

UNDER

THE INQUIRIES ACT 2003

IN THE MATTER
OPERATION

A GOVERNMENT INQUIRY INTO
BURNHAM AND RELATED MATTERS

Dates of Hearing: 22-23 May 2019
Commenced at 10.00 a.m.

Inquiry Members:
Sir Terence Arnold QC - Chair
Sir Geoffrey Palmer QC

Counsel Appearing:
Ms K McDonald QC and Mr Andru Isac QC, Counsel Assisting
the Inquiry
Mr S Humphrey appears for Jon Stephenson
Mr P Radich QC and Dr L Richardson appear for NZDF
Mr B Gray QC and Mr S Worthy appear for Hon Dr Wayne
Mapp
Mr I Auld and Dr P Ridings appear for Crown Law

Venue:
The Thorndon Hotel,
24 Hawkestone Street
Thorndon
Wellington

TRANSCRIPT OF PROCEEDINGS

I N D E X

	Page No.
22 May 2019	
Opening Remarks	3
Afghanistan Civilian Perspective	7
Presentation by Nicky Hager	36
Presentation by Judge Advocate General Kevin Riordan	59
Presentation by Brigadier Lisa Ferris	98

OPENING REMARKS

SIR TERENCE: Can I welcome you all to the second of the three public hearings that the Inquiry is holding on legal and other issues arising from its Terms of Reference. The hearing will be spread over two days and will cover a number of important topics.

We will begin today's session with evidence on how the situation of continuing conflict in Afghanistan has affected the civilian population. This topic was included at the suggestion of counsel for the Afghan villagers.

The witness concerned is protected by a comprehensive non-publication order in respect of **[WITHHELD]** and any identifying particulars, including information about occupation and gender. In addition, no photographs or video images may be taken of the witness. The media may record the witness's oral evidence, but may not broadcast it. In other words, the media may only reference the evidence by way of text or voice-over summary. Copies of the formal order to that effect have been distributed to the media and are available for members of the public.

I should emphasise that this order applies to the public just as much as it does to the media.

[WITHHELD]

Following that presentation, there will be an opportunity for non-Crown core participants to respond to the presentations made at the first of the public hearings on 4 April. You will recall that those presentations were made by Sir Angus Houston, former Chief of the Defence Force in Australia, the Hon Dr

Wayne Mapp; the Minister of Defence at the time; and the New Zealand Defence Force on the issue of the location of Operation Burnham.

As it has turned out, Mr Hager will be the only one making a presentation in response to these presentations today. His co-author, Mr Stephenson, had originally intended to make a presentation but unfortunately he is unwell and is unable to attend. He may, of course, if he wishes, submit something in writing at a later stage, however. Ms Manning for the Afghan villagers has indicated that she will not be attending the hearing. After the lunch break, there will be two presentations on behalf of the New Zealand Defence Force on various aspects of rules of engagement, the first from the Judge Advocate General, Kevin Riordan, and the second from Brigadier Lisa Ferris, the Director of Defence Legal Services. This order is a variation from the agenda distributed earlier. These presentations will take the balance of the day.

Tomorrow, we will start at 10.00 a.m. with a presentation by Crown agencies on issues relating to the on-going detention of people captured in the course of operations. Following that, the Hon Dr Wayne Mapp will give evidence about the process for Government approval of rules of engagement and the steps New Zealand took in relation to compliance with its obligations in relation to detention in Afghanistan. After Dr Mapp, Mr Hager will make a presentation in relation to rules of engagement and detention and that will be followed by a submission from Mr Stephenson's counsel, Mr Sam Humphrey, on those same topics.

I should explain briefly why we have asked for presentations on rules of engagement and detention at this public hearing.

As we see it, there are four areas of law which have particular significance for the Inquiry's work: rules of

engagement, obligations in relation to the detention of persons captured, the requirements of international humanitarian law in a situation of non-international armed conflict such as existed in Afghanistan, and the operation of the Joint Prioritised Effects List (JPEL). Sir Geoffrey and I felt that we would be assisted by hearing explanations of how NZDF and the relevant government agencies addressed these matters and hearing submissions on issues raised by those explanations. We also considered that public explanations and submissions would help the media and members of the public understand the issues and put them in their proper context.

To facilitate an informed discussion, some previously classified material relating to Operation Burnham, to the rules of engagement and to detention has been released, the first batch on 7 May and a second batch dealing mainly with detention on 17 May 2019. That material is available on the Inquiry's website. We acknowledge that the material released takes time to assimilate, but all core participants will have the opportunity to file further submissions two weeks after this hearing, and we plan to return to these issues when we make our provisional views available in October. As a consequence, we anticipate that anything that can usefully be said on these topics will be raised. Finally, I should say that the presentations and submissions will be recorded and transcribed and the transcript will be posted on the Inquiry's website in due course.

Now, just before we hear from the first witness, could I just take or note the appearances today by counsel and others?

Counsel Assisting, Ms Kristy McDonald QC and Andru Isac QC.

For the Defence Force, Mr Radich QC and Dr Lucy Richardson.

MR RADICH: Thank you, Sir.

SIR TERENCE: Of the other core participants, Mr Hager, you are appearing for yourself. And Mr Humphrey, you are appearing for Jon Stephenson.

And then for the Hon Dr Wayne Mapp, Bruce Gray QC and Mr Worthy.

MR GRAY: Yes, Sir.

SIR TERENCE: And for Crown Law, Mr Auld and Dr Penny Ridings. Thank you.

I've got everybody? I haven't missed anybody? Good.

All right, I'll ask Mr Isac to call the first witness.

MR ISAC: Thank you, Sir.

AFGHANISTAN CIVILIAN PERSPECTIVE

(Witness sworn)

EXAMINED BY MR ISAC

Q. Can we begin with a little bit about your professional background and where you're from?

A. Sure. Good morning, everyone. [WITHHELD]

Q. Thank you. Can you begin perhaps with an overview of how the ordinary lives of the people of Afghanistan have been affected by conflict and, in particular, the lives of women and children?

A. When we talk about the conflict in Afghanistan, we talk about four decades of war which is still continuing. So, it has made life much harder for everyone. It has created lot of uncertainty about the future. People are constantly in survival mode.

You know how our brain functions when there is danger, we usually operate on the fight or flight mode and for a lot of Afghans because of the ongoing danger and conflict, that's the mentality.

Waking up every day, people are unsure about whether or not they will make it to the evening alive.

[WITHHELD] when they say good-bye to their partner or their children, they are not sure whether they will make it back home and see them again in the evening.

The insurgents have not distinguished military from civilians. Many lives have been lost, the exact number of which has never been ascertained, if it is known at all. The constant struggle to meet basic needs and find relative security has resulted in mass migration and internal displacement, often tearing families apart.

I would be surprised if you find a family member in Afghanistan who doesn't have other family members around the world or in other parts of Afghanistan, mostly torn apart because of conflict.

The war has led to insecurity and poverty which have become obstacles to education and led to a survival mindset. By this, I mean, as parents, if you don't have enough food to eat yourself and you don't have enough to provide for your children and there is no security, you don't have proper shelter - thinking about education for your children and other aspects on values of life, they become secondary.

In general, people are always anxious about their own future and there is a sense of hopelessness and helplessness about the future of the country.

[WITHHELD] What I have noticed are significant deteriorations in the sense of hope and an increased sense of helplessness about the future of the country.

Many families who did not want to leave the country have now changed their mind and they just want to move out of the country.

The long-term conflict has impacted the mental health of the general population, not surprisingly, and has huge implications for their sense of trust. In the Afghan mindset "one is guilty until proven innocent". This is not to make judgements but it is for their survival. If you live in a context where there is ongoing danger, having the mindset to believe everybody and everything that comes without questioning it can be detrimental to your safety. So, it is a survival mechanism but unfortunately it can continue even when people are in a safe place.

[WITHHELD]

Persistent war has resulted in the destruction of the country's economic, social and cultural infrastructure.

It has led to loss of family members, loss of land and households. Many Afghans were forcefully displaced, internally and externally. **[WITHHELD]**

Many have been imprisoned and tortured by various political groups or Government agencies.

In my knowledge and in my experience, I think the total imprisonment were usually because one belonged to certain ethnic groups or certain religious groups. In the context of ongoing conflict, an ordinary Afghan family has limited options. If they have capacity (financial or connections), they will leave the country for a safer place, where their children can receive education and be safe. The migration route starts with Pakistan, India, Iran and Turkey and from there to western countries including the United States.

In terms of women, Afghanistan is a very patriarchal society, and with successive governments, many and varied restrictions were imposed on women. The highlight of that period was the Taliban era where women were banned from access to education and many were not allowed to work. And even they were deprived of their right to appear outside the house without a male relative escort.

The situation of women has improved in the past few years but still we have a long way to go. Women were also raped and forced into marriages to men in power, a topic often denied, or silenced in public discussions.

The Oral History of Women published by United Nations Women in Afghanistan in 2011 describes some of the dark experiences by women during the 30 years of war from 1978 to the present.

In addition to the restrictions imposed on women, women experienced high levels of trauma as a result of domestic violence. [WITHHELD] A significant number of women were victims of domestic abuse and who felt quite helpless to seek any help in the fear that they will lose their children if they chose divorce.

As is common in the context of war, many men become victims and they die and they leave many women as widows. This resulted in the loss of the only breadwinner in the family and took the families to the depth of poverty. When a woman doesn't have much education or skills or has never worked outside the house, certainly loss of a husband can be quite detrimental.

There is not much research on the mental health of women, but what is available indicates that the prevalence of depression and anxiety among women is high compared to men.

Suicide rates in Afghanistan, according to WHO in 2014, is 5.7 per 100,000 population and the majority are women. However, saying this, this is in the context where suicide is a highly stigmatised concept in the society. Many families, even if a member commits suicide, they will not report it as suicide, they will use other excuses when they report. Many women try to attempt suicide by self-immolation, burning themselves, it's quite common in the western part of Afghanistan and in southern but it can happen I think anywhere.

A recent research by a psychiatrist in western part of Afghanistan showed that the risk factor for self-immolation women in that specific region is domestic violence. Unfortunately, violence is inflicted first by mother-in-law, sister-in-law, then husband. In the northern parts of Afghanistan, usually when women commit suicide it's by drowning themselves in the river.

Children have been impacted mostly because of loss of a parent figure, mostly fathers in war.

And also, they have been raised by parents who have experienced trauma for many years. So, we can make assumption that their children can be exposed to violence by their parents as well.

The boys in a family often have to work from a very young age, as young as six years old, to help support the family.

Young girls at times become victims of child marriage in exchange for money.

One-third of Afghan girls marry before the age of 18. Children, especially boys, are driven to join armed groups in search of a steady income and support for their families.

Poverty, limited access to quality education, and limited access to quality healthcare have all impacted on Afghan children in negative ways.

Q. Thank you. Can you now perhaps explain how life has changed within the villages and the rural areas?

A. Yes, thank you. [WITHHELD] The lives in villages have been impacted in many ways.

Villagers are usually deprived of access to basic education and healthcare. Provinces like Baghlan [WITHHELD] which are located on the mountainous regions of Afghanistan, have been deprived of many opportunities. For this reason, many of the people, communities from the northern region, they come to the capital in search of education, if they are financially capable, or in search of access to better healthcare. With the collapse of the Taliban in approximately 2001, there have been significant changes in the villages, where more schools and more health facilities were built. In many places, roads and bridges were constructed with the support of the international

community, and that facilitated transport between villages.

The villages also got access to technology and the internet. Many people in the villages, regardless of their financial status, have mobile phones, and they have access to internet. It might depend on the geographical locations. No specific study has been done to show the impact of exposure to the outside world through mobile devices in the Afghan villages, so I am not able to comment on this. But, for instance, in [WITHHELD] it would not be uncommon for a family to have access to at least one mobile phone, which might be shared amongst the wider group. And recently, [WITHHELD] members were using Facebook as a common way to do their campaigns, I mean candidates from [WITHHELD] and northern regions.

Since Afghanistan is mostly an agricultural country, the majority of the population in villages rely on agriculture for basic food. During winter, when there is not much work, many young men from families try to migrate to countries like Iran, or go to the capital Kabul, in search of a job, or sometimes young adults go to Kabul within 3 months of winter to study English or to take a computer class. In addition, again because of the financial need, young men in families either join the Afghan National Army or the Taliban.

People have lost both lives and property. War has left a huge number of disabled persons who typically become an economic burden for their families. Villages have at times been out of reach due to destruction of a bridge or a communication line by a warring side. At times people have left all their belongings behind and have migrated on foot to a safer village, and later on upon return have found all their belongings looted and have had to restart life from zero.

Also, for the past many years, we have had quite intense drought in Afghanistan and that has put lots of financial strain on people. This year, fortunately there has been more rain and people are optimistic in villages in terms of agriculture.

Q. Thank you. I wonder if you might now tell us a bit more about how the conflict has impacted on the welfare of the people, in particular in relation to health outcomes, education and household income?

A. Sure, yeah. Again, I am repeating myself but the minds, because the minds of many Afghans are fixed on survival mode and meeting basic needs, this has adversely impacted on the lifestyle of people. Little value is given to exercise and recreational activities, even with and for children. For many, meeting their basic needs is a continuous and all-encompassing challenge. Insecurity is an additional obstacle for people who exercise and socialise. This too has a negative impact on both the physical and mental health of the population.

[WITHHELD] For some men, even though socially it was appropriate or easy to walk, security-wise it was not safe for them. For women, socially it was also not safe. They were saying if I go for a walk outside my house, I will be harassed by a lot of the looks or some verbal harassment by people in the public.

In 2015, UNAMA and UNICEF documented 125 adverse incidents affecting access to healthcare compared to 59 in 2014, including 20 health workers killed, 43 injured and 66 abducted.

132 conflict-related incidents affecting access to education and education-related personnel were also documented, including 11 education personnel killed, 15 injured and 49 abducted. This is based on the United Nations report in 2016.

In having these facts, we can assume the implications for villages is even worse because of security, because of the location of the villages, not many people will be wanting to go and teach or practice as a doctor in very remote areas because of the access.

In terms of health, according to the latest WHO data published in 2018, life expectancy in Afghanistan is 62.7 years. For males the average life expectancy is 61 and for females it is 64.5. Asking age is always a tricky thing in Afghanistan. One is usually, if you go from western countries you can make an assumption about somebody's age based on their physical appearance. They usually appear much older than their actual age. Also, many people don't know their correct age to start with. So, a person who looks to be 40 years of age may in reality can be only 25 or 30 years old.

Child mortality is very high. 70 out of 1,000 children die prior to reaching 5 years old. Afghanistan has one of the world's highest mortality rate for children under 5.

Afghanistan still remains one of the most dangerous places to be an infant, a child and a mother; one in every 18 children die prior to celebrating their first birthday. This is according to UNICEF 2015. Limited access to healthcare services is one of the primary reasons.

With international support, child mortality was reduced by 50% between 1990 and 2015.

34.5% of children under the age of 5 are under weight and 59.3% have stunted growth.

Women have very low education levels. 85.3% have no access to education according to 2015 data.

Women have also reported high levels of malnutrition. In the northern regions, breakfast and lunch constitute bread and milk tea. Families are lucky if they have milk to add to their tea. Dinners are usually basic vegetable

soups. Many families regularly go to bed with empty stomachs.

Physical disabilities are high due to loss of limbs in mines and in explosions.

High levels of mental health symptoms such as depression, anxiety and Post Traumatic Stress Disorder exist. In addition, easy access to opium contributes to a high level of substance abuse.

In mountainous areas the challenge is even greater; families need to walk for hours to reach health facilities. There have been efforts to establish basic health facilities, however the limited availability of doctors and female doctors is an obstacle.

In terms of education of children, access to primary school is still a dream for many children in Afghanistan, particularly children in rural areas and girls.

There are many obstacles for girls to attend school, including limited availability of schools in their geographical area and social cultural barriers for girls to attend school. In my observation, there has been improvements in the mentality of parents and families to send their girls to school but still, there are still many girls who cannot attend school because of the belief of their families about girls going to school. Some families do not want their girls to be exposed to other men and worry if their daughters attend school, they will learn to push the boundaries at home. And I'm aware of a village that families withdrew their girls from attending school because the teachers in that school, the teachers were males.

When families struggle to provide their children with three meals a day, education, as I said earlier, becomes a secondary priority.

Many families struggle with provision of basic stationery and shoes for their children to walk to

school, especially in remote areas where schools are quite a distance from home. Ensuring their children have good shoes to walk every day to school is a challenge.

Children have been impacted by war, by bombardment, mines, and loss of parents. For example, in November 2007, in Baghlan hundreds of children who were welcoming Members of Parliament at a sugar cane factory were caught in explosions. Many lost their lives and many were injured.

There are very limited psychological care services for children. To my knowledge, we do not have any child psychiatrists or child psychologists in the country. Moreover, the awareness on common mental health issues in children among parents and school teachers is very low. So, even if a child has a mental health issue that needs attention, the parents and the children will have difficulty to identify that and to find ways to seek help.

In terms of your question on family income, the majority of Afghans live with a salary of less than USD50 per month. This is in the context of huge disparity between the rich and the poor which means there are many families who live with much less than USD50 per month.

Many families live in poverty. For example, the research conducted by a psychologist, one of the participants reported "My guilt over the death of my children is not about their death but about the context in which they died. They were crying for a piece of bread when the rocket hit our house".

Q. Thank you. I wonder if we might move now to talk about the education levels and the literacy, in particular in relation to the Baghlan province. Are you able to provide a comment about that?

A. Yes. This is to the best of my knowledge. Many of the comments I have is from my observation and things I have

heard, so some of them are not based on an evidence-based research or survey.

Q. Sure.

A. Only one-third of boys and one-fifth of girls attend school. According to a 2013 survey, there are about 500 schools in the province of Baghlan providing education to as many as 32,000 students, 37% of them being girls. Compared to developed countries, rates of illiteracy are relatively high, but have improved steadily following the post-Taliban Government. UNESCO has reported that Afghanistan has one of the lowest rates of literacy in the world, currently estimated at about 31% of the adult population. Female literacy levels are on average 17%. There are relatively few children in private education. In Baghlan specifically, 5,000 students have been enrolled in private schools. This is according to Integrity Watch Afghanistan in 2018.

Q. Thank you. In terms of the conflict, what impact has that had in terms of infrastructure, and in particular issues like the mobility of people from villages, access to the cellular network and so on?

A. Right, thank you. Transport is challenging within cities with security restrictions and security threats. On the positive side, with the help of international forces many roads have been built and this has facilitated transport between cities, especially in the regions and the capital.

However, saying that, in the past three years, I know people could easily travel between Afghanistan and northern region provinces [WITHHELD] Kunduz - Baghlan by car but in the past I think two years, there are lots of security threats on the way. Many people are very fearful of going by car, some chose to fly by plane if they can.

