Operation Wātea allowed for targeting, which could be done using the JPEL. As this slide shows, the two most relevant ROE were:²⁷
 - **Rule H** authorised the use of offensive force against those individuals who were considered to be members of an OAG, sufficiently connected to the combat effectiveness or capability of that group – who were therefore considered by New Zealand to be in a state of 'continuous' DPH until such membership ceased. Rule H initially labelled certain specified group(s), but was later amended to include all groups directly participating in hostilities against the legitimate Afghan Government.²⁸
 - The ROE contained definitions of 'hostile act' and 'hostile intent', primarily relevant to **Rule A**, which permitted force against a hostile act or hostile intent. It did not contain a definition of 'DPH'. While the definitions of hostile act and intent may have assisted in considering what amounted to 'DPH', the precise

²⁷ For more complete information regarding ROE and authorisations of force, including the December 2009 amendment to Rule H, see Memorandum for New Zealand Defence Force regarding Rules of Engagement, 13 June 2019.

²⁸ Ibid.

legal threshold for action under Rule H was that the relevant individual or group was *directly participating in hostilities*.

43. A scenario, based on actual operations New Zealand was involved with, 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 are 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.
44. How would it be determined that these individuals were DPH? For the targets of the operation, **the relevant New Zealand ROE is Rule H**. The assessment would be 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 the person was a member of an OAG 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.
45. What of those who may not be the targets of an operation but who nevertheless present as DPH during an operation? This would generally be relevant to Rule A of the New Zealand ROE, that is a defensive use of force against individuals assessed as DPH through hostile act or hostile intent. Recall that IHL contains a presumption of civilian protection: if there is any 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 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 reasonably be achieved in the circumstances'.²⁹ Any assessment of DPH was to be made in good faith, on the basis of the information available to the decision-maker at the time, including intelligence, manoeuvre, motivation, activity, weapons, age, and gender. It is often a combination of these factors which will contribute to a judgement regarding engagement.

How JPEL applied in practice, including safeguards and training

46. Having set out the relevant law and understanding of DPH, I turn now to how it worked in practice in the context of the JPEL.
47. As I said at the outset, JPEL was not a kill list. Professor Akande has considered the question of **whether the 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 such a rule would be difficult to apply. NZDF agrees with this position of the law.
48. However, 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 Afghan authorities and processed through the Afghan criminal justice system, where it was possible to do so safely. In line with ISAF's mandate, this meant ISAF provided the support and resources necessary to enable the 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 the 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 NZDF participated in, the targets were captured rather than killed**, notwithstanding that the latter would have been lawful under IHL.

²⁹ ICRC Guidance at [76]. This determination will have to take into account, inter alia, the intelligence available to the decision maker, the urgency of the situation, and the harm likely to result to the operating forces or to persons and objects protected against direct attack from an erroneous decision.

49. To provide context and background to the creation, maintenance, and use of the JPEL, I would like to give an overview of targeting doctrine more generally, before going on to talk about JPEL specifically.
50. 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 it relates to targeting into a target evaluation and decision making process.
51. Decision making in the context of targeting will traditionally be achieved through a targeting cycle which comprises several phases. Although the specific NATO ISAF SOPs on targeting in Afghanistan remain classified, NATO have released their current doctrine on targeting from 2016 which broadly describes the targeting process. As this slide shows, there are generally six phases to the operational targeting cycle. This is the process that would generally be undertaken at the operational level of a combined joint environment much like the ISAF Coalition.
52. From the matters the Inquiry has requested to be covered in this presentation, the phase of the targeting cycle that appears to be of interest is **Phase 2**. It concerns target development and this is where target lists such as the JPEL are developed. Target development 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.
53. First there is a form of target analysis which is usually undertaken with a centre of gravity analysis which involves identifying existing critical susceptibilities and vulnerabilities of an adversary and applying them against the lens of the Commander's objectives. Following an initial assessment of targets from the analysis process, targets are vetted from an intelligence perspective to ensure that the target performs the specified function for an adversary. Next, the target will need to be validated. This ensures that there is continued compliance with the Commander's objectives, guidance, intent and desired effects; compliance with IHL and ROE; as well as an assessment of the accuracy and credibility of the sources used to develop the target.
54. Following this process, a target will be nominated for approval via a coordination process and identified for inclusion and prioritisation on a target list. Following that,

target prioritisation will occur. This means 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 will traditionally have their own SOPs and procedures and will involve subject matter experts from the operational level of the Coalition such as intelligence and operational staff, and legal advisors. The principal output of this phase is often called the Joint Prioritised Target List which we can broadly equate in this context 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.