So, in Afghanistan, the most common source of news is radio, followed by television, phones and then the

internet. Mosques and community Shuras are also common ways of interacting.

In a study conducted by Asia Foundation in 2016, nationwide 40% of respondents say they live in an area or location that has access to the internet, which includes 32.6% of respondents in rural areas and 62.2% of respondents in urban areas. In addition, 11.2% of respondents said they have access to a personal mobile phone with cellular internet.

And I think in my observation since 2016 until now, access to mobiles and internet has improved.

Q. And are you able to comment on how changes, in terms of accessibility to technology, has affected some of the more traditional ways of how people in the villages might understand things like time and historical events?

A. Yes, thank you. In the past, I remember a family member said that for them to wake up in a fasting month for breakfast, because it is a very specific time very early in the morning, one family member had a watch and they constantly needed to wake him up, 'Can you check your watch and tell us what time it is?' But now with cellular phones, it's much easier, people use phones and use alarms. Calendars and other things depends on their educational level and understanding of how to use the phone but alarms are commonly used now.

Q. Thank you.

A. So, just to finalise that, in the same study, 27.4% of respondents indicated that they have one or more mobile phones in their household that have the ability to access the internet. More men compared to women, obviously in a country where men are dominant, have access to mobile phones and internet.

Q. Thank you. Perhaps if you proceed in terms of this issue of the impact of technology?

A. Technology, yes. As I said, most of the villages have streets and vehicles, and this has created a context of

accessibility. Traditionally, people relied on the sunset and the direction of the sunset to determine the direction of Mecca. That was the direction to make prayers. Nowadays, the accessibility of mobile phones and the internet has facilitated that process.

Most village and personal history tends to be oral, with stories passed from generation to generation through narrations and reference to major events in that particular year. Again, we are talking about a population where the literacy level is very low, so a lot of stories are passed orally from one generation to another generation. For example, references are made to 'the year that we had a lot of snow', 'the year that we had the biggest flood' or 'the year when the Russians attacked our village'. People usually remember and recall the operations that happened at night. The massacres, the killings, are all narrated from generation to generation. For example, in the years of 1970-1971, in the northern regions of Afghanistan there was drought, at the same time there was conflict between Bangladesh and Pakistan where Bangladesh got their independence and they were sending lots of rice to Afghanistan. That year is known as the year of 'Bangladesh'.

And a lot of parents make reference to the birth of their children in terms of the events that were happening. 'My son was born when we had the drought' or 'my son was born when we had the biggest snow', which makes it quite tricky in terms of identifying the exact time and month.

- Q. Thank you. Perhaps if we can move now to [WITHHELD] talk about the psychological harm that the conflict has had on the population, [WITHHELD].**
- A.** Yes, sure. Again, we are talking about a country where they have experienced conflict over years and years and years and is still ongoing, so we are not talking about

a single event. Usually, Afghans have been exposed to multiple trauma events, the majority.

On the prevalence of Post-Traumatic Stress Disorder, there are limited researches. [WITHHELD] A major study which was conducted by Lopes Cardozo in 2004, where he and his team interviewed 799 participants all across Afghanistan, it showed a prevalence of 42.1% of PTSD among the Afghan population, which reflected high prevalence rates of symptoms of depression, anxiety and PTSD. 62% of the study respondents had experienced multiple trauma events. And interestingly, they found there was no strong link between exposure to traumatic events and PTSD symptoms. However, there was a strong link between social economic factors such as extreme poverty and concern for day-to-day survival caused by economic hardship and PTSD symptoms.

Q. Can you perhaps just explain why that connection is found between socioeconomic factors and the incidents of PTSD?

A. Well, if you look at the factors that presupposes or puts an individual at risk of developing PTSD because not everyone who has experienced trauma develops PTSD. Humans are quite resilient, even though they might have experienced it, if they have more protective factors, good coping skills, they can survive. They may have some symptoms but they can be quite functioning.

But on the risk factors for PTSD, one of them is low socioeconomic status, low education. So, these are the things that, let's say, makes a stronger context for a person to develop PTSD.

Q. Thank you.

A. In the same study, religious and spiritual practices were important coping mechanisms for Afghan, for many Afghans.

In a recent study, which was conducted by the Minister of Public Health and funded by the European

Commission, 66.33% of the respondents, the respondents were around 4,400, samples from all around the country, were found to have experienced personally at least one traumatic event, and 77.1% witnessed such an event. Because for one to have PTSD, you do not need to be only exposed to the incident. Witnessing a traumatic event can also predispose one to developing PTSD [WITHHELD].

Q. Sure.

A. [WITHHELD] Part of it is, I think, this is my own theory, is when people in the families present with physical complaints, they get more attention. Mental health awareness is low, so it's easier for a woman to say 'I have headache'. Her husband will most probably take her to the doctor and try to help her, than for her to say 'I'm sad'. Yeah.

Hyperarousal, so lots of sleep disturbances, feeling more irritable or having outbursts of anger. This is very common in Afghanistan. You see in parents, in their parenting skills, when people say that 'I became asaabi', means I became more irritable. On the streets, if they get into an accident, immediately prior to any negotiations, the drivers get into physical fight. Having difficulty concentrating, feeling constantly on guard or like danger is lurking around every corner, being jumpy or easily startled, risky and destructive behaviour is also common among Afghans.

Re-experiencing, having recurrent nightmares, feeling as though the event were happening again, which is flashbacks [WITHHELD].

Strong feelings of distress when reminded of the event. Being physically responsive, such as increased heart rate when reminded of the event. Avoidance. Usually people avoid wearing the clothes that they wore when the incident happened or wearing the perfume that they were wearing during the incident.

Or even making efforts to avoid thoughts, feelings or conversations about the traumatic event. Also avoiding of people or places that remind them of the traumatic event.

Negative thoughts. Experiencing difficulties having positive feelings such as happiness or love, feeling distant from others, having a difficult time remembering important parts of the traumatic event which later on I'm going to talk about more. Also, the person, they can blame themselves or they can blame others for causing the trauma.

In terms of Post-Traumatic Stress Disorder, not many people understand PTSD in Afghanistan. Even among quite highly educated people, they don't know what PTSD is but they know depression, they know anxiety. [WITHHELD]. Or sometimes in my understanding, the PTSD has never been treated, never been given any attention, and depression and other symptoms have come on top of it.

The impact of PTSD also have a knock-on effect in terms of the families, friends and associates of the sufferer, who may need to care for them. One of the risk factors for developing PTSD is learning that a relative or close friend was exposed to a trauma, or through indirect exposure to aversive details of the trauma, usually in the course of sometimes professional duties. We are not immune from this.

In Afghanistan, due to prolonged war, the damage of trauma throughout the years has been transmitted from parents to children.

The risk of, we call this complex trauma when one person is exposed to multiple traumas and we're not only talking about war related traumas. We have domestic violence, we have child abuse, sexual abuse, all of this can come together and the person if it's not treated as the child grows it impacts the personality and people can present with some personality traits. For example,

having difficulty to regulate their emotions. If they become distressed, they cannot calm themselves.

Difficulty forming relationships, difficulty trusting others or engaging in impulsive behaviours or in self-harm behaviours. So, these are things which are quite commonly seen in the population.

Psychological distress is very high which means that people have high levels of anxiety and depression symptoms. Symptoms of depression and anxiety are higher among women than men.

In a recent study on the prevalence of mental health disorders in Afghanistan, 66.3% of those interviewed had personally experienced at least one traumatic event, and 77.1% had witnessed such an event. In total 84.93% had either personally experienced or witnessed a traumatic event. With almost daily bombings in many places, this is not a surprise. People who experienced trauma experienced on average 2.17 traumas, and those who witnessed a traumatic event have witnessed on average 3.92 such events.

The prevalence of non-psychotic special experiences (by non-psychotic experiences I mean experiences which do not qualify an individual to have schizophrenia or a specific psychotic disorder but they appear as psychotic symptoms, such as disassociation, hearing voices, especially somebody calling the person's name, as well as hearing Jinn or the supernatural forces talking to them) are exceptionally intense and frequent. These experiences can all be seen as reactions to stress and lead to the risk of developing other mental health disorders.

As regards disability resulting from mental health disorders, half of all Afghans (50%), and this is based on the National Mental Health Survey, suffer from psychological distress and one out of five (20%) is

impaired in their roles because of mental health problems.

For post-traumatic stress disorder and non-psychotic special experiences, two variables or risk factors have a striking impact; the level of the danger of the place of residence and whether the area was rural or urban. Rural areas put an individual at higher risk of developing PTSD compared to urban areas.

Q. Thank you. Perhaps now can you tell us about the sorts of services and support there is for someone suffering from mental illness within that area?

A. Sure. There are a very limited number of trained psychiatrists and psychologists in the country who can assess and treat PTSD or other mental health disorders, according to the WHO there is 0.010 psychiatrist per 100,000 population in Afghanistan. The psychiatrists that I know of or to my knowledge are no longer even working in Afghanistan but the Ministry of Public Health, what they have done, they have tried to train existing GPs, doctors, nurses in identification of common mental health disorders and in provision of basic treatment.

They have also trained counsellors. I cannot comment on the quality of their work but the provision of training for counsellors that they have done is very short, it's I think 3 months, with some follow-up supervision which helps people but still for people who have experienced complex mental health conditions, it can be quite challenging.

As I said, they have tried to train general - yeah. Should I comment on the memory?

Q. Yes.

A. Sorry. So, as I said, one of the common symptoms of PTSD is intrusive, distressing and unintentional memories of the traumatic event. When traumatic events happen, our brain's frontal lobe, which is for judgment and memory,

the function decreases and the mind is on the fight, flight or freeze mode or the survival. So, this has implications on what an individual can remember from a traumatic event.

They usually remember the feelings and intense emotions associated with the memory but they will have difficulty remembering specific things around the event. For example, they may know that an explosion happened and it was very distressing; which road, what time of the day, what they were wearing, a lot of individuals with trauma will have difficulty recalling those specificities.

Researchers have shown that participants who had been exposed to trauma recalled fewer specific memories than those who have not been exposed to trauma. This means if individuals are asked about the details of an event, those who have experienced trauma may be unable to recall specific things about the incident, in terms of time, place, what they were wearing and what they were doing.

Trauma-exposed individuals show compromised memory specificity compared with individuals without exposure. Surveys of participants who had been exposed to trauma in adulthood suggest they were more likely to have difficulty in their specificity of their recall of the traumatic event.

- Q. Thank you. I wonder if we might move now and if I can ask you to address the impact, if you like, of the Taliban, the international security forces and the "fighting season", as I think it's referred to, on local communities.**
- A.** Thank you. During the Taliban time, women were deprived of education and work. This decreased literacy significantly among women. I knew not actually a doctor but few doctors who were Afghan female doctors who were in their initial years of training to become a physician

when the Taliban came. So, they had to stay home for many years and then resume back to Medical School when the Taliban Government collapsed. You can imagine the implication on one's mental health. A competent woman who is enthusiastic who has enrolment in Medical School but not able to pursue her dreams because of the restrictions imposed.

Men were also exposed, during Taliban time, to lots of violence and restrictions. In terms of the time, they're forced to ensure that they go to mosque for prayer, their physical appearance, the beard, and if they did not follow, they were subject to physical abuse.

Many families in the rural areas send their children to madrasas. So, madrasas are religious Islamic schools. In the past, they were a teaching pure Islamic school like Koran and other Islamic books. However, in my knowledge, now the name has been misused by Taliban and children who go to madrasas who are controlled by Taliban are - I question whether they are trained in Islamic values, rather my understanding is they are trained in Taliban philosophy and mentality. Some families still in rural areas send their children to madrasas with hope they will become proficient in religious studies. However, many have been lost to the Taliban forces.

In many areas, people feel safe with the presence of international forces, as this deters the Taliban from entering cities. However, it also means the possibility of explosions in the form of suicide bombings which often target international forces is high. In Kabul, many people therefore try to keep their distance from international forces' vehicles. They also want to avoid being mistakenly shot by international forces who require a certain distance to be kept from their vehicles.

I remember seeing in the ISAF newspaper when I was in Kabul clearly demonstrated to keep certain distance from the vehicles. [WITHHELD] and the explosion happened, targeting the international forces vehicles but many people around that explosion were impacted.

In the fighting season, which is, in my understanding, usually spring and summer, the number of armed clashes increases, and this obviously has implications for people's anxiety and general well-being.

Q. Thank you. To what extent are Afghan people generally able to distinguish between different contributing national forces who might be present?

A. People in the cities may know some forces by their flags, particularly, you know, like the Turkish flag, the American flag. The rest are given a label or description based on the similarity of flags or features.

In villages, where again literacy level is low, people tend not to know the names of countries. All ISAF forces are called "Khareji" which means foreigners.

Q. Thank you. Moving again back to the Baghlan province in particular, are you able to give us an understanding of village demographics and the nature of community relationships within that area?

A. Yes. The village population in Baghlan can start from around 50 families or less and can reach up to 300-400 families. Households on average have six members. This can include two adults or more and children. However, in saying this, households have on average six members, Afghans usually have extended families and they have a high number of children. Many households have an extended family format of up to four generations, including grandparents, parents, children and grandchildren.

Agriculture and farming are the general pattern of life. There are few who might be teachers, doctors, nurses or

administrators. During winter some men travel to Kabul or Iran in search of work.

The chain of authority follows a patriarchal model and secondary to that is seniority, thus the eldest man of the family makes decisions on most of the family affairs. If the eldest is a woman, her role will be as an adviser. For example, if a woman does not have a husband to make decisions for her, herself or her family, her oldest son will be the decision-maker and if the son is very young, the paternal uncle will be the decision-maker.

Relationships amongst families usually follow blood relationships or marital relationships. The base of community relationship is the mosque. Some elders and members go to the mosque up to five times a day which provides a setting for communication and social interaction. If there is a problem in the community, they seek guidance from the Imam, and people's representatives.

And the mental health survey also found that many women go to Imam in the mosques when they have psychological issues, asking for spiritual treatment. Interaction with officials or foreigners is mainly through the men of the family, if the issue is related to one family only. When it comes to village affairs, usually a small group of men comprise the Imam, a war lord, the head of village and prominent members of villages will interact with local officials, and if possible representatives of international organisations. In some villages the most educated person of a village, sometimes an engineer or teacher or doctor, is also included in this group.

Those who are more senior, powerful and wealthy have a strong voice in these communities. However, in some villages, experience and education is increasingly respected. Additionally, with the influence of the

- international organisations which directly or indirectly encourages the presence and involvement of women, in some villages women are finding a voice.
- Q. You mentioned the word 'war lord' before in terms of individuals within the village community who might have authority. Can you help us understand what you mean by that?**
- A.** So, these are prominent figures in villages and in rural areas who have access to guns and who have a number of followers. In my knowledge, they can belong to a particular political group and be supported by that political group or they can be forming their own territory by themselves. They are quite powerful and there is a strong sense of fear by people in the village if they don't include them.
- Q. Sure, thank you. And then in terms of village leadership, who would normally organise people in terms of their interactions with officials, for instance, who would be a spokesperson? Is that a role that particular individuals might adopt?**
- A.** I mentioned earlier, a small group is usually in charge of the rest of the village. However, in some villages the most powerful or wealthy person may lead autocratically or with some input from the Imam and village representatives. The role of Imam, people's representative, and head of villages (sometimes it's called Arbab Qaryah) are important especially when there is no war lord.

When there is a decision to be taken with input from members of the village, people usually use the mosques as the primary place for gathering. However, in some villages they may also use an open space, for example under a bigotry, or the home of the village's Arbab (traditionally head of the village) to interact. With the influence of international organisation, the Ministry of Rural Rehabilitation and Development in

Afghanistan has recently been encouraging villagers to make some form of more democratic village assembly. They are known as village Shura. In these Shuras each mosque has one representative and women are sometimes included based on - depending on whether the village is under control of government or non-government.

The Shura has a head, a deputy and a treasurer. Shuras are becoming more widespread but only in Government-controlled areas.

In small villages, there is usually one mosque and in larger villages there can be up to six mosques. Larger mosques are where people gather together to pray on Fridays and to discuss their problems of the village. People gather twice a year after Ramadan and two months later in larger religious ceremonies called Eid, as well as for funerals. Men of a few villages gather together and besides praying discuss other community affairs. Local government officials liaise with their village head and the head of the Shura. The District Manager will invite the head of the village Shuras to their office to discuss the problems of the district which is composed of many villages and is the smallest unit that directly reports to the governor of the province.

Q. Thank you. How common is it for women to be involved in those community discussions?

A. It's not that common but, again, it depends whether the area is predominantly controlled by Taliban or by government. I know [WITHHELD] in some villages, women have a strong voice but I'm not aware of the areas that are not under control of the Government.

Q. Thank you. Perhaps if we move quickly, and you've been on your feet for quite a while so we will endeavour to move along if we can.

A. Sure.

Q. But it would be helpful if you could tell the Inquiry something about household demographics and how families

live in terms of the housing and the sorts of construction of houses within the rural village environment?

- A. Okay. So, families in villages usually sleep together in one room. This means, for example, in one room parents and children all sleep together. They normally sleep on mattresses on the ground. This is for two reasons. One is of course poverty and unavailability of many rooms. The other thing is also in terms of saving of energy. We have very harsh winters with snow and it's economically much better when families sleep together. The third reason is also security. Parents have access to their children and if anything happens you're all together. So, sometimes the same room can be a living room during the day and evening, and turned into a bedroom at night with the same mattresses.

In the villages the houses are mostly built from basic materials such as clay, stone and wood. The houses are relatively bigger compared to the houses in the cities in terms of the surface area. In cases where the villages have access to running water, people do gardening and try to keep the area green. However, in the past 10 years in villages, you can see usually like 20-30 houses made of clay and there is one house slightly taller building made of concrete in nice colour but that's not a surprise to see.

The contents of houses include rugs, carpets, religious books and household items and clothes. In some villages, especially those in Baghlan where little furniture is available, people make do with rugs and mattresses. Guns are rarely kept in the houses. Religious books, I can say in almost all houses, whether people can read or not, they usually have a few religious books, Quran and other prominent books of Islam.

Some families might have, if their financial situation allows, more than one building as part of their home. There is often a guest house, which is a stand-alone room in which men in the family might receive guests. The family will often live communally in a separate building, where women are not likely to encounter men who are not part of their family, and therefore are free to move without wearing full religious attire.

Q. Just in terms of religious attire, can you help us understand what might commonly be worn?

A. Okay. So, at home in villages most of the time women keep their scarves on and the sleeves, they have long sleeves and legs are covered. Even though there might not be men other than their family but usually because they live with extended family members, so religiously they're obliged to cover even if they are living with their brother, for example.

When they go out, again it's the practice of specific areas, they are usually covered either by a kufiya or they cover their face and only eyes can be seen.

Q. Thank you. Finally, it would be helpful if you could tell us something about the system for registration of births and deaths and what you understand of it within Afghanistan.

A. Sure. Again, this is to my knowledge in Afghanistan, so there is no centralised or universal system for registration of deaths. When a person dies, there are specific social rituals, but there is no proper Government registration system.

Verification or proof of death is usually limited to specific cases, such as murder or suicide, however for general death and especially death related to war, there is no registration.

To my knowledge, there is no document available generally in Afghanistan such as a death certificate.

If babies are born in a hospital, the majority get a birth certificate which will allow them to get a national ID. However, many births happen at home and when babies are born at home they still can get a birth certificate but parents need to apply for it and in my observation, usually parents don't apply for a birth certificate unless there is a need for them to, if they are going out of the country they need to get an ID, then based on the ID they get a passport.

Q. Thank you. That's the end of my questions for you. I had better check with Sir Geoffrey and Sir Terence though, they may have a question for you.

A. Thank you very much.

SIR TERENCE: Thank you. I just wanted to ask you one question. You talked about war lords and access to weapons and you made a comment that guns are rarely kept in houses and so on. Is it common for men in rural villages to carry weapons around with them in their daily lives?

A. In my understanding, they can, yes. I have - and again this isn't my personal experience - I have seen families where they have kept guns for their safety in case anything happens. I'm not sure whether they carry it around but I know that sometimes they keep it in their homes.

SIR TERENCE: Thank you.

SIR GEOFFREY: You said in your evidence that sometimes torture was the result of different ethnic composition.

A. Yes.

SIR GEOFFREY: I have read that there hasn't been a census in Afghanistan for many years. Is that correct, that there has been no census for many years?

A. Unfortunately, I don't have the knowledge on that but I will not be surprised if there are no census. In many areas, we don't have proper statistics and numbers.

SIR GEOFFREY: And that makes it difficult, does it not, to know what the precise ethnic composition of the country is at any time?

A. Absolutely, absolutely.

SIR GEOFFREY: Thank you.

A. Thank you very much.

SIR TERENCE: Thank you very much for your time and for travelling down at such a late stage, thank you.

A. Thank you very much, my pleasure.

SIR TERENCE: Mr Hager is going to present a submission in response to some of the material we heard at the first module, so would you like to do it from here?

MR HAGER: I am happy either way.

SIR TERENCE: It's really what suits you. It's probably a good idea. We won't swear you in as this is a submission rather than evidence and we will be taking evidence from you in a later session.

PRESENTATION BY NICKY HAGER

[COMMENCED AT APPROX. 11.30AM]

SIR TERENCE: Now Mr Hager is going to present a submission in response to some of the material we heard in the first module so would you like to do it from here?

MR HAGER: Happy either way.

SIR TERENCE: It's really what suits you. It's probably a good idea. We won't swear you in as this is a submission, rather than evidence and we will be taking evidence from you in a later session.

MR HAGER: I should explain for a start, I wasn't at the first module.

SIR TERENCE: No.

MR HAGER: So, what I am doing is I'm going to be talking more generally on the question of background.

SIR TERENCE: Right. And you should - we've allocated an hour, we've gone a little over on the first one but you take the time you need.

MR HAGER: Thank you. I suspect I will be less than an hour and we will all be on time.

SIR TERENCE: Right.

MR HAGER: Kia ora tātou. I have been asked to speak today about some background context to the events covered by this Inquiry. The book *Other People's Wars*, which I wrote a few years before *Hit & Run*, gives a broad overview of the war in Afghanistan. I will begin by mentioning some bits of the book, which is largely based on internal NZDF documents.

The book opens on the then SAS Commanding Officer Tim Keating sitting at his desk on September 11, 2001, writing a report on his recent trip to the US Special Forces Command in Tampa, Florida, where he had been pushing for more contact between New Zealand and US commandos. I have a copy of this document. It explains - the book explains he was back in Tampa shortly after that lobbying for New Zealand SAS troops to be allowed to work as part of the US Special Forces in the recently begun Afghanistan war. His lobbying was successful. Keating is central to the current Inquiry; a long-term supporter and defender of the SAS.

The "CDF Directive", that is the Chief of Defence Force Directive, for the SAS's deployment to Afghanistan had a "legal annex", which I've also got a copy of, which explained that the purpose of the military action was to destroy the Al-Qaeda network and to bring Osama bin Laden to justice. The New Zealand SAS contingent touched down at its new base in two Hercules aircraft in Kandahar on, by chance, the same day that Osama bin Laden crossed the mountains into Pakistan, at which point the stated purpose of the deployment had largely disappeared. Two and a half months later the New Zealand Joint Forces Commander Martyn Dunne visited the SAS in Kandahar and, as he wrote in his trip report, found that there seemed to be, I quote: "No over-arching operational campaign plan that drives future planning or links tasks so far carried out", and that there was "a lack of coherent strategy or even clear Commander's intent". The New Zealand public was never told about these problems or his doubts.

Years of incoherent strategy in Afghanistan followed. Dunne also visited New Zealand peacekeepers in Kabul who were supposed to be helping unload humanitarian aid flights into the city, at least that's what the New Zealand public was told. He expressed concern about

a "blurring" of roles, as he put it, including "special agency helicopter operations". Other documents I was given for the book showed that the so-called peacekeepers were spending a lot of their time loading CIA helicopters, those were the special helicopters they were working on, and also loading huge volumes of explosives for assault troops. Internal documents instructed the NZDF personnel to keep their non-peacekeeping operations secret.

Later that year, when the New Zealand Navy wanted to send two frigates to work with the US Navy forces in the Middle East, Prime Minister Helen Clark was concerned that the deployment might clash with her Government's decision not to join the coming invasion of Iraq. She gave strict instructions to ensure that the operation "was not linked to Iraq or any possible future Iraq operations". These instructions were conveyed to senior NZDF officers at Defence Headquarters. Yet, between January and May 2003 the two New Zealand frigates escorted 92 aircraft carriers, warships and ammunition ships into the Persian Gulf, a large proportion of the invasion force. NZDF went to great lengths to hide and deny what it had done, with its PR staff issuing stories about inspecting ships for smuggling and trying to stop terrorists escaping by sea from Afghanistan.

Soon after, after the invasion, Iraq invasion, when NZDF persuaded the Clark Government to send peacekeepers to southern Iraq following the invasion, the public was told the purpose was to repair schools and drinking water supplies for the city of Basra. In reality, much of the contingent's time went to supplying infrastructure for the occupation forces (for example building defences at UK military bases), a highly political and controversial role to play straight after the invasion. But all the security roles were hidden and the NZDF PR people promoted stories such as that

New Zealand troops were "bringing water to over 200,000 people for the first time in a generation". This was almost completely untrue. A New Zealand water engineer working in Basra for a real aid project at that time explained that Basra had a good drinking water system up until it was bombed during invasion; and that the water work the NZDF did was helping install two small reverse osmosis plants arranged by the US military and funded by the Kuwait Government that was then used to supply money to some outlying villages of the city on a for-sale basis. And so on through the book, often over and over a gulf between what the NZDF does and what it chooses to tell the public and Parliament. It is the same with the book *Hit & Run*, which describes the way that New Zealand's Provincial Reconstruction Team in Bamiyan province was presented to the New Zealand public from 2003 as largely being an aid project, whereas the reality was that New Zealand had taken over counter-insurgency warfare in the province, including all the usual counter-insurgency warfare components: psychological operations staff, intelligence operations, military patrols and, indeed, development aid, but as a conscious tool for managing the population. We published the PRT's public relations plan that said the "key messages for all military communications about the Bamiyan deployment were to be that 'the focus of this mission is reconstruction'" and that the Defence Force personnel were "'not going to war'." Neither of those was true. It went on that the aim of the PR, the messaging, was to "encourage support for the NZDF" and "generate and maintain public support for the operations in Bamiyan".

The thing I found over and over with Afghanistan and the Iraq wars, was that the NZDF only told the public and the Government what they wanted them to hear. This doesn't mean that they were untruthful all the time, of

course; just when they didn't want to admit the truth. NZDF seems to believe it is entitled to hide news that might not be welcomed by New Zealanders and to bend the facts whenever necessary to avoid criticism or scrutiny: not just mistakes made in war, but toxic foam used on bases that you may have seen in the news recently, the scale of sexual abuse in the forces and much more. This, I believe, is the most important piece of context needed in preparation for this Inquiry.

I have realised, through years of researching and writing about the NZDF, that the root problem is that the organisation is obsessed with making itself look good in public. This is done by a combination of keeping embarrassing things kept secret, claiming operational security, and employing a small army of PR staff to control information reaching the public about military issues. The LinkedIn page of the NZDF Director of Public Affairs says that she leads "a team of 60 marketing and communications professionals". Sixty. Internal NZDF plans say (this is what they say themselves that their PR staff are to do), they say, "The public affairs group purpose is to directly enhance the reputation ... of the NZDF". It "plays an important role in maintaining confidence in the NZDF..." It is to "Maintain an environmental, political and institutional awareness of issues and risks with the potential to impact on the NZDF..." And finally, the public relations staff are to, "Ensure that all internal and external public affairs and publications ... enhance the organisation's reputation".

These internal plans always come back to protecting the organisation's reputation. This is very important for understanding this Inquiry. It does not say that the public relations staff are to "ensure that all internal and external public affairs and publications are truthful", or that all organisations make mistakes and

that the real road to public confidence is to be willing to front up and admit your mistakes.

NZDF almost never admits mistakes until utterly forced to, and even then they will minimise and spin the news. Reputation trumps being upfront. Also the PR plans identify "primary target audiences" and on top of the list, quite outrageously, is the Government, followed by Parliament, as if it is legitimate for the military to use public relations to maintain political support for its operations. In other words, what in a far away country would be called information operations but information operations within its own country.

When Tim Keating was working out his denials over *Hit & Run*, and later lobbying to try and stop this Inquiry, he had John Key's former chief spin doctor at his elbow in nearly every meeting. There is far too much PR influence in the NZDF. The result is extremely unhealthy and ill-suited to a democratic country.

All this applies to the current Inquiry as well. It was PR people, Defence PR people, who helped to setup the \$2 million Special Inquiry Office, without even asking their Minister for permission to do so; I have the papers on that, and the plans said "Strategic policy, information and communications advice will be a key requirement for the Special Inquiry Office". The linchpin of this office is the Strategic Inquiry Liaison Officer, whose job description called for an expert in public relations and media management with a "proven ability to operationalise strategy", who would work closely with Defence Public Affairs Unit. A "key working relationship" is with the Queen's Counsel that Defence has hired and other external counsel and the key task is "to carry out risk analysis and provide mitigation strategies as necessary". This is far, far from just handing over the documents and witnesses to the Inquiry and letting it do its job.

One part the of the job description stands out. It requires of that key PR person in the Inquiry office, Defence Inquiry Office, "An ability to gather, analyse and synthesise information from a range of sources into a cohesive word picture". These "cohesive word pictures" are what we have been getting from the NZDF as it tries to deny that its staff killed and injured innocent people, that it knew almost straight away that it had done this but it gave no assistance to these people and it has all been covered up since.

The NZDF's reaction to *Hit & Run* in March 2017 is a clear example of the NZDF's attitude to fact and truth. In a first press release on 21 March, NZDF said that an ISAF investigation "concluded that the allegations of civilian casualties were unfounded" - which was not actually what the ISAF investigation had concluded, nor what NZDF itself knew to be true.

A few days later, on 26 March 2017, NZDF issued a press release with what would become their main rebuttal for the next year of debate, "The central premise of Nicky Hager and Jon Stephenson's book *Hit & Run*", the Chief of Defence Force Tim Keating said, "is incorrect".

"The NZDF troops never operated in the two villages identified in the book ... Upon review of *Hit & Run*, it is evident there are major inaccuracies - the main one being the location and names of the villages ... The villages are named in the book as Naik and Khak Khuday Dad but the NZDF can confirm that the NZDF personnel have never operated in these villages. The authors appear to have confused interviews, stories and anecdotes from locals with an operation conducted more than two kilometres to the south, known as Operation Burnham".

I assume everyone here is well aware of this but it deserves to stand as a black mark on the NZDF.

NZDF has quietly ditched this ridiculous "location" argument by now after using it for as long as it would work but it tells us everything about the attitude of the organisation. They could have admitted that they accidentally killed and injured innocents at that point, and offered medical and other aid (which is still needed). This whole current Inquiry would not have been needed. But instead, the idea of defending reputation meant that they ran this utterly disingenuous line for month after month.

In Keating's infamous press conference after the book came out he dug in further, "There has been no evidence produced from the village that we operated in ... that casualties occurred in that village", he said. And then, "It's not an operation that NZSAS conducted", and much more like this.

If this substance of our book, about civilian casualties, not giving aid and cover up, was genuinely not correct, why would the NZDF resort to such transparently false and irrelevant diversion? The same attitude to fact and truth - the standard NZDF attitude of hiding and denial - is seen in the NZDF narrative of what happened in Operation Burnham. I am referring to the document called "NZDF unreferenced account of events at issue" that NZDF provided to the Inquiry in November last year. This document was requested by the Inquiry more than a year after the book was published, so there was no excuse for it not to be rigorously accurate. It is a key document in the Inquiry process.

I want to focus on the narrative, which contains and so highlights key falsehoods in the NZDF case. The document, produced by the Special Inquiry Office with its PR people and all, and filed with the Inquiry by its senior lawyers, is a classic example of a "cohesive word picture" prepared with the assistance of the PR staff.

Whenever the narrative gets near to difficult issues, it bends or does not tell the truth. It bends the truth or does not tell the truth.

The main purpose of the narrative, the document says, is to "confirm the fundamental elements of information released publicly on other occasions, including that NZDF did not kill or harm any civilians during these operations". In other words, the authors of the narrative remain determined not to admit what the SAS did. Instead, in words that have clearly been carefully worked out and argued over by the PR staff, the document says that "the SAS ground troops did not cause or observe any civilian casualties".

This is why it's important to remember the NZDF's proven record of hiding any information that does not suit it. We are forced to figure out for ourselves the evasions, omissions and untruths in what they have written.

First, as the document itself says, all attacks during Operation Burnham were authorised by the Ground Force Commander: a New Zealand Special Air Service officer. This means that NZDF was indisputably responsible for any civilian casualties. They are hoping to get around this by changing the language and using the word "caused" instead.

Then the narrative moves on to rewrite the facts of what the NZDF did. Let's take, for example, the following statement in the narrative: "At approximately 0125 hours, the ISR RPA", which stands for, which refers to one of those large predator drones which the US was using in the war, "observed an armed insurgent moving along the ridgeline south of the village towards the observation post where the Commander and his team were stationed".

I will read that again to get it clear, "At approximately 0125 hours, the drone observed an armed

insurgent moving along the ridgeline south of the village towards the observation position where the Commander and his team were stationed". That is the SAS Commander.

The SAS Ground Commander authorised an SAS sniper to shoot and kill this man. It all sounds understandable perhaps with an armed insurgent coming towards them. The trouble is that the narrative is not true. To any reader, the action sounded justified, as they intended it to, because an insurgent is heading for our troops with a weapon. In fact, in Afghanistan, carrying a weapon in the countryside doesn't mean you're an insurgent. But we don't need to even consider that because the person who approached the SAS post was not armed. He did not have a weapon. This is confirmed in other documentation. The statement in the narrative is self-justifying and false.

So, what actually seems to have happened is that, an hour after the raid began, one of the male civilian villagers was walking on the hills above the town to keep out of the trouble going on below. Unbeknown to him, there was a group of hidden SAS troops in an observation post directing the operation. Here was an unarmed man, on his own, accidentally wandering close to a group of heavily armed SAS troopers in full body armour and with night vision equipment - and the SAS Commander assessed him such a risk to them that they had to kill him on the spot.

There is nothing justified or legal about this. Indeed, this is not how many SAS people would behave, judging from ones that I have spoken to. Did the SAS cause his death? Of course they did. They shot him. The trick was that they hid the wrongness of this act by making up that he was armed and, by that little act of "cohesive word picture", hid the fact that he was a civilian villager.

Many of the other civilian casualties that night were caused by a US helicopter gunship attacking another single "insurgent" - an attack authorised by the SAS Commander via the SAS Joint Tactical Air Controller who was with him, both of them as it was, as it happened to be, in that observation post on the high ridge where they also shot the man who walked towards them. NZDF was obviously responsible for these decisions and actions. This was the attack where, NZDF says, "Several rounds fell short due to a gun sight malfunction and this resulted in a building near the Helicopter Landing Zone being inadvertently hit by gunfire". A woman and two children had been seen leaving this building and returning to it. This "coherent word picture" is the basis of the NZDF position that there "may" have been civilian casualties but they have no evidence that there definitely were, which is their current standard fixed position that they're trying to defend.

What we see repeatedly with Operation Burnham is that when the story gets blurry, brief and imprecise (I'm talking about the New Zealand Defence Force story gets blurry, brief and imprecise) it is likely that the Defence Force is trying to hide things. That is the case here. First, who says the man was an insurgent? The narrative did not call him an armed insurgent, so it seems he was not armed. No evidence is given for why the NZSAS commander ordered an attack by helicopter gunship against an apparently unarmed man. Also, why did they order an attack in the midst of a civilian village? I will explain this point further tomorrow in much more detail.

The next bit of the "cohesive word picture" is the idea that only "several rounds fell short". Sort of a wonderful minimising, making it feel small. There is a chance that this is truthful and that those few rounds caused so much civilian injury. We haven't been allowed

to see the gunship weapon video to check but it doesn't sound right. An Apache helicopter, a 30mm cannon, fires about 600 rounds per minute, which means that "several rounds" would be something like a one second burst of firing. That is unlikely to have caused all the casualties to women and children that happened that night. Also, those few rounds went into a house but the women and children harmed were not actually in that house. We are getting a massaged story, where much more is hidden than is being revealed.

But the most glaring, and morally offensive, part of the narrative is that the dead and injured villagers, the ones that the SAS was responsible for but never went back to help, are almost absent from the narrative. It is completely silent on who was injured and killed where and what the NZDF knew about them. The furthest it goes is to suggest "the possibility of civilian casualties". The narrative begins by explaining that "this account reflects the NZDF's current understanding of what happened". NZDF's QC who filed the narrative with the Inquiry, said that it is "as accurate as possible". But this is not true.

When NZDF wrote that narrative in November last year, they did not know that the Inquiry would end up releasing some of the NZDF documents in Operation Burnham that the organisation has worked hard to keep secret. These are the 14 redacted documents released by the Inquiry two weeks ago on 7th of May. They are some of the original intelligence updates written in Afghanistan in the first days after the SAS raid.

Operation Burnham happened in the early hours of 22 August 2010. By 24 August intelligence updates began appearing that list the names of people believed to be dead and injured. This is based particularly on the informers that they had in the towns which we detail in the book, in the little villages. Two of those reports

declare unambiguously that "a small number of civilians have been killed or wounded" including "sister", "(possibly) daughter of...", "2 female injured" and so on. Why isn't this key information included in the NZDF narrative?