55. 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 it listed. Rather, **the JPEL 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 is, therefore, whether a person *was a legitimate target* under IHL for the desired effect, and not whether someone can or should have been placed on the JPEL.
56. Generally speaking, with regard to JPEL, **TCNs put forward nominations** for desired effects against individuals. Nominations were supported by relevant evidential reporting which specified the threat posed by the individual. Such reporting had to meet standards of reliability and credibility prescribed by ISAF. Nominations were assessed and scrutinised by a range of personnel from different coalition forces, including intelligence and operational staff, and legal advisors including LOAC experts.
57. 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 could be considered reliable by**

all ISAF coalition forces. Every individual nomination was subject to a high level of scrutiny, and all those involved at the various stages of the vetting and approval process had to be satisfied before an individual would be approved for inclusion on the list. 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.

58. 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. This provided another level of control and verification over operations in relation to JPEL targets, specifically by New Zealand forces and legal advisors.
59. The process of placing an individual on the JPEL is distinct from the planning for an operation involving such an individual. As such, there is an **important distinction to be made between 'pre-authorized' and 'predetermined'**. While a person on the 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 any use of 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.
60. There were **additional criteria, safeguards, tasks or 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 is anticipated that the use of force is likely to be required, the *actual* use of force is 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 that they use it.
61. Any actual operation or engagement remained subject to (i) relevant prescriptions set down in ISAF SOPs (which remain classified and are not able to be discussed here) and (ii) operational command orders and situational context, and (iii) LOAC.
62. Operationally, if members of the NZDF were carrying out an operation in relation to a person on the JPEL they were at all times still subject to New Zealand's own ROE, and

the specific authorisations and caveats contained within. For instance, Cabinet had placed specific limits on New Zealand's participation in counter-narcotics operations.

63. Positively identifying the identity of a target, before any engagement, was crucial for 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 ROE, part of which has been publicly released.
64. Further, in New Zealand operations involving direct action tasks, governed by **Rule H**, planned attacks on JPEL targets had to be approved at the specified authorisation level, and additionally, positive confirmation by a specified authority that a target was DPH was required by the authority specified in the Rule.
65. Reflecting the fundamental IHL principle of proportionality, all 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.
66. The question of **temporality**, raised in Professor Akande's paper, is an important one, both in regard to the list itself and any operation undertaken to target an individual on the 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 the 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.
67. In sum, operations involving individuals listed on **JPEL, irrespective of the means or methods of targeting used in the operation, were within the bounds of applicable IHL**. For example, manned or unmanned armed aerial systems might be used. 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, and proportionality, continued to apply to any such operations.

68. Regarding **training**, as was discussed in Module 2, members of the NZDF – including those involved in preparing JPEL nominations and participating in operations involving individuals on the JPEL – had training in LOAC prior to, and during their deployment.³⁰ NZDF personnel were trained in the other safeguards and processes prescribed by ISAF relating to JPEL targets.
69. I will turn now to make some comments on **the significance of Afghan involvement with JPEL**. ISAF, broadly speaking, was mandated to combat the terrorist insurgency in order to assist the Afghan authorities to 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 the hostilities. In IHL terms, this meant they had lost their civilian protection and were legitimate targets.
70. 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 subject to an arrest warrant issued by the appropriate Afghan authorities.
71. Generally individuals on the JPEL were verified as being DPH and targetable on that basis under LOAC. 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 them through the Afghan criminal justice system could validly be a way of achieving the 'effect' against that individual desired through the JPEL.
72. Nominations were required to be sent to ISAF in an approved format and by implication only ISAF coalition forces could actually make nominations. Coalition forces could, however, use information sourced from Afghan authorities to inform any target nominations they submitted for approval. The hypothetical scenario proposed by the

³⁰ For more complete information regarding training in ROE and LOAC, see presentation by Brigadier Lisa Ferris, Module 2 hearing, May 22 2019.

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 different sources including Afghan sources. Coalition forces could also share information with the Afghan authorities that would lead to those authorities issuing a warrant. Over time, as the capacity of the Afghan authorities increased, their involvement in different stages of operations involving individuals on the JPEL also increased.

73. As a final point, I would note that, at its peak, the NZDF contingent in Afghanistan numbered around 300 people. Of those, only a fraction was able to participate in operations involving individuals listed on the JPEL. Partnering with Afghan forces allowed New Zealand to do its part in response to the request of the 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 small part of the large ISAF coalition and this partnering activity and joint operations were key to effectiveness in Afghanistan.