Then a nasty thing can be seen in the 2010 documents. In the successive SAS reports over the period of about a week, they gradually dropped the civilians from the lists and call nearly everyone left an insurgent. We can see the SAS beginning the cover up.

But at the same time, the SAS has airbrushed the civilian casualty problems away, down the road at the Bamiyan province PRT - that's the New Zealand main military base, Kiwi Base, Bamiyan - a report by the non-NZ SAS Intelligence Officers gives exactly the opposite story. What I'm saying is, that in the SAS reports the number of insurgents was gradually being reduced and reduced, the number of civilians I mean, and more and more names were getting "INS" (insurgents) put after them. But at exactly the same time as those reports, the non-SAS intelligence officers who were working in the main New Zealand base in that region were writing a completely separate story.

The non-NZ SAS reports written on 26 August 2010 concludes "several local nationals killed", local national meaning a civilian and "several local nationals wounded". This is what the intelligence officers at the base that was most closely watching the villagers had concluded.

The same PRT intelligence report states that "names of casualties do not match the TB ORBAT". I will just explain, the TB ORBAT means Taliban Order of Battle. That means the people in the Taliban Insurgency Group that they had been monitoring and who were the targets of the attack in the villages. The names of casualties do not match the TB ORBAT from the 3rd of August

contact. In other words, these people aren't the known insurgents who they came to the villages looking for. Does everyone get that point? Sorry I stumbled over it. It also says, as we did in the book, that the "LN [local national] funerals were recorded"; which refers to a video of the funerals made by a local Afghan PRT informer and supplied to the PRT intelligence staff. If they got a video of the funerals of the civilians, they obviously would have got first-hand accounts of the civilians killed and injured as well, as mentioned in their 26 August intelligence report.

This is very serious. Why weren't we told about local nationals killed and wounded? It directly contradicts the repeated claims from the NZDF. Here, in the documents we can see the SAS cover up but also plenty of signs that NZDF staff knew in detail about civilian casualties. Of course they did. The deaths and injuries were also being reported in the local Afghan media and in the New York Times. The declassified document number 13, that's of the 14 documents declassified by the Inquiry, declassified document number 13 reports that two local nationals "possibly linked to this operation are at PEK Hospital". PEK is the Baghlan capital Pul e Khumri. We have details of those two women in hospital in *Hit & Run*. Why didn't the SAS go and see them? Check what happened? And offer help? Why wasn't this in the narrative? Because the narrative, this key contribution to the Inquiry is essentially a PR job.

That's not all. For instance, why does the narrative not mention the fact - which I had to extract from the Defence Force using the Official Information Act - that none of the so-called insurgents fired a single shot at the SAS-led forces during the entire three hours of the raid? Were any bullets fired at the SAS-led troops? No. Were any RPGs fired at the SAS-led troops? No. This does

not fit with their cohesive word picture and so it was omitted.

In short, the narrative did not actually "reflect the NZDF's current understanding of what occurred" and it is certainly not "as accurate as possible". It should have referred to these intelligence reports in the days after, and that they confirm what was written in the book; namely, that intelligence reports discussing civilian casualties were written in the days after the raid. They are key documents which the NZDF had in its possession. Without these reports the narrative has given a false and misleading picture of what had happened.

I want to say on the record that I think it is wrong that military officers and lawyers - each with their own professional responsibilities - would participate in misleading the public. Officers should tell the truth and their lawyers should not file inaccurate and incomplete documents on their clients' behalf. I also think it is wrong that the military lawyers attended briefings with Ministers and the public, standing by while officers claimed we wrote about the wrong operation; i.e. as the Ministers in charge and the public were misled.

The NZDF made much of having a lawyer posted in Afghanistan with its troops but it only counts for anything if lawyers are prepared to check for themselves the facts and object when false statements are made and wrongful things occur. Where were the NZDF lawyers investigating the allegations of civilian casualties? I note that NZDF has supplied over a thousand documents to the Inquiry and we have been given just 14 so far on the Operation Burnham part, but even these few show that the official NZDF narrative was hiding more than it revealed about the central issue of the Inquiry. This helps explain why NZDF has fought so hard to keep all

its documents secret and to have to give evidence only in secret hearings.

It goes on. For some reason this is a very small thing I am about to tell you but it irks me greatly. It goes on. The NZDF QC sent a memorandum to the Inquiry last week on 17 May disputing the Inquiry's, this is the name of the document, "Comparative analysis of public accounts of events during Operation Burnham". He wrote: "NZDF notes that the headings of certain paragraphs ... contain, or are based upon factual premises that remain disputed or have not yet been determined conclusively by the Inquiry". The headings he objected to were "How many civilians were killed in the operation?" and "How many civilians were injured in the operation?". He said, "The question of whether civilian deaths or injuries occurred during the operation has not yet been determined".

What is going on here? Both the lawyer and the people who instruct him have presumably read the 2010 intelligence reports, seen photos of the little girl Fatima and seen her parents on New Zealand television talking about their daughter's death. Surely it is unnecessary and bad taste to hold so firmly to the denials that he needs to dispute a heading saying "How many civilians were killed in the operation?"

A few footnotes are needed to this point. First, the officers and lawyers might argue that they didn't include the news of civilian casualties in the narrative because this information was classified. No, that would be a weak argument, both in principle and considering that the Ombudsman forced them in February 2018 to acknowledge that five intelligence reports from after the raid mentioned the death of a child. If that's not classified, neither are other details of civilian deaths and injuries.

Also, NZDF might claim, as it has before, that the civilian deaths were not "verified". This is the idea

expressed by Tim Keating in March 2017 that "there is no confirmation that any casualties occurred"; and expressed coldly by NZDF a year later in a 23 March 2018 OIA response to me when it wrote, "The NZDF have no grounds for believing or not believing that a child might have been killed during the operation".

And herein lies one of the particularly dishonourable parts of this, because NZDF knew that there were reports of dead and wounded civilians, including a dead child and people in serious need of medical assistance. It was their job and legal obligation to investigate, but they did nothing. The only reason the civilian casualties are not verified is because they didn't try to verify them.

Moving on now from the narrative, I want to mention a few related matters.

First, looking at the 14 recently declassified documents on Operation Burnham - thank you to the Commissioner for getting them declassified - a very interesting picture emerges; not from what is there but from what NZDF has fought to have redacted. The usual story is that military documents need to be redacted or withheld to keep methods and capabilities secret. This, when applied genuinely, makes sense. But these documents mention capabilities such as human intelligence and the drone and the AC-130 gunships provided by the US military.

The thing the NZDF has insisted on having redacted is, instead, the names and details of the various insurgents and civilians listed as injured and killed in the intelligence updates. I have argued at various times during this Inquiry that I believe the answer to resolving the mystery of Operation Burnham lies in this detail; which supposed insurgents in the NZDF's version were where and at what time? I believe this is how we can resolve the opposing stories and, in many cases at least, find that the ordinary farmers and their families

that we wrote about were mistaken to be insurgents. I suspect that this is precisely the reason why NZDF is determined to keep this information secret from the other parties to this Inquiry.

Note that next to the redacted names in the intelligence reports, the document reviewers wrote - this is quoting the two people who have been hired by the Inquiry to decide which documents might be declassified - "noting that some individuals have since been publicly identified, the individuals identified in this table appear to correlate with some of those who have been publicly identified". That may have been confusing, what they were saying is individuals identified in the table, that is the list of dead in the intelligence reports at the time, appear to correlate with some of those who have been publicly identified, for instance in the book *Hit & Run*. I believe this supports the idea that once the information is not suppressed, very worthwhile correlation can occur. Many of the villager names are already in the book but if genuine - sorry, I can't read my writing, many of the villager names are already in the book but if genuine privacy risks to those people exist, there will be ways to mitigate them.

I submit therefore, in the interests of the Inquiry and in the interests of the victims, that the Inquiry ask NZDF to release the following information to all parties:

1. The names and details of all people it knows of who were killed and wounded in the raid (whether claimed insurgents or civilians).
2. Precisely where and when that person was shot or wounded, killed or wounded.
3. What grounds, if any, NZDF had for believing that person was an insurgent and the supporting documents for these things.

I urge the Inquiry to do this.

I note also that an ongoing reason for withholding crucial information from the non-NZDF parties is the claim that the US military and NATO would not let us have access to those documents and the weapon systems video. This is also the reason for redactions in the 14 Operation Burnham documents that we have been given. It is my strong belief that if the other parties can study the video and compare it with what their other sources have said, then much of the truth will come into focus. But it seems my requests to the Inquiry to arrange access to this material have been ignored.

I was surprised to discover, as I raised in a 24 April 2019 submission to the Inquiry, that no-one seems to have actually asked the US military and NATO for permission for core participants in the Inquiry to have access to the documents and the video. If this is the case, please can you do that now? I am asking the Commissioners please can you do that now? It could possibly resolve the whole thing.

I also want to address an apparent misunderstanding in the NZDF arguments about Operation Burnham. The argument, at its heart, is that if civilians were killed and injured it's not NZDF's fault, because it was a mechanical error, i.e. the Apache helicopter gun sites causing several cannon rounds to fall short. What can NZDF be blamed for? How can NZDF be blamed for a mechanical error?

This could sound initially convincing but it's actually almost irrelevant for the following reasons. First, many of the civilian deaths were not caused by the supposed few rounds falling short. They were fleeing farmers misidentified as insurgents and attacked at other times and places during the operation. Second, the story about a single equipment failure and some rounds falling short might be true but, based on

past performance, it may well be stretched or untrue. "Several" rounds did a ghastly amount of damage to flesh and buildings.

But, most important, the book is clear that the civilian casualties were accidental.

Tim Keating said after publication of the book that we had written that they deliberately killed civilians. But this is not the case and was just another diversion. We believe and wrote that it was an accident. So whether the accident occurred through mechanical failure or some other cause, that's not the main point. The main wrong done by the NZSAS - the thing they are responsible for - is 1, any carelessness in orders given to the attack aircraft; 2, not going back to give medical assistance and aid, which was a standard thing for soldiers in their position to do; and 3, hiding and denying what they had done.

I want to end with a final example of the NZDF's greater concern for reputation than truth.

After Operation Burnham, when NZDF could have been investigating and providing assistance to the injured and homeless villagers, it was instead arranging medals for two of the SAS troopers who went on the raid. One of the people awarded was a Joint Tactical Air Controller, meaning a person who called in the air attacks. That's kind of like an SAS Officer on the ground with a radio who kept in contact and passed on the instructions for firing to the attack helicopters and attack aircraft.

The one-page medal "citation" document was released under instructions from the Ombudsman in the NZDF Operation Burnham information pack early last year, and explained in 22 lines his noteworthy deeds.

More than half of the citation is about how, on 20 August 2010 (the wrong date), the trooper made an epic 2 kilometre journey on foot to get into position for Operation Burnham. The NZDF narrative map marks this

journey as being about 100 metres. I don't know which is correct. Then the citation suddenly goes very sketchy and non-specific, saying he brought "effective aerial fire to bear" on "the enemy, during which a number were killed..." and that the insurgents massed for two further attacks.

This was a medal for the person who called in the air attacks, in a primarily civilian residential area, that caused most of the civilian casualties; and who called in various other attacks, all or most against farmers whom there are good reasons to believe were also innocent.

The man was given the Distinguished Service Decoration, which is awarded to people for "outstanding performance of military duties ... which bring great credit to the New Zealand Defence Force". According to an SAS source interviewed by the New Zealand Herald, his SAS colleagues were aware of reports of civilian casualties and felt that he should give the medal back. But the SAS officers advocated for the medal and the SAS Commanding Officer signed off the application. They were awarding a man who had accidentally helped cause a large number of civilian casualties with the medal presumably proposed by the Ground Force Commander who authorised those same attacks. In a rational and honourable organisation, this would not have happened. My conclusion, from everything I have said today, is that great caution is needed over everything NZDF claims about Operation Burnham.

Was that armed insurgent really an insurgent? Was that armed insurgent even armed? Are confidently repeated pieces of fact actually fact? Are original SAS documents correct or just original pieces of cover up? Is an obvious truth, for example, for instance, about insurgents in the villages, really just some PR person's "coherent word picture"?

NZDF's relentless denials about Operation Burnham appear to be entirely standard operating procedure; a tool deployed despite the facts to try and defend the indefensible.

They are also uncannily reminiscent of climate change deniers. Most of the public probably does not believe the denials, facts will never lead the deniers to change their minds, and lurking behind the denials is a strong sense of vested interests: the oil industry on the one hand and on the other the NZDF with its obsession for defending its reputation at all costs. Facts are bent and stretched, no point is ever openly conceded, the deniers distract, divert and muddy the water; and behind it all is a lack of conscience about who is hurt by the denials.

If the Inquiry would like me to supply any of the references I have mentioned, I would be glad to, thank you.

SIR TERENCE: Thank you, Mr Hager. Obviously, we've got a wide range of questions arising out of that, probably the best thing to do is to pursue them with you when we take your evidence.

MR HAGER: Yes.

SIR TERENCE: But yes, the references that you refer to, any in addition to the open material that we've made available, we'd like you to give us.

MR HAGER: Thank you, with pleasure, thank you for this opportunity.

SIR TERENCE: So, thank you very much. All right. We'll take the lunch break now and we start again at 1.10, thank you.

Hearing adjourned from 12.10 p.m. until 1.10 p.m.

PRESENTATION BY KEVIN J RIORDAN

SIR TERENCE: We're now going to hear from the Judge Advocate General Kevin Riordan.

MR RIORDAN: Sir Terence, Sir Geoffrey, kia ora huihui mai ano tātou kātoa, i raro i te tuanui I tēnei a tātou whare. My name is Kevin Riordan, I am the Judge Advocate General of the Armed Forces of New Zealand and the Chief Judge of the Court Martial of New Zealand.

I joined the New Zealand Army in 1977 as a Territorial Infantryman. At the same time, I was studying for a Bachelor of Laws and a Bachelor of Arts at Victoria University of Wellington. At the end of my Territorial Force service, which included quite some time in the ranks and then commissioned as an Officer, I joined the Army Legal Service in 1983 and since that time, I have performed a number of different Legal Staff Officer duties in the Defence Force, eventually becoming Director of Legal Services and then Director-General of Defence Legal Services. And during that time I have deployed overseas, provided legal advice in the field in Sinai, Israel and Egypt, and in Bosnia Herzegovina and East Timor and in Afghanistan and in many places in the South Pacific and also in the Middle East. I'm going to use the whiteboard if that suits the members of the Inquiry.

But I am going to start off, I've been asked - I'll just start again. The Inquiry has asked me a series of questions and I've actually set them out there in the

beginning of my presentation, so I won't read them out again unless you want me to but they are your questions to me. I'm going to address some of them at the bottom which I've set out at the bottom of the page there and then Brigadier Ferris, who is the current Director of Defence Legal Services, is going to pick up the others. There will be a little bit of an overlap between our presentations because some of the questions don't fit neatly into one or other of your headings there. So, in order to meet your requirement, what I will be addressing is the nature, purpose and function of rules of engagement. I'm going to be talking about the legal framework within which rules of engagement are constructed and also, how they are applied and how they operate.

I'm going to talk about the political, legal and military imperatives which help forming rules of engagement and then I'm going to talk about how they are written and how they are approved.

I will just mention that, despite having spent most of my working life in the military, I'm going to try and avoid using acronyms because this is an acronym heavy field of interest but occasionally I will not be able to help myself and I will slip into some, I am sure. So, for clarity, ROE is rules of engagement. LOAC is the Law of Armed Conflict. And CDF is the Chief of Defence Force. And if someone would be kind enough to signal to me if I use another one which I don't explain, I will go back and do so at that point in time.

As I've mentioned in the written brief of my presentation, I'm going to be talking about rules of engagement generally. So, I'll be making mention of rules of engagement from previous operations but I will not be dealing with specific rules of engagement out of a particular operation in that context.

Firstly, what are rules of engagement? Well, they are the directives issued by the highest level of military command which specify the circumstances and manner under which force will be used in execution of the mission. Highest level of military command in New Zealand is the Chief of Defence Force. They are, in effect, a mechanism for making sure that legal imperatives, the political imperatives and the operational imperatives or military imperatives are all aligned. And that is a point that I will return to many times during this presentation.

I'll just mention a brief history of rules of engagement. In the earliest times, of course, warfare was largely unconstrained. When the sovereign was the leader, the commander of the Armed Forces, then the sovereign's will as to how those forces behaved was guaranteed. Later on as professional Armed Forces started to develop, the sovereign or the government of the day might issue very broad directions to the Armed Forces but since they were often operating at a great distance from the capital, it took a long time for messages to get there and get back, so these constraints on how it was that the Crown wanted the particular campaign or operational war to be fought were often expressed in very broad terms, and often, the commanders in the field had no way of communicating back to get them amended.

Conversely, it was not at all unusual for commanders to be given a literal *carte blanche*. And so, the term literally means a blank sheet of paper with a signature of the King on the bottom of it and the commander could write his or other own rules, and Cardinal Richelieu was particularly adept at doing that, simply issuing orders that said 'the bearer of this paper has done what he has done for France', and that was the rules of engagement, if you like.

Even as early really as the middle of the 19th century, however, these ideas started to change. A very early example of constraints on the use of force would be the rules for the fight which are issued by the Ngai Te Rangi leadership at the battle of Pukehinahina or Gate Pa where they essentially wrote out four rules which said this is how we are going to conduct our operations. Some of them reflected spiritual ideas. Some of them reflected the law and customs of war as it stood in the middle of the 19th century. Others of them exceeded that. They said that they wouldn't pursue someone who overcome with their fears ran away from the battlefield and hid in the house of a priest. What they were saying is, this is not a war that we want to conduct on the basis that it is a fight to the death. We're going to constrain our use of force in order to achieve greater aims. So, that would be a good example of how these ideas started to develop.

Certainly, however, in the First World War and the Second World War there were no documents called rules of engagement by that name. And that's quite easy to understand in view of the fact that what you had there was formed armies fighting against formed armies and they were all in uniform and they were involved in a very high level of conflict.

There were, however, examples where the idea of minimum force was already being developed and certainly the slaughter of thousands of Sikh civilians in Amritsar 1919 and the British Government's response to that was the beginning of the idea that minimum force in everything but a pitched battle was the norm that was what was to be expected.

I might add incidentally, that it was also about that time or perhaps a little earlier that governments throughout the world started to conceive of the idea that military force was simply one of the tools that

were available to them in order to pursue their greater interests. And so, you have Georges Clemenceau, for example, paraphrased "War is too serious a matter to be left to Generals". Governments wanted to be able to control the use of force because it was but one of the options that were available to them.

New Zealand did carry rules - New Zealand forces carried rules of engagement in the Malayan emergency. They carried them in the Borneo confrontation, they carried them in Vietnam. It was really at the time of the Vietnam War, the American War in Vietnam, that you started to get rules of engagement as a common term, almost a household word. People started to hear of these things called rules of engagement and often they were described in quite a negative way. Rules of engagement, it was perceived, often stopped Armed Forces from taking advantage of what they saw as a perfect military opportunity, because the Government had a higher aim than simply winning a particular military engagement in the field.

So, you had a situation, for example, in Vietnam where American forces were not allowed to attack surface-to-air missiles while they were being constructed on the ground. It was perfectly lawful to attack them under the Law of Armed Conflict. It made good sense from a military perspective. They were prohibited to do so because the people assembling them were Russian service members and the United States did not want to draw Russia into the conflict.

So, there you have a very clear example of where a rule of engagement might constrain a use of force which might, from a military perspective, seem to make sense or might even from a legal perspective be available but from a grand political position was unacceptable. And that's always going to be a situation where people are going to look back on issues like that and wonder

whether the balance is struck correctly or not and that, again, is a point I will return to.

New Zealand really first became involved, I suppose, in writing its own rules of engagement about the time of the Fijian coup when in 1987 a plane was hijacked on the airfield at Nadi and the then-Prime Minister gave an order saying to deploy a C130 aircraft with Special Forces on board to protect New Zealand's interests as necessary. And that, of course, then gave rise to the question of, if we're going to write rules of engagement we have to know exactly what it is that the Government of the day wants the military to do. What level of force, what response, to whom? If you are fired upon, do you respond? If you are not fired upon, how do you carry out your mission? What level of force is required?

Now, history shows it wasn't necessary to resolve any of those matters because a crew member with a bottle of whiskey resolved the problem by hitting the hijacker over the back of the head but I think that out of that incident a lot of things changed. A lot of thinking was done as to how it is that you're going to ensure that what the Government wants to happen is what is going to happen.

So, that pretty much brings us up to today, unless anyone has any questions about that very brief, very, very brief overview of how we got to where we are. I mean, essentially the history of rules of engagement is a brief history because the use of rules of engagement is relatively brief. It was really during the Cold War, about 1957, that documents started to turn up with those words on them.

SIR TERENCE: Can I just ask, was it also related to the emergence of the Law of Armed Conflict, International Humanitarian Law, all the developments that took place after the Second

World War and the various conventions and things;
is it interlinked with that or not?

MR RIORDAN: It cannot be divorced from that. However, I will draw a little picture in a moment which I hope will explain how those two bodies, well one body of law and one sort of *lex non scripta*, unwritten law surrounding rules of engagement, how those two things combine and it's a very important relationship, a very important relationship, yeah, absolutely.

And, you know, as I say, the Cold War, of course, so from one perspective, yes, absolutely, in 1949 you had four Geneva Conventions became law and were adopted, as it happens, throughout the entire world. So, that was a major issue.

Another major issue is you then had a significant number of nuclear-capable powers. So, you might be involved in an armed conflict which is localised; fighting occurring between the surrogates of major world nuclear powers. A decision by a commander at quite a low level could draw in a response from a nuclear power. I think it's at that stage that a lot of people drew breath and thought, actually, that's not a decision which should be left to a Second Lieutenant in the field to decide whether you're going to pursue somebody beyond your boundaries and, therefore, risk a response which in a tit-for-tat could end up in global nuclear war. So, there are a lot of different influences coming together at that point.

Another one was the emergence of peacekeeping. That was a major feature in the developments of rules of engagement because up until that point, Armed Forces had been trained to fight. So, closing with and killing the enemy was the basis of their training and their ethos and their complete mode of operation. You then got people who were trained in that notion and you put them

into a circumstance where they're now not closing with and killing the enemy, they're actually trying to keep two warring parties away from each other. Rules of engagement, therefore, said, well, what happens if your peacekeeping forces are attacked? How do they respond? Do they join the war? Do they become a party to the war? What would the consequences of that be?

It was really at that point that you started getting rules of engagement, not just being a term of art which occurred at an abstract level. It was a day-to-day issue for Armed Forces throughout the world.

So, well, our experience of dealing with rules of engagement is at least five decades old because from the earliest of those operations, you were dealing with rules of engagement that often initiated out of the United Nations headquarters themselves or would come out of a coalition of States.

Any further questions?

SIR TERENCE: No, thank you.

MR RIORDAN: The purpose of rules of engagement. There are really two fundamental reasons for rules of engagement.

The first one is to ensure that military action in the field is controlled and is aligned with what it is that Government wants that force to do. So, already really stated that, it's just a fundamental purpose of what is happening there, ensuring alignment between what it is that the Government wants and what it is that the soldiers want.

There's another reason, and that is that it gives soldiers, sailors, airmen, airwomen, on the ground the confidence to act decisively, boldly, with control, in the knowledge that what they are doing is correct in a situation where they simply cannot hesitate. So, these rules are intended to put into the hands of soldiers, sailors, airmen, airwomen, the controls from the

Government so they know that when it's time to act they will act.

Unlike a lawyer or a commentator or someone who's abstractly looking at this from the safety and security of retrospect, soldiers and sailors, airmen and women on the ground do not have hours or minutes to analyse the information that's in front of them. In fact, they might have to react that fast [clicks fingers] and they do not have a lawyer standing next to them. They have all been legally briefed, they may be briefed in the field, but when that moment comes when one of our young people is standing on the side of the road up to their knees in snow in Bosnia and confronted with a situation, it's them that has to make that decision on the spot. And the consequences of making a wrong decision are very significant. It could cost that soldier his or her life. It could cost the life of his or her comrades. It could cost the life of the people that they are tasked to protect. It could cost the entire mission. That's how serious it is for people to be making those decisions on the spot and they make them very fast and they know that they are legally accountable for getting that decision right or wrong.

So, that is why the responsibility to get rules of engagement right is so keenly felt both within the military, at the political level and the legal level, is because it is quite literally a life and death issue. I think that that significance is well understood by everyone who is involved in dealing with them.

The consequences particularly, I might add, particularly a self-defence decision, what level of force is reasonable in self-defence, even in the normal criminal law context, the courts are not going to weigh to a nicety just exactly how much force is required but if that's so in a situation in peacetime New Zealand under the ordinary common rules of self-defence, we also

have to remember the situational circumstances in which rules of engagement are used.

So, if you're talking about self-defence, for example, in New Zealand, as we know from the cases that have been before the courts, we know that you might - the reasonableness of your response is going to be measured against things like, well, you could have called the police. You are faced with a threat, you could have called the police. Operations are conducted in usually 99% of the time, maybe 100% of the time, our soldiers and sailors and airmen and women are being sent to places where the rule of law has broken down, you cannot call the police. In the middle of a country which is being ripped apart by crimes against humanity and genocide, the police have either fled, been killed or they're doing it. Or alternatively, you're there in order to train the police so that they can conduct their operations, so that's not an option.

Ordinarily, if you're confronted with a use of force against you on the street, you can run away. The court might ask, why can't you run away? Why can't a soldier run away? Because that's called cowardice and is a criminal offence under the Armed Forces Discipline Act. They can't run away, it is their duty to stand there and deal with the situation.

Although the constants of the law thread through all of this, we also have to remember that they're being exercised largely in some quite aberrant circumstances where the ordinary features that would help us to understand how the law apply are often quite absent. So, just to recap on that. Rules of engagement, they must be constructed in a way that makes it possible for the force to protect itself, to achieve the objectives of the operation. Force may need to be minimised so as not to allow the situation to needlessly escalate. Rules

must be robust enough to enable the deployed forces to accomplish their mission and to survive.

Rules that are too restrictive, as I have said before, rules of engagement which deprive your team on the ground of the right to use lawful force, then the results can be pretty serious. They can result in your service people being killed. It can result in the people who they are protecting being killed. It can result in the failure of the whole mission. There are numerous examples in this regard.

I'll just take one which is the Beirut Marine Corps Base in 1983 where the young marine who is standing there on the road has rules of engagement that say he is allowed to shoot somebody if they are shooting at him. They didn't say anything about anyone driving a truck at him. He did not have a round in the chamber of his rifle. The truck in question contained probably the largest explosive charge that had been detonated on the ground in history and it drove through the barrier right into the middle of the camp and exploded killing 241 of his colleagues and grievously wounding many, many more. So, there you have a situation where you would say if you inadvertently write your rules of engagement to neglect to mention what happens if someone drives a truck at you, then it can have a situation where the soldier on the ground is ripped by indecision and that indecision proves to be lethal.

But what about rules of engagement that are too permissive? Rules of engagement that are too permissive will mean that you could end up escalating. You could escalate a conflict out of some quite small incident into a larger conflict which in itself costs lives. Now, sometimes people say, well, it could lead to civilian massacres, for example, but for reasons I am about to show you, you would have to breach two areas of law to get to that position, not just have rules of engagement

which were a bit too broad which would perhaps lead to that result.

So, on that note, I will now use the whiteboard which has been sitting here unused up to this point to, sort of, explain a couple of principles about the rules of engagement and how they arise and how they are used. Before I do, you have asked a specific question in there, which is application to the NZSAS, it is a separate point, so I will address that before I start on this.

And the answer really is a simple well yes, yes, rules of engagement apply to the New Zealand Special Air Service; Special Operations Forces are bound by the law as are all other forces. There is no exception under law. There is no exception under international law or domestic law. They are not referred to, Special Forces are not referred to in any act entitling them to do anything that any other service member is not entitled to do.

Rules of engagement are particular to the operation. They're not particular to the force that carries it out. So, it's not unheard of for, even within the one theatre, for different forces to have different rules of engagement because they're doing different jobs, so tailor the rules of engagement as to what it is that the person is actually going to be doing on the ground. There's no status exemption for them.

Furthermore, under our model of law, soldiers are fundamentally civilians in uniform. They derive their powers from the common law and from international law. When a soldier is acting in self-defence, that's the same self-defence that applies to, well, everybody in this room actually.

Now, of course, as I said before, they are in a different circumstance but their fundamental right is derived from the same route as everybody else. So, in a

war situation, an armed conflict situation, the powers of members of the Special Air Service are derived from the fact that they're combatants, not from the fact that they're Special Operations Forces. There is no suggestion that there is any special law which applies to them.

How rules of engagement are forged. As I've already mentioned I think two or three times, there are fundamentally three different imperatives which drive rules of engagement. We have the legal imperatives. We have the political imperatives or the policy imperatives. Excuse my spelling here of political. There you go. Lastly, we have the operational military imperatives.

Now, some sources refer to them as influencers or considerations. I'm using the word imperative because the law is not an influence. You can't break the law. So, the law requires you to do things. It's not an influencer. Being unlawful is the ultimate constraint on any plan.

Similarly, political input is not something that the military forces can ignore. It's not something that they can treat just simply as an influence on what they're going to do. They're absolutely bound to comply with it. And then there are the military influencers. And that is the aspects of rules of engagement which relate to what a force can actually do.

Now, again, I mentioned Srebrenica before, if I didn't I will now, Srebrenica of course became notorious as an example of a failure to align political requirements and military requirements. And it's often attributed to bad rules of engagement. Now, amongst the very, very numerous reasons why a Dutch battalion stood by and allowed 8,000 young Muslim men and boys to be slaughtered by Bosnian Serb forces, the misalignment of the political with the military was the greatest reason.

The actual drafting of the rules of engagement paled into insignificance with that because the rules of engagement did in fact allow the Dutch battalion to defend those people but having rules of engagement which allow you to defend people is not the same thing as providing anti-tank weapons to that military force. It's not the same thing as ensuring they have air support. It's not the same thing as ensuring they have a way of protecting themselves and engaging with the enemy and surviving.

So, all of these factors sort of work in together. I am going to start with the legal. If we imagine a square box that has everything you could do within a military operation within that box, every capability you can imagine. Now, if we go back in time, this box, of course, was pretty much unfettered. The traditional concept was there was a war of peace and there was a war of law. In fact, before that there was a conception that said you had a war of peace and nothing on the other side of the balance, but even at a very early classical stage people started saying, no, not even the extreme circumstances of war relieve us of our most fundamental obligations to our fellow men and women. So, that idea imperfectly expressed is actually quite an old one. But you can have everything within this box that you can do in an operation. Although I'm talking about war here because that's the extreme position, there are a lot of operations that are a lot less than war. They are things like peer support, for example.

So, there are some things like, for example, if we were to talk about closing with and killing members of an opposing force, that's something you can do during a war. Burning a city to the ground is something you can do in a war. If you look at the Roman concept of war, they didn't even actually conceive of a difference between a combatant and a civilian, there was no

difference. When they attacked another nation, they would destroy the cities and salt the fields and completely obliterate and put people into slavery. So, those things are both physically capable of being done. Sinking shipping is capable of being done. Aerial bombardment of civilian objects is capable of being done. Destroying cultural property is capable of being done. Enslaving populations, stealing the wealth of the nation, all of those things are capable of being done.

But by gradual process, civilianisation has decided that some things are permissible and some things are not, and this gets back to your question, Sir Terence. We're really talking about the middle of the 19th century. You can find earlier examples but that's when it started to develop, the idea out of the Battle of Solferino, the idea of an obligation to care for the wounded and sick and the shipwrecked. And, you know, the idea of sparing the lives of people who at their discretion surrender, people put their hands up. It's capable, you are capable of shooting every prisoner you find and many commanders, including Napoleon, did that on occasion. But, from about the middle of the 19th century, you started to see this idea of a box, things which were beyond the laws and customs of war, beyond the customary rules of law.

As time has gone by, that constraint has become tighter and tighter and tighter. For example, it is possible to use cluster munitions on an opposing force. New Zealand, however, has assumed totally the use of cluster munitions. So, whereas that once would have fitted in here, for us it's now out there. Each development takes that box in more closely. And it's not just the Law of Armed Conflict, it's not just the Law of Armed Conflict. There are so many, many, many other issues which constrain the use of international armed forces. Obviously, the UN Charter is one. Obviously, the

Law of the Sea is another. If you're involved in maritime operations, you may well have a rule of engagement which precludes your ship from entering certain waters, no matter how militarily advantageous it might be to do it. But that might impinge upon the neutrality of territorial sea of another State, so you're told you can't do that, that's in the outside box, the law does not allow you to do it.

Domestic law also has this effect. Using mercenaries is something you can do in war, not if you're a New Zealander. Using nuclear weapons is something you can do in war but not if you're a New Zealander.

And so, this picture builds up of a massive body of law. There are elements of about 60 different treaties and a massively large area of customary international law which apply to New Zealand operations overseas. So, that line there is a pretty hard line.

I might add incidentally too, that where that line falls, at least in theory, is different between an international armed conflict and a non-international armed conflict. But New Zealand has taken the position, we will apply the highest standard to both areas of law so we don't make a distinction which would allow a greater level of freedom just because it is a non-international armed conflict.

Some of the States do draw that distinction very strongly. It makes legal differences which we'll get on to later but, as far as things like the treatment of prisoners, for example, New Zealand has taken the stance that is not a relevant consideration as to how they are treated.

Okay. So, now we move to rules of engagement. Within this box, this legal box here, you're going to draw up rules of engagement. And the rules of engagement could, for example, just incorporate that much. If we put in this box here, the use of force in self-defence, if you

are attacked, despite the fact that there is all of this legal capability here, you're not doing it. New Zealand force, you are perfectly entitled to do things like use artillery to attack the headquarters of one of the warring parties. Law says you can do it. But the rules of engagement might say, no, you can't and that's an order.

Very high level, a very high level of violence, high intensity, the high intensity operation, that rules of engagement might go right up to the level of the law. You might well have rules of engagement which say if international law allows you to do it, if the Law of Armed Conflict allows you to do it, if New Zealand domestic law allow you to do it, you can do it. You might have rules that are that permissive.

Usually, we're coming in quite a bit short of that position, quite a bit short of that position. Depending on which operation you're talking about, it can be about this low. Operation Bel Isi, for example, when New Zealanders went unarmed into Bougainville, part of the peace support mission over there, in fact strictly speaking it didn't even really get on here at all because they were unarmed, so you know that was the low level. They didn't actually even get issued with rules of engagement per se because they didn't have weapons to use them but that was an operation which estimated a very low level of force being used.

Right through to certainly since the end of the Second World War, the idea of significant use of military force by the Defence Force has always been constrained somewhere along that line.

Just on that concept, any questions?

SIR GEOFFREY: The asymmetrical nature of a lot of modern conflict seems to me - how do you design ROE to deal with that?

MR RIORDAN: Right. Asymmetrical means fundamentally that the opposing force does not use the same tactics, means or operational capabilities that you use. So, the minute you have a situation where the other side decides that rather than meeting you strength on strength, they will attack beyond your lines, that's asymmetric.

As I said before, if we think about a model that sort of said something along the lines of, here you have the law of peace. I'll just call that LoP, Law of Peace. For the longest period of time there was just nothing on that side of it. The minute that war was decreed, the Law of Peace, the sounds of the lawyers were drowned out by the din of battle under the Suro sort of model.

Then you had an idea where you had Law of Peace here and then you had Law of War here. And the two were very distinct. And indeed, Oppenheim, the great book on international law, divided two volumes, Law of Peace and Law of War. And you could tell, for legal purposes at least, that you had gone between the two both effectively by a declaration of war. If the King decides there is a war, there is a war. If the King decides there is not a war, there is not a war. And that was a model which survived some degree, well into the 20th century. That is not the model that exists now.

I might add incidentally, declarations of war were actually very rare and there have been no serious declarations of war since 1945 because of course the influence of the United Nations Charter, especially Articles 2.1 and 2.4.

So, now what we have is what is usually referred to as a spectrum of conflict, or a spectrum of operations is the other expression that is used for it. So, you can have a situation which, this is peace, I'll write "peace" in there; and this is global thermonuclear war. So, I'll just write "nuclear" in there.

SIR TERENCE: Just write "the end".

MR RIORDAN: Yes, "the end", there we are, the end. So, if that's our range of possibilities, then the influence of different aspects of the law, like the Law of Armed Conflict for example, starts to engage really just a fraction past peace, just a fraction past peace. And what applies on the other side of that fraction? Well, of course, so much of what we know about that other side of the fraction there comes from the experience of British Army in Northern Ireland, for example. The British Government said this is not war, we are acting in a policing situation. But if you're a young British soldier with a pipe bomb landing at your feet, it may not be legally a war but many of the things you're going through very much resemble a war. And then you have the influence of different areas of law coming in. Like, for example, if we were to say that's the Law of Armed Conflict. The influence of the Law of Armed Conflict grows, the range of things that you are going to have to comply with grow as your intensity grows.

Now, you might notice, I always used to just stop that just short of the nuclear war because for the longest period of time, even the International Court of Justice could not decide entirely satisfactorily with a nuclear, use of nuclear weapons was unlawful. I'm going to rub that out and take it up to there because New Zealand has ratified the treaty banning nuclear weapons. From our perspective, the law applies to the exclusion of all nuclear weapons. And our domestic law, which you well know, Sir Geoffrey, has done so since 1987. So, you have gradations along there.

You also have International Human Rights Law. That's particularly, of course, if you are in occupation of foreign country. So, you could have co-existing rules under the Law of Armed Conflict or International Humanitarian Law, IHL as it is often known, and at the same time in parts of your operation where you are, for example, in occupation, a lawful occupation, you could have another area of law. What about domestic New Zealand law? Domestic New Zealand law does not disappear because you have gone from a state of armed conflict - from peace into armed conflict. If you are in an operation and you murder somebody, you're still guilty of murder. A soldier, on the other hand, a combatant, has special permission under international law and domestic law, the common law - the common law, not statute law - the common law, provides that a combatant who kills a combatant in the course of armed conflict has committed no offence.

So, again, you know, you've got a partial existence of domestic law and also Law of the Sea, the Law of Overflight, the Law of Neutrality, all of these things. And you are picking at any point in time that your force elements fit somewhere on that gradation. And the gradation can change from one societal situation to another without apparent change. The person on the ground may see no change in their circumstance but the legal situation has changed. A war that starts off as an international armed conflict can turn into a non-international armed conflict.

A non-international armed conflict can turn into an international armed conflict. Sorry, a non-international armed conflict.

A peace support operation can engage elements of conflict.

And so, what you have to do, is the Government decides what is the nature of this operation? And what rules are the ones that apply to us?

But I will just say before you conclude that this is all too complex, there are some rules which are absolute. It doesn't matter where on that line you lie, torture is unlawful. There is no circumstance in which torture is lawful. There is something like 23 references in domestic and international law prohibiting torture, so it doesn't matter where you fall on that. Similarly, the treatment of detainees or prisoners of war. It makes a big difference whether the person you've captured is captured in an international or non-international armed conflict because they might be a detainee or they might be a prisoner of war. But does that mean you're allowed to take them out and murder them? No, clearly not.

So, the big, the big issues, the biggest of the big issues are constant regardless of the legal situation. International law and domestic law has now grown to a point that no person is fundamentally without protection under the law. So, artificial decisions to try and place somebody in a position where they fought in between being a civilian and being a prisoner of law, New Zealand has never accepted that position. You're protected under one body of the law or the other. Actually, to get back to your actual question, which is where asymmetric warfare fits in this, well usually it's fitting around about this level here. It's actually, I mean, the asymmetric part of it operates in two ways. First of all, you are constrained in the amount of force that you can use against asymmetric warriors as a general rule. And the reason for that is that they usually often, often, the asymmetric nature of their operations is actually designed, it's calculated to induce breaches of the law of armed conflict. An

asymmetric fighter will often find it very difficult to attack a hard target like an army base. They find it very easy, on the other hand, to attack like a police outpost or civilians or a school or something along those lines.

And the advantage for them doing that is, of course, that they can cause a great deal of damage and also by doing so they hope to induce a response from the other side which will undermine its moral and legal authority. That's part of the reason why you would use that. Sometimes it's by force.

So, the question is, does the actions or do the actions of the opposing force mean that you leave behind that big square that I had there before? No, absolutely not. The rules are still applicable, even if the opponent is not complying with any formal rules -

SIR GEOFFREY: It is much more difficult to apply them, isn't it?

MR RIORDAN: Well, it could be and that's particularly so when the opposing side is forced, for example, to conduct its operations from within a built-up area, like inside a city, for example.

And if you look at something like central Sarajevo, for example, there were a great many war crimes committed by the foreign forces but also the forces inside who were forced, had to essentially use asymmetric techniques, were also doing things like putting mortar tubes in the grounds of hospitals, for example, in the expectation that when they fired the hospital would be shelled. And there are examples of that happening and there always are, which is why the task of the young people who get sent out to do this work on behalf of our nation is a far from simple one. And that is why, as I say, it falls upon us to try and get their rules of engagement as accurate as we possibly can.

I might add, there has never been a possibility of writing rules of engagement which deal with every possible contingency. The circumstances of armed conflict, and indeed all operations, are fundamentally uncertain. People do not know what is going to happen tomorrow and if you can sit down and write for every eventuality, you end up with a rules of engagement document that is about that big [indicates size] which the person on the ground is not going to be able to deal with.

On that point, while we're still dealing with that sort of application, rules of engagement - rules of engagement are the details documents that are signed off. You also can have rules of engagement cards which are the small notebook-sized rendition of the most important of those rules and often the same terminology is used in respect of both.

The idea that a soldier on the ground in the middle of a firefight will be able to reach into his or her pocket and pull the card out and read it is completely fanciful and should just be dismissed from people's minds. That's not what they are there for. They have to be trained in the rules of engagement. Soldiers, sailors, airmen and women, need to be trained in the rules of engagement. The card is not the way. Sometimes you won't issue a card at all.

SIR GEOFFREY: Just on that, does the SAS, do they have cards?

MR RIORDAN: They have a range of operations and for some of them they will have cards but, generally speaking, generally speaking, if you have rules of engagement which are completely aligned with the nature of your mission, sticking a piece of paper in someone's pocket is just a useless distraction. You're saying to the person: you are going to do

this task tomorrow, these are your rules of engagement.

And there is another aspect to it as well, I don't want to over-dramatise but of course opposing forces are capable of exploiting your rules of engagement and if you were to put rules of engagement into the hands of service members who get killed or captured, that could have consequences as well.

Rules of engagement cards are very useful when you have service people doing a job that has many different aspects to it. Like an infantry battalion or company in Bosnia, for example, tomorrow they are doing vehicle checkpoints, the day after that they will do a task assisting putting a school roof on, the day after that they might be trying to control civilian access to somewhere. The constants of their job in respect of the rules of engagement is a good thing to have on a card because each day is not being directed to those rules of engagement, so yeah.

The subject matter that's covered by rules of engagement, incidentally, and I am going back slightly on my presentation on the papers, I'm not following it completely linearly, but the subject matter of rules of engagement is quite important as well because, as I said before, you don't always have to issue rules of engagement. The nature of the operation might just make it inapplicable. That was the case with Bel Isi and Bougainville.

Beyond that, however, you have rules of engagement for every conceivable use of force. And that can be from the firing of the high velocity rifle, which if it hits the person that it is aimed at is likely to kill or seriously injure that person. So, that's one type of force that we're thinking about. But there are many other types of force or coercive measures or resources

of engagement: from illumination, for example, what you put up in the sky to light up the field of operations.

A warship might be used to interpose another vessel, to stop it from getting where it's going. It doesn't fire at it, it just places itself between that vessel and where it wants to go. You need to have rules of engagement as to what to do in respect of the reaction of that other vessel.

You have rules of engagement, for example, if you think you're going to be dealing with rioting. Are you going to issue weapons that fire, for example, beanbag rounds? Are you going to hand out batons? If you're going to hand out batons to your soldiers, are you sure they've been trained in how to use them? And also, you know, how they use them, when they use them and most importantly, when they stop using them. So, you can have a complete range of different uses of force, all of which may be directed to particular questions of the use of force.

You asked a specific question in your request for a presentation in which you said, how do the rules of engagement deal with things like, for example, treatment of the wounded and sick? Generally speaking, rules of engagement are actually a very good mechanism for putting specific parts of the law-abiding conflict or IHL down to the unit. So, you might well do that and that will be particularly so in respect of things like detention policies, for example. If part of the role anticipates that people are going to be detained within a law and order framework or an armed conflict framework, you might give a separate detention card. But, generally speaking, if we cast our mind back to the hard square box, there are some things that are the same in every operation and those ones you wouldn't put in there.

Treatment, for example: in every operation you have to collect and care for the wounded and sick, regardless of whether they are friend or foe. That's an obligation. I might add, it is a contingent obligation on your ability to do so and it says no sooner than the end of hostilities but it's a fundamental obligation.

So, you would never have a set of rules of engagement that said you don't do that. Since you don't have a set of rules of engagement that says don't worry about that one, any more than you would have one about shooting prisoners, you will not have a rule of engagement that says you can shoot prisoners because that hardline can't be crossed by your rules of engagement. That would be an unlawful order if you did that.

So, that's when this one, this document, Brigadier Ferris has got some of these, that's the Code of Conduct card. We will make sure we pass these up. If you run down through the Code of Conduct card you will find, for example, number 6: collect and care for the wounded and sick with a friend or foe. So, that's a constant. That's not going to change from operation to operation. So, you wouldn't put it in the rules of engagement.

Now, I have to emphasise that rules of engagement are not a source of law. They are not a treaty. There's no statute in New Zealand that refers to rules of engagement, except they do get a mention in one of the Waitangi Tribunals, one of the Acts giving effect there. But, other than that, no, they are not a legal document. That has two profound effects.

First of all, they can't override any other source of the law. Rules of engagement cannot negate the effect of a statute and they can't negate the effect of a treaty. They are not a separate source of law. They may encapsulate the law. They may make the law understandable to the people who have to apply it but they don't create it. They don't create specific rights

and they don't create specific obligations. They are, however, orders. They're orders issued in New Zealand by the Chief of Defence Force. Now, some overseas forces do not follow that practice. They regard them as guidance which is an approach which could be problematic because it suggests that guidance you can follow or not, as you feel inclined.

A person who breaches a rule of engagement under our system is liable to be charged with an offence under the Armed Forces Discipline Act, most likely section 39B but perhaps others. So, you have this obligation that says if it's a hard and fast rule that says you are not allowed to do the following things, you are not to and you do, then you can be charged with an offence because that is the Chief of Defence Force's order.

However, what they don't do, is they don't override the ordinary power of command as long as that command is within the rules of engagement. I need to return to a square box.

So, you can have a situation where the rules of engagement are the directives to your commander telling you what level of force you may use. They are not a directive saying what that commander must do. So, here's a very, very simple example. You might have rules of engagement that say that the members of a certain insurgent group, a certain group of civilians involved directly participating in hostilities, constitute a constant threat. So, when you identify a person who belongs to that organisation, that armed group, you're allowed to engage them.

But what if they're coming in to negotiate a peace? You couldn't have one of your soldiers turning around and shooting one of these people because the rules of engagement have identified them as hostile. So, obviously, you can have a situation where a soldier has rules of engagement saying that person is a member of a

hostile organisation, it's continuously using armed force against us, and you can engage them but today, Private, you're going to protect that guy because he's walking into an environment where we want him to be.

The soldier could not say 'I'm pulling out my rules of engagement and I'm ignoring your order' because what has been ordered to do is within that ROE framework, it's not outside it.

Similarly, you're engaged in a firefight and the soldier is told cease fire. The soldier is not allowed to keep firing because he says 'I perceive these people are still a threat'. No, sorry, you're told to cease fire, you cease fire, that's an order. From that perspective, commanders always maintain that right to do something which is within.

What they can't do, is do something outside the rules of engagement. So, if the Chief of Defence Force gives to me, as the commander in the field, a set of rules of engagement which tell me I am allowed to use the following weapons in the following circumstances, I cannot then write an order which says I will use a different weapon and in different circumstances. If I do, then that order is an unlawful order. And the servicemen under my command are not only entitled, they are expected to disobey it. That's a fairly significant legal consequence of rules of engagement.

If you cast your mind back to those arrows that I drew - legal, political, military - because the principle of adherence to the rule of law in this country, a political imperative cannot overrule a legal imperative. The legal imperative is the one that must prevail. Not even the Government can turn around and authorise a use of force which is in breach of law.

I make the comment in here, the relationship between that political imperative and the law is a multifaceted one. I think if we cast our mind back to the drawing

down here, it gives you an idea of just how multifaceted it is.

So, the question is not if the law applies. Of course, it does. The question is, in this particular circumstance how does it apply?

SIR GEOFFREY: How do you get the balance between the three requirements that the ROE have to meet because often there might be disagreement from the political arm as to what the military arm wants and so on; how do you resolve that?

MR RIORDAN: Actually, in my experience, that disagreement doesn't happen very - I'll say very often because you never say never and I can't remember every single example but fundamentally, the cost for a government of authorising an unlawful use of force is enormous.

And certainly the military, I mean, I will give you an example. The military now are very keenly aware of what their legal rights and obligations are. So, if you're told that the means or method of operation that you're talking about is in breach of international law, that's regarded as the end of the show really for that purpose.

I think if General Sir Michael Jackson, Commander of the British Forces at the time of British involvement in Iraq, demanded a statement from the Attorney-General saying that what he was about to do was lawful in accordance with the Attorney-General's view (we can have a discussion about that view, if you'd like, but I think we probably haven't time); but the point is, he said, quite famously said, "I've spent the last 10 years trying to put Milosevic behind bars, I do not want to appear in a cell next to him."

So, you have this understanding of those legal imperatives but of course the law, as I've said, it's multifaceted. And so, how do you solve any legal

problem? State the facts, state the law, apply the law to the facts. In an operation as complex as the ones I've been talking about, the facts can be very complex and you have to have a very firm understanding of what they are before you start providing legal authority for things like the use of force.

I might add incidentally, there's a further dimension. We've really moved, haven't we, onto the political now?

And so, the first point is, under our constitutional system, there's a couple of very important constitutional conventions which are at work in this process that you just have to instinctively understand. Probably the first one of them is that the military is subordinate to the civilian authority in New Zealand. You don't have the situation where the Minister of Defence is a uniformed member of the Armed Forces here. So, at every stage the use of the military is determined by the civilian authority. That's the first.

The second thing is the rule of law. That is a fundamental understanding of our constitution. Another one is, of course, that it is for the Government of the day to decide on the use of force. It is for the Government of the day to decide when to engage, when not to engage, when to escalate, when to de-escalate and when to cease operations. That's a fundamental prerogative of the Crown. It's never been successfully challenged.

As our system stands at present, that is a decision for the Government of the day to make, not the military. So, the military might well say, if we were to escalate operations now we could solve this problem faster. The Government turns around and says, thank you for your input, we're not going to escalate, we're actually going to de-escalate. We're actually going to move away from this operation.

So, the way that fundamentally works, of course, is the Defence Act. So, we're back to the law again, the law and policy are interacted at every level. Section 7 of the Defence Act says, "The Armed Forces are controlled by the Minister of Defence". The Minister of Defence controls the Armed Forces. He does so through the Chief of Defence Force. The Minister of Defence can't give an order to a soldier but the Minister of Defence says to the Chief of Defence Force, this is what we are going to do. And that's a fundamentally very important aspect. But, in fact, again, as I say, inter-related. You talk about the Government and of course now section 7 of the Defence Act makes it very clear, who is in control of who in this relationship? But you also have those same considerations at the governmental level. You have the same influences at work because you have a Minister of Defence but there is a safeguard. There is an Attorney-General. And the Attorney-General's role under our constitution is to ensure that the actions of the Executive Government are lawful and constitutionally sound. That's what the Attorney-General does in that role.

And you also have a Minister of Foreign Affairs and Trade. And the Minister of Foreign Affairs and Trade is very keenly aware that actually the use of military force is just one of the abilities that's available to a government to solve its foreign responsibilities. And it may well be that the military are providing professional advice saying we think we have an opportunity here to solve this problem militarily, but the Ministry of Foreign Affairs and Trade says, yes, or we could actually do something diplomatically here. By the way, the Ministry of Foreign Affairs and Trade are responsible for ensuring that New Zealand complies with its international treaty obligations and so much of

what I was talking about before was international treaty law obligations.

So, this is not just an abstract. If there was any thought that you could have, sort of, a rogue set of rules of engagement getting through a rogue Minister of Defence, and by that skewing dramatically off the path of New Zealand's legal obligations, there are a number of inherent checks on anything like that occurring.

SIR TERENCE: I was going to ask, you've said that the ROE may occupy a greater or lesser amount of the square created by international legal obligations and so on. Where the Government commits the Defence Force to a joint operational force or a multi-party course, I guess it's likely that ROE, for different countries, may cover different areas of the larger square, so there may be differences?

MR RIORDAN: Yes.

SIR TERENCE: How is that managed?

MR RIORDAN: I will clear the whiteboard. This is modern military operations. This is what they are.

So, if you have a coalition of armed forces from different countries, you end up with what we colloquially refer to as an Interoperability Military Matrix.

So, somewhere in your headquarters you're going to have to have somebody working very hard on a chart. Let's just have five nations in this, we'll just have five nations in this coalition. A, B, C, D, E, just five. If I could just remind you, ISAF; 40. Right. So, five nations. Some things, let's take the Geneva Conventions. The Geneva Conventions of 1949, four of them. Every country on earth is a party. So, there is no coalition party that can turn around and say we're not going to apply the Geneva Conventions, not going to happen.

Then you have, following close in behind it, two protocols. There's actually three but I'm just going to talk about two of them.

So, Protocol 1: international armed conflict. Protocol 2: non-international armed conflict. Now we're going to see divergence. Although the overwhelming majority of states are parties to both, many of the major military powers are not.

So, you might end up with country A that has signed up to Geneva Protocol 1. You might have country B that has not. Country C has. Country D has not but applies its rules as if it did. And then you have E who's probably still thinking about it. They may have signed it but not ratified it, so they'll give them a tick. Similarly, we'll go down here, yes, no, no, yes, no. Why does that matter? Because if your situation changes from being an international armed conflict to a non-international armed conflict, suddenly your matrix is going to change overnight because you may well have a State that is signed up to all of the rules under Geneva Protocol 1 but not the rules under Geneva Protocol 2. I should mention in here, there's another very important convention or part of a convention which is Common Article 3 of the Geneva Conventions. Common Article 3 sets out a basic code of treatment which is now regarded as applicable through all operations. That is the very fundamental, don't torture, don't starve people to death, do not mistreat. So, we'll put everybody as a yes to that. Already you will have big divergence. What about Customary International Law? Customary International Law, as we know, is the law that applies, so it's what States do but they do it because they have a sense of legal obligation. Not just they don't do it because it's advantageous, they believe, I feel very embarrassed telling you this, Sir Geoffrey, but it is because they feel they have a legal obligation.

You can have a rule that we believe is Customary International Law: they believe it, they believe it, they believe it, but these people here have never accepted it, they are persistent objectors to it. Again, you have a bit of a change there [referring to E].

And then it's going to get worse because that's your fundamental ones. Sorry, just one more. Jus cogens norms, the super strong rules of international law, they apply to everybody, so we're going to get a big tick there. What are they? There's no permissible use of slavery. There's no permissible use of genocide, so that's fine.

Now you get into the really detailed stuff. You're going to have, for example, the Ottawa Convention on Anti-Personnel Mines. Yes a party, yes a party, no, yes, no.

Cluster munitions. Yes, yes, no, no, no. On it goes through every rule that you can think of.

And what has to happen, is that the rules of engagement as a result of this are going to differ from unit to unit.

Now, some years ago there was a big impetus to say if we're going to deploy somewhere, let's have everybody on the same rules of engagement. Why? So that I know that if an emergency happens and I have to call on the next nearest battalion that comes from another nation, they'll do what we would do. I'll know that because we're on the same rules of engagement.

Well, it didn't take very long for people to say, actually, that's just simply not going to work. We, Country C, cannot sign up to your common ROE because in your common ROE, for example, you say you can use deadly force or may be deadly to protect the mission as central property. That's not lawful under our law. We have no power under your domestic law to use deadly force in protection of military central property.

So, the commander of all of this arrangement up here, when he or she is picking people for a mission, will say we have a power articulation plant that feeds directly to a maternity hospital. If it gets destroyed by the rebels, this is going to be a very bad thing for everybody in that hospital. We can send these people to defend it but we won't send those ones. And that is a work of interrelationship which is a constant feature of coalition operations.

So, if you are at a local level, you cannot, if you are B you can't order troops from C to do something they're not permitted to do. But nor yet can you prohibit them from doing something which they are permitted to do.

Coalition command is really command in name only. What you are doing is you are organising the command structures of every nation that forms part of your coalition. This is not new. You can end up with a situation with a battalion run by one country that has within it a company run from another country that has borrowed a platoon from a third country all on different rules of engagement. That happened in Timor. That's a job for somebody and I say at headquarters and I think Brigadier Ferris, just from the look of her, is going to talk about this subsequently so I've probably ruined the fun.

SIR GEOFFREY: It does occur to me that there might be easier legal careers than being a military lawyer!

MR RIORDAN: Yes, maybe but this area of law has grown throughout my career. When I joined in 1983, there were so few operations and this area of law was - it wasn't a separate thing. Now it is absolutely a thing. Again, General Sir Michael Jackson said, "I used to deploy overseas, I always used to have my Artillery Commander in my hip pocket, now I keep my lawyer in my hip pocket

because there's very, very complex material". And, you know, we are talking about if you make a wrong decision, a decision one way may cost you your life. A decision the other way may cost you your liberty. That's the stakes.

I've covered something a little bit further off.

Obviously, I've mentioned all of the sources of law. I talked about them through there. I have your permission not to bore you again reading them all out. With the political nature, again I will quickly flash over the facts that use of Armed Forces is one of several means available to the Government. And the last one we have there was our military one. I have actually spoken about that quite a bit. We do actually have to fundamentally understand that within that square box, that is the last bit of whiteboard I have, the square box of the ROE go down, you can achieve certain military objectives through rules of engagement as well.

The rules of engagement are not used to effect military decisions like which troops go where to better attack the enemy. They are strategic tactical operational decisions, that's not rules of engagement. That's op orders. Saving ammunition, is not a rules of engagement issue. That's an operations order. But if you're a commander in the field and you have limited resources, and we need to remind ourselves that New Zealand sends quite small forces overseas, they're quite small, escalation is very limited within the resources of a commander.

If you're in a naval engagement, if New Zealand is involved in the future in a naval engagement to which it commits one frigate, the level of escalation is only another frigate, we've only got two. So, if you're starting to escalate something up to a level where you

might need three frigates as a commander, then you've got a big issue of a military nature which would cause you to want to limit that escalation. And it is the same on the land and it's the same in the air.

Similarly, New Zealand forces have been extremely good at using what resources they have to achieve a lot more than they might be able to do if they were a bigger force, so encourage that degree of flexibility.

So, there's a military aspect. As I said before, what's the ultimate military aspect of this? Don't write rules of engagement for me as a commander on the field saying that if a main battle tank attacks these people I'm allowed to destroy it if you don't give me a medium-range army weapon with which to do it. Don't tell me to stop a force of 10,000 people carrying out a genocide if you've supplied me with 600 people with which to do it. And that, I think, is one of the big advantages of the rules of engagement formulation that has, you know, through pain come to this day, is that it actually drives decision-making to understand that political policy and legal aims and military ones must align, they must align. Not just for theoretical reasons but for practical ones on the ground as well. Don't give your soldiers a job to do that they are not capable of doing.

I have had a wave from my learned friend there which suggests I might be running to the end of my half of this presentation.

I would like to say, I've spoken there about formulation, how they take part. Our rules of engagement are approved by Government. The Minister of Defence will sign those. The Prime Minister, depending on the size of the operation, but the Prime Minister may sign those rules of engagement. This is an important aspect of the way that we do business. We tell our soldiers, sailors, airmen and women, here are your rules of engagement and they were signed by the Prime Minister. And that

actually provides a great deal of comfort to the soldiers who are being spoken to because they know that there is no possibility that the Government, that the people who have sent them there, are then in a position of saying, "gosh, we didn't know that's what you were doing". There is no possibility of that because they've signed the piece of paper that says that's what they're going to be doing.

And I would reiterate, everyone in that process throughout my experience has been fully aware of the weight that attaches to those decisions. It's not a casual matter. It is treated very, very seriously. The last comment that I would like to make, if you will allow me, is to say that of course you can never plan for every eventuality. So, we have young people standing on the sides of roads in dangerous and uncomfortable places. We do not deploy to liberal democracies to keep the peace. We deploy to some very unpleasant places and those young people get the opportunity to make use of force decisions frequently. Frequently they have to make those decisions and time and time again they make the right decision and that's in part because of the way they're trained and it's in part because of their culture and it's in part because of their instincts, and I have always been very proud to see them operate in that way and I think we should all be proud of them. Thank you for your attention.

SIR TERENCE: Thank you very much. We will take a break now and start again at 2.55 with Brigadier Ferris.

Hearing adjourned from 2.40 p.m. until 2.55 p.m.

BRIGADIER LISA FERRIS - AFFIRMED

BRIGADIER FERRIS: Tēnā koutou, tēnā koutou, tēnā
koutou kātoa
Tēnā koutou e tēnā āku rangatira
Ki a Papatūānuku - tēnā koe
Ki te hunga mate
Ki te hunga ora
Tēnā koutou, tēnā koutou, tēnā tātou kātoa

As has been said, my name is Brigadier Lisa Ferris, I am the Director of Defence Legal Services. I was commissioned into the Army Legal Service in 2003. My operational experience includes a deployment to the Arabian Gulf aboard HMNZS Te Mana in 2008, and to Afghanistan in 2009 where I advised the Senior National Officer on rules of engagement, the Law of Armed Conflict and general military law issues. I returned to Afghanistan in 2012 as counsel assisting a Court of Inquiry. And I also went to Iraq in 2015 to support the planning for the deployment of NZ force elements.

In April 2016 I was promoted to the rank of Acting Colonel and appointed the Acting Director of Defence Legal Services. In January 2017 I was substantiated as the Director of Defence Legal Services and in January 2018 I was promoted to my current rank of Brigadier. I also hold the statutorily independent role of Director of Military Prosecutions.

I have direct experience in the generation, promulgation, and training of rules of engagement

to NZ Defence Force personnel both in NZ and overseas.

As has already been highlighted by the Judge Advocate General, in my presentation today I am going to cover the following areas in the more operational context rather than doctrinal context:

The Law of Armed Conflict - and again as with the Judge Advocate General, I apologise if I slip into acronyms or abbreviations, it is a flaw in the military but please don't hesitate to ask me to explain if needed - and rules of engagement training; I am going to look at LOAC and rules of engagement training as they were provided to the SAS personnel; the delivery of LOAC and rules of engagement legal advice in the field; as well as modifications in Afghanistan and how national rules of engagement operate in the context of coalition operations.

I will also briefly discuss the military justice framework in the context of rules of engagement breaches.

I am conscious that there is a significant amount of NZDF material on the topic of rules of engagement that has been declassified and is available on the Inquiry website. Accordingly, the objective of my presentation today is to complement that material and hopefully dispel a few myths about rules of engagement and how they operate.

I anticipate that this presentation will take about 40-45 minutes, so that will leave plenty of time for questions.

Dealing first with the LOAC and rules of engagement training. In order to prevent contraventions of rules of engagement and breaches of LOAC during the conduct of operations, the NZ Defence Force provides all of its

personnel with relevant training at different points in time. Currently, LOAC training is the subject of a Defence Force Order, which was authorised in the year 2000, which mandates the NZDF approach. This training is briefly summarised as follows:

On enlistment or transfer into the NZ Defence Force all personnel receive a comprehensive brief about LOAC, known currently as LOAC Level 1. LOAC Level 1 is the minimum level of understanding required for all Armed Forces personnel. The aim is to inform personnel of the basic principles of LOAC, their individual responsibilities, and to emphasise that the rules are absolute. Specific lessons include, for example, an explanation of the fundamental principles of LOAC such as proportionality and distinction; other topics include women peace and security; and of particular importance, as the Judge Advocate General has already highlighted, the NZ Defence Force Code of Conduct card.

I would also note, at the end of this training a test is given which is a pass/fail. Individuals cannot deploy unless they have passed this initial phase of training.

At present, NZ Defence Force personnel will receive further, advanced LOAC training in certain circumstances. This is currently known as LOAC Levels 2 and 3. Level 2 is designed to complement Level 1 understanding and is designed for all Armed Forces personnel who could become prisoners of war or become involved in the handling of prisoners of war, including members of operational units that could have direct contact with the enemy, and personnel who could be involved in matters such as civil affairs duties. It takes into account military specialisation and rank level. Level 3 is the additional requirement for those Armed Forces personnel involved in the planning and directing of combat operations and post-combat

administration at Headquarters level. Both LOAC Levels 2 and 3 are delivered during promotion courses, or during attendance at Command and Staff Courses (for those Officers and Warrant Officers). Additional, specific training is provided to units on request; training that focuses on a unit's specialisation. All of this LOAC training is classroom based, although the Defence Force Order prescribes that LOAC scenarios and associated issues are to be included in all major exercises, which I will elaborate on a little later in this presentation.

The system of LOAC training in the NZDF is currently under review; a review that was initiated by me in early 2016. Pursuant to this review, my intent is to produce for the Chief of Defence Force a LOAC training package that is contemporary in its content and methods of delivery and which engages the audience more effectively by embracing a variety of media. The training package will also have the flexibility to be more adaptable to changes of the objectives of the various Defence Force Training Institutes that the Defence Legal Services supports. The new system of training will be implemented in stages. Stage 1, which is a revision of the 'basic' LOAC training, is complete. Stage 2, the replacement of the more enhanced training provided to personnel during promotional courses is nearing completion. Stage 3, which will allow for enhanced flexibility in training delivery, is currently under development.

I highlight that all the rules of engagement form part of the LOAC instruction modules at all levels. In order to highlight what is taught to the members of the Armed Forces, if the technology will work, I have a few slides directly taken from that initial training package. Some of this may look familiar to you.

It's not quite as exciting as the Judge Advocate General's drawings on his whiteboard but this is a copy of a slide given to all members of the Armed Forces that highlights the different factors or imperatives affecting the formulation of rules of engagement. As you can see, as the Judge Advocate General says, it involves national policy and political factors, operational objectives and military factors and law around conflict and other law.

This next slide shows that rules of engagement will always be subject to the law and emphasises personal legal responsibilities of individuals and commanders when it comes to using force.

Again, this next slide may be familiar, although the Judge Advocate General drew it in the form of squares or rectangles. We have chosen to display the relationship in a form of circular relationship but the effect is the same, whereby emphasising that, as a consequence of all possible actions, rules of engagement can never go beyond that permitted by the law or LOAC.

Lastly, we discuss how rules of engagement planning is undertaken with a view to facilitating national and military objectives, again emphasising the need to be consistent with the law.

So, these are direct slides that are taken from training that are given to all members of the Armed Forces.

In addition to classroom and theoretical training, the NZDF personnel receive further training through participation in regular exercises at all levels. For example, Exercise Southern Katipo, a multinational exercise involving over 10 countries held in NZ every two to three years, has specific LOAC and rules of engagement scenarios built in to test participants. NZ Defence Force personnel receive further training in relation to rules of engagement and LOAC compliance

prior to deploying to a theatre of operations. This training is part of a package known as pre-deployment training (PDT). Administered by the New Zealand Collective Training Centre and delivered to task group, task unit and task elements, PDT includes various modules of realistic preparatory training characterised by moderate stress designed to develop instinctive responses and deepen the learning experience. PDT ensures that personnel can be certified as ready to deploy on contemporary operations.

Members of my staff provide the training in relation to rules of engagement and LOAC. Typically, personnel will receive an overview of the relevant legal issues and considerations for a particular theatre of operations, including any matters that have posed repeated challenges for personnel over a sustained period of time. The rules of engagement for the theatre will be set out and explained to those personnel. The training is interactive and questions are encouraged from the audience in order to ensure that personnel understand the rules of engagement and are confident in the application of the rules.

As part of their training, they receive instruction on what to do if they witness a breach of rules of engagement or LOAC, including intervening if appropriate, and reporting any misconduct through the command chain. This obligation is also clearly articulated in the Code of Conduct card which has already been discussed by the Judge Advocate General. I am not sure in terms of if you would like to see copies of that Code of Conduct card but I do have copies available for the Inquiry if that would be of use. I have them here. Note that card is current as at 2016.

SIR TERENCE: Thank you.

BRIGADIER FERRIS: The pre-deployment training is classroom-based. However, as part of

pre-deployment training, personnel are tested on their comprehension of LOAC and rules of engagement during simulated and live exercises. Part of this phase is taught in scenarios designed to mimic conditions that personnel may face in theatres of operations. During the training personnel will be required to respond to a range of scenarios that present different challenges with regard to the application of LOAC principles and rules of engagement. It provides personnel with an opportunity to 'rehearse' certain scenarios and to assimilate information including acceptable responses.

On arrival in a theatre of operations, particularly if the theatre of operations is in a conflict zone, NZ Defence Force personnel will, typically, receive further training in relation to LOAC and rules of engagement. Where there is a deployed legal adviser, regular ongoing training will occur through the duration of the deployment.

The inquiry has also requested information about the other training models used by other nations and organisations such as NATO and the United States. I am unable to discuss the various training models in any specific detail due to security caveats. Nevertheless, I am confident that the model used by the NZ Defence Force is comparable to that used by other Five Eyes nations and NATO. For most modern militaries, the delivery of training in relation to LOAC and rules of engagement will typically begin with a classroom-based briefing. This is reinforced with scenario-based training, which is undertaken in battlefield simulators, using a form of virtual reality, or in traditional exercise environments, or a combination of a number of these factors.

This model of training and preparation for deployment is used by the other Five Eyes nations and NATO in various guises. Inevitably, there are differences between the NZ Defence Force and other nations as to the specific training models used, and this is largely due to scale. Other militaries and organisations such as NATO and the United States conduct training on a significantly larger scale than the New Zealand Defence Force. That, combined with the nature of their deployments, will necessarily mean training modalities will differ.

If I look specifically at the NATO model of LOAC and rules of engagement training and what is available open source, as a multinational organisation, interoperability in all areas is key, including training of forces in LOAC. The NATO Standardisation Agreement (STANAG) 2449 sets out a minimum standard of necessary training for NATO forces and provides an outline of a training program for use by NATO countries. This STANAG also includes consideration of interoperability of rules of engagement in the NATO context; something, as the Advocate General has highlighted, can be very complex.

NATO has its own rules of engagement as part of its integrated alliance command and control structure and they are tailored for specific operations and authorised by the North Atlantic Council. NATO does not issue rules of engagement on self-defence as it considers self-defence to be part of national law. Accordingly, NATO training on rules of engagement is necessarily operation-specific.

Overall, examining the open source material available on LOAC training of NATO and other Five

Eye partners, I note that the fundamental approach to compliance with LOAC and comprehension and application of the respective nation's rules of engagement remains similar regardless of the size of the fighting force.

The Inquiry has requested IHL/LOAC and rules of engagement training provided to Special Operations Forces.

All members of the NZSAS receive training on LOAC as part of their initial training, as I have previously described. As most NZSAS personnel have significant prior military experience they will also have received LOAC training to various levels in accordance with their previous roles.

Due to their specialised skillsets and the unique situations faced by Special Operations Forces, members of NZ SAS receive additional LOAC training as part of commando training and the SAS Cycle of Training. This is equivalent to the advanced Levels 2 and 3 LOAC training that I have already mentioned. It is delivered to members of the NZ Defence Force as they progress through their military careers, and as previously discussed is currently under review.

For those members of the NZSAS deploying on operations, refresher training - including LOAC training, is provided. This provides significant scope for interaction, including clarification of any complex legal issues that might be faced during the operation. The NZSAS also have sophisticated facilities to undertake realistic practical simulations of scenarios that they may face on operations.

In addition, members of the NZSAS regularly participate in domestic and international bilateral and multilateral exercises that have

detailed rules of engagement. These experiences ensure that adherence to rules of engagement in a coalition environment is routinely practised by members of Special Operations Forces.

Training in regard to LOAC and rules of engagement continues once in a theatre of operations. In the event that the NZSAS rules of engagement are distinct from the rules of engagement of partner or host nations, further briefings will be provided to ensure that personnel fully understand their responsibilities and the limits of their authorised use of force. I would highlight that where there is a difference between partner ROE and NZ ROE, NZ ROE will always have primacy.

Stepping down a level, and prior to deploying on a task in a specific theatre, personnel will be reminded about the applicable rules of engagement and other issues which may have LOAC implications, for example the appropriate handling of detainees. These reminders, given during the preparatory stages of a task, ensure that the rules of engagement and other relevant issues are fresh in the mind of personnel. As discussed above, there are clear obligations to report any misconduct promptly through the chain of command. The key point to note is that SAS are comprehensively trained in LOAC and rules of engagement and take seriously the obligation to comply with applicable international law. It is important to understand that the situations and environments in which New Zealand chooses to place its Special Operations Forces have few, if any, clear boundaries or 'bright lines'. They demand decisions to be made quickly including about the

application of rules of engagement in complex and dynamic situations.

Turning now to the delivery of LOAC and rules of engagement advice in the field.

It is helpful to highlight at this juncture that it is an obligation embedded in international law to have legal officers available to advise Commanders. Article 82 of Additional Protocol I to the Geneva Convention is particularly helpful in this regard and provides that "*Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise Military Commanders at the appropriate level*".

When implementing this obligation, it is increasingly commonplace for nations that have legal advisers as members of their regular or reserve Armed Forces to locate these personnel with units at the different levels of a military operation; at the strategic, the operational, and tactical level. For example, during the conflict in Afghanistan, there were lawyers providing advice to the Commander ISAF and staff at HQ ISAF in Kabul, at the operational level headquarters for that mission known as the ISAF Joint Command or the IJC; to Commanders and staff at the Regional headquarters located throughout Afghanistan and down to Commanders and staff at the Brigade and Task Force Headquarters located within the various provinces within Afghanistan. The presence of lawyers in the aforementioned headquarters allowed for the provision of effective, focused, and informed legal advice in a timely manner. As a member of staff these lawyers had a more complete appreciation of developing issues in theatre and were therefore able to provide proactive rather than reactive legal advice and counsel. This assisted in the

minimisation or mitigation of risk for the achievement of the mission.

As 'specialist staff' in military headquarters, lawyers are typically included and provide advice to a significant array of planning teams, working groups, and meetings. As a member of the Command Group, senior lawyers attend various boards and groups which make decisions about activities that have LOAC and rules of engagement implications. For example, it is routine practice for a lawyer to provide advice to a commander before a decision is made to use force or to commit forces, including Special Operations Forces, to the fulfilment of a particular objective.

Where resources allow, some nations will commit their legal advisers to units operating at the tactical level, particularly if the deployment is into a complex environment or where substantial numbers are being deployed. An example is the deployment of a legal adviser on the NZSAS operation to Afghanistan, Operation WĀTEA.

The benefits of having a lawyer deployed with a unit operating at a tactical level are self-evident. The proximity of a lawyer allowed for the planning of more complex situations and scenarios to be undertaken more readily. It also allowed for potential LOAC and rules of engagement challenges to be addressed *in situ* rather than reaching-back to operational headquarters for legal support. The immediacy of the legal advice provided by a lawyer who was fully aware of the tactical situation, provided reassurance to commanders on the ground. It also ensured that any ambiguity that might arise with regard to in-theatre policy directions and the implications of certain activities could be resolved effectively and expeditiously.

The inquiry has requested information about how NZ rules of engagement operated in the context of

international operations, specifically with regard to NATO and ISAF and any modifications that were made in Afghanistan.

I don't want to redo the operational matrix by the Advocate, as he highlighted that is the reality in a coalition environment, we deploy as an independent entity of the New Zealand Defence Force. Most if not all of our operations will be in a coalition or combined operation. So, some form of matrix and a deconfliction process is essential.

SIR TERENCE: Just to interrupt, what will be the scope of - you talked a little earlier about the scope of the NATO ROE to take ISAF, what would the scope of its ROE be?

BRIGADIER FERRIS: So, NATO or ISAF as a coalition will generally draft its own rules of engagement. Any deploying country or contributing nation that deployed there would have to work within the boundaries of the organisation even if they developed their own. So, they can be no more permissive than what the NATO or ISAF rules of engagement will set.

In the context of the coalition or combined operations it is usually the major troop contributing nation that drafts the rules of engagement that are proposed to be used by all the nations. Where the NZ Defence Force contributes to a force raised by an international organisation, for example the United Nations, the rules of engagement will usually be proposed by that organisation.

As is explained in our doctrine which is available publicly, there are many advantages to having all participants in a coalition or combined operation using substantially the same rules of engagement. However, as has been discussed,

achieving this level of consensus is challenging because different nations may have different views of national policy, legal, and operational factors that shape rules of engagement. These challenges are exacerbated when there are as many as 40 nations in a coalition or combined operation, as was the case with the ISAF mission at its peak.

Consequently, when nations such as New Zealand contribute to a coalition or combined operation they will conduct an evaluation of the proposed rules of engagement to assess if they are in accordance with national policy, legal and operational factors. This evaluation will inform a decision about the proposed rules of engagement. The rules of engagement will either be accepted in their entirety; accepted with amendments, caveats, amplifications, additions or deletions; or rejected in favour of national rules of engagement.

In the context of the NATO/ISAF mission in Afghanistan, NZ developed its own national rules of engagement that were applicable to NZ Defence Force personnel. And, as I have just highlighted, they were no more permissive than the NATO/ISAF rules of engagement, because having more permissive rules could potentially destabilise the strategic objectives of the ISAF mission.

I would note, however, that New Zealand forces were placed under, using the military term, the Operational Control of the Commander ISAF. That means, that Commander ISAF could approve specific missions within the NZ mandate. Despite differing rules of engagement, any pre-planned missions also required the approval of the ISAF command chain and this would include advice on LOAC and rules of engagement compliance from a NATO/ISAF

perspective.

Commonly, from my experience, this was done at the operational command, the IJC level.

Turning now to the modifications of rules of engagement. The Judge Advocate General has described the process for the development and implementation of rules of engagement. However, they are not fixed and can be changed. There are many reasons why a change might be requested. I will not provide an exhaustive list but some examples may include a change in the mission objectives, a change in the operational situation, or identified deficiencies in extant rules of engagement. The latter is not unusual because, despite best efforts to formulate appropriate rules of engagement for a theatre of operations prior to a deployment, they do sometimes need to be adjusted in order to better suit the circumstances that are presented to NZ forces on the ground. Under our doctrine, the changes to rules of engagement follow the same authorisation process as described by the Judge Advocate General. In particular, they are drafted with the support of legal advisers and other experts, they are actually reviewed at Headquarters Joint Forces level initially before being submitted to Headquarters New Zealand Defence Force to the Minister of Defence for endorsement and then on to the Prime Minister for approval.

The rules of engagement for the NZ SAS deployment, OP WÂTEA were the subject of two notable amendments. First, in December 2009 certain provisions were changed to better align NZ's rules of engagement with those of ISAF. These changes clarified that NZ forces were able to engage forces or groups who were directly

participating in hostilities. In accordance with the procedure described, the amendments to the rules of engagement were endorsed by the Minister and approved by the Prime Minister.

Second, in May 2010 the rules of engagement were changed in relation to the search and seizure of property. The rationale for the change was to allow NZ forces to effectively exercise necessary security and control measures when conducting operations. Again, this amendment was endorsed and approved by the Government of NZ.

Once the amendments have been approved, they were promulgated to NZ forces through HQ Joint Forces NZ. I will not discuss specific rules of engagement in this presentation. What I will say is that it is a misplaced assumption that rules of engagement are overly complex and prone to misinterpretation. The rules of engagement for OP WĀTEA, were necessarily detailed to provide NZ forces with direction as to what they could or could not do in carrying out operations. The forces were experienced in dealing with rules of engagement and were well trained. Any issues of ambiguity regarding the rules of engagement were addressed during pre-deployment training and in-theatre training with a deployed legal adviser to ensure comprehension and appropriate application.

The Inquiry has also requested information about the military justice framework and discipline (including the Armed Forces Discipline Act 1971). I will provide a very brief summary of the framework and the application of the legislation. This is almost a lecture in its own entirety.

The military justice system is quite a unique feature of New Zealand law.

Pursuant to section 74 of the Armed Defences Discipline Act, the NZDF maintains a form of universal

jurisdiction over its personnel, which means that all offences under New Zealand criminal law are applicable to members of the Armed Forces, wherever they may be in the world.

In the event of an alleged contravention of rules of engagement or a breach of LOAC for example, within the military justice system a preliminary inquiry will be conducted. For serious allegations, that preliminary inquiry will be conducted by the Military Police. The Military Police will collect evidence to assist the Commanding Officer to determine whether there is a well-founded allegation under the Armed Forces Discipline Act.

Once an investigation is complete and they've made that recommendation to the commanding officer, he or she, will make a decision as to whether or not an allegation is 'well-founded'. In accordance with section 102 of the Armed Forces Discipline Act, if it is alleged that a person subject to this Act has committed an offence against this Act, the Commanding Officer of that person must, unless he or she considers the allegation not well founded, either cause the allegation to be recorded in the form of a charge and to be investigated in the prescribed manner; or cause the allegation to be referred to the appropriate civil authority for investigation.

SIR TERENCE: Can I stop you there? 50.1, "cause the allegation to be recorded in the form of a charge and to be investigated in the prescribed manner". This follows an investigation, so there's another one is there?

BRIGADIER FERRIS: The word 'investigation' is really another word for Summary Trial. So, the investigation in terms of a policing investigation happens prior to that point.

SIR TERENCE: Right, thank you. So, it is a Summary Trial, thank you.

BRIGADIER FERRIS: Accordingly, unlike the civilian system, there is no prosecutorial discretion for commanding officers. Where an allegation is well-founded, they must prefer a charge or refer to the appropriate authority.

It is also worth emphasising at this point that the NZ Police have concurrent jurisdiction with NZ Defence Force with respect to many criminal offences, particularly serious international law crimes for example.

If an allegation, however, is being dealt with within the military jurisdiction, when an allegation is recorded in the form of charge the charge it will be referred to the applicable commander, based upon the rank of the accused and whether or not a particular commander is empowered to hear the charge.

The NZDF, to explain it quite simply, has a two tiered system. Minor offences may be heard summarily, whereby the matter will be heard in the form of a Summary Trial in front of a Disciplinary Officer. The Summary Trial is a lawyer-free zone where a Presenting Officer (usually an officer or non-commissioned officer) essentially prosecutes the case and the accused is usually represented by a Defending Officer (also usually an officer or non-commissioned officer). They can also represent themselves.

All serious allegations, however, must be referred to the Director of Military Prosecutions and certain classes of offending may be tried only in the Court Martial of New Zealand, including any offence for which the maximum punishment is life

imprisonment or a term of imprisonment exceeding seven years.

If, as the Director of Military Prosecutions, I determine that a prosecution should be committed for trial, a charge sheet is laid before the Registrar, generally a trial will follow which is headed by a Judge of the Court Martial of New Zealand and made up of military members. And there is also legal representation at the Court Martial.

The Court Martial of New Zealand is a court of record that was established as an independent entity from the New Zealand Defence Force.

Linking back to breaches of rules of engagement, they are a serious matter, which the Judge Advocate General has highlighted, and would be investigated in accordance with the process I have just described. I would emphasise, however, that not all breaches of rules of engagement will result in a breach of LOAC or other law. As has already been discussed, rules of engagement are orders and are traditionally drafted in mandatory language rather than guidance or optional language. Accordingly, where there has been an allegation of a breach of a rule, that is not a breach of LOAC or other law, it will likely be investigated under the specific Armed Forces Discipline Act offences of either breaching a written order pursuant to section 39 (and this will be the most common charge used for a breach) or an alternative might be disobeying a lawful command pursuant to section 38. Other offences that exist solely within the military jurisdiction which may be relevant in an operational context include such offences as negligence performance of duty or conduct prejudicial to service discipline.

SIR GEOFFREY: Have there been any cases actually where breaches of rules of engagement have led to a prosecution in recent years?

BRIGADIER FERRIS: Not to my knowledge, but Judge McEwen might have more institutional knowledge than I do, but not to my recollection. I would note there are no law equivalents of these provisions, they exist solely within the Armed Forces. In summary, LOAC and rules of engagement are comprehensively taught to members of the New Zealand Armed Forces and that training is continually reinforced during exercises before deployment and during operations. This training is of similar standard and depth to other modern militaries. Legal advisers are increasingly being utilised as a force enabler on operations, particularly to assist in navigating the complexity of large multi-national coalition operations as was seen in the ISAF mission. Finally, as I've just discussed, there are robust disciplinary mechanisms that exist for dealing with any allegations of breach of engagement.

I raced through that but I am happy to answer any questions you may have.

SIR TERENCE: Right, thank you very much. Can I just ask, going back to paragraph 12 of the outline and following, about the training and the use of scenarios, exactly how that works?

Both Sir Geoffrey and I, of course, were law students and law teachers and both lived through and used the Socratic method, so your description here of Pre-Deployment Training, including various elements of realistic preparatory training characterised by moderate stress designed to develop instinctive responses deep in the learning experience rang a bell with us. But to take, for example, what you talk about in paragraph 12, the exercise Southern Katipo, how would

the engaging scenarios be built into that and how would you then review them once the exercise was over?

BRIGADIER FERRIS: So, I think to take from the outset, it's quite difficult in the time given to explain the whole exercise construct for the New Zealand Armed Forces but we have what is called Exercise Control that design the scenarios and inject them basically into the exercise. These are not classroom exercises by the way. You have forces and boots on the ground. I am not sure if you will have seen in the newspaper or previously but the last Southern Katipo exercised primarily around the Marlborough region, you actually have deployed force elements exercising capabilities in real-time.

And as part of Exercise Control, they develop certain injects, shall we say, or scenarios designed to test individual members of the Armed Forces under realistic conditions. That exercise control will include a lawyer as well. So, the exercise will have rules of engagement. They will have lawyers deployed as part of the exercise to brief those rules of engagement and then they'll have tests on those rules of engagement in the field. An example being part of the injects was a number of internally displaced personnel showed up to a camp one day, you know, what are your actions on when a group of internally displaced people show up? What do you do? So it's testing those kind of constructs in real-time on exercise.

And when I say moderate stress, it will be things like at 3.00 in the morning you will be the subject of a potential rocket attack, for example, what are your responses to that? And they have to work through what paradigm are they operating in, what rules of engagement do we have, what's the appropriate responses to that?

Like any exercise construct though, you are limited. There's only so much you can do. So, in terms of a full spectrum follow-up, it is difficult. Like I've never gone through to having, say, a Court Martial or someone who is alleged to have deliberately breached LOAC or anything like that as a consequence of an exercise training scenario.

SIR TERENCE: So, how do you, say at 3.00 in the morning the event happens, the people on the exercise then have to think about how they're going to respond to that, how do you evaluate that, their response? I mean, are there videos? Are there people watching them, watching how they're doing? How does it work?

BRIGADIER FERRIS: Yes, there are exercise controllers that run through as part of the each of the scenarios. At the end of the exercise proper, there is a lessons learned report or programme that articulates all of the, sort of, recommendations and lessons learned. Some are captured immediately by the exercise controller on the ground and others captured later as part of our formal reporting process.

SIR TERENCE: I see, thank you.

SIR GEOFFREY: Brigadier Ferris, the material that you referred to that has been issued about rules of engagement is set out, and you will be familiar with it, in H, the one that's called H. It says "attack on individuals, forces or groups directly participating in hostilities in Afghanistan against the legitimate Afghan Government including" and then there's a couple of qualifications.

You may not be able to answer this now. If you feel that you would like to take time to do that, that is fine, but I have been looking at our Terms of Reference

and one of them says: "Separate from the operations, whether the rules of engagement or any version of them authorised the predetermined and offensive use of lethal force against specified individuals other than in the course of the direct battle and if so, whether there was or it should have been apparent to (a) the NZDF who approved the relevant version and (b) the responsible Ministers".

I just want to give Dr Mapp some warning that I'm going to put a similar question to him.

But I would like to see some analytical material, open sourced, that draws the way in which the language that has been released can be interpreted to allow the predetermined and offensive use of force?

BRIGADIER FERRIS: You're right, Sir, I think I will need a little bit of time to consider it but I think in general terms what I can say, as the Judge Advocate General highlighted, rules of engagement don't, in my view, predetermine the use of force. They give a range of authorities up to a certain point of time. As the Judge Advocate General helpfully highlighted in his diagram, that doesn't mean you automatically have to use that force up to and including that point in time. It will necessarily be constrained by operational orders in theatre, by the context on the ground. He gave that helpful example of someone turning up to the peace protest. If someone has been designated for attack or identified as a direct participant in hostilities, that rule of engagement doesn't mean you automatically have carte blanche to engage them.

SIR GEOFFREY: But in terms of what the Terms of Reference seem to be getting at, and that's what I'm interested in because we have to answer them, is did the authors of the ROE know what they were

authorising? And even more important, did Ministers know what they were authorising?

BRIGADIER FERRIS: I think that's probably more an appropriate question for others I believe.

SIR GEOFFREY: Dr Mapp will be answering that tomorrow. I mean, it is really quite important because the language referred to in what is released is pretty spare, not very specific, rather general.

BRIGADIER FERRIS: In terms of the specific Rules of Engagement?

SIR GEOFFREY: Yes.

BRIGADIER FERRIS: Confirming attack?

SIR GEOFFREY: Yes.

BRIGADIER FERRIS: I think it has to be read in context of the whole rules of engagement as a totality as well. It shouldn't be read in isolation. It should also be read in the context of the operational instruction, the command directives, the overall mandate given by Government. And I think it is a dangerous thing to exercise a particular rule and treat it in isolation.

SIR GEOFFREY: Well, we've got quite a number of them here and they can all be dealt with in that context. And, in terms of what it is that is authorised by them and what isn't, it becomes, of course, quite a sophisticated difficult factual Inquiry, doesn't it?

BRIGADIER FERRIS: I think, as, you know, we've already discussed, rules of engagement are highly contextual. We are facing increasingly complex military operations that on the ground are going to shift and change over time which is why you're seeing increased lawyers on the ground to navigate that complexity.

SIR GEOFFREY: Yes, I understand that.

Another thing that was released in this was quite an extensive LOAC 101 really, almost a law student standard, and that was used, was it not, in Afghanistan to educate people there?

BRIGADIER FERRIS: In terms of the presentations that were put together?

SIR GEOFFREY: Yes, I'm talking about the presentations.

BRIGADIER FERRIS: The presentations that are available on the website were used both in Pre-Deployment Training and they were used overseas in theatre.

SIR GEOFFREY: Yes.

BRIGADIER FERRIS: I would note they were specifically tailored, as well, for specific tactical operations. Some rules of engagement may not be applicable in some operations and applicable in others.

SIR GEOFFREY: As a person who's been an experienced military educator, if I can put it that way, can you just describe how you went about those briefings? I mean, how long did it take? Was it question and answer? How did it go? Can you just tell us a bit about that?

BRIGADIER FERRIS: As a student from Victoria University Law School as well and I'm familiar with your method, Sir Geoffrey, I personally as part of my training methods use quite a Socratic method in teaching, and that was, to be honest, it is very interactive. It's classroom-based at least from the outset before you move into practical exercises and there are a number of questions and answers to and from the audience. If I say specifically with SAS personnel, you're talking about people that are usually more experienced than your average infantry person, for example. They have a sophisticated level of

understanding of use of force. They're usually deployed across a range of operations, so they are very involved and interested in their legal obligations and will continue to test and challenge you on that.

SIR GEOFFREY: Some of the material put through scenarios and it must be very difficult to be definite always? To say, well, the answer is clearly this or clearly that. These are not binary always, are they?

BRIGADIER FERRIS: Absolutely. As was discussed, generally there are no bright lines. It's very difficult to be black and white in a number of these scenarios. They're highly contextual. They require rapid reaction times, based on the information you have available and that information may not necessarily be perfect. So, the scenarios you run through have to tease out all of those, kind of, unknowns or uncertainties.

SIR GEOFFREY: As the Judge Advocate General said, the soldier in the field, young, has to make split very quick decisions. This is pretty demanding stuff, isn't it?

BRIGADIER FERRIS: It is exceptionally demanding which is why we put such an emphasis on the pre-deployment in the initial training of our forces, so that in ambiguous situations they have the tools and the skillset to respond.

SIR GEOFFREY: The whole question of - this is a very complex and rather vague, the law on this subject doesn't speak in black and white terms, as you've just said, and some of it is contested internationally. And I just wonder how practical it is to expect good outcomes always in circumstances like this?

BRIGADIER FERRIS: I think it's exceptionally challenging but what my job is, and the job of my staff, is to try and distil down to the level of the soldier, sailors and airperson on the ground as clear and as simple approach to use of force, approach to levels of engagement, as we possibly can. That's really one of our remit. As you say, it's not going to be easy in all situations but the effort is still there, it needs to be put in.

SIR GEOFFREY: And I wonder, since we're on this theme, we talk about hostilities. There's got to be a distinction in the asymmetric warfare context that we're operating in, in Afghanistan. How do you teach people how to make that distinction?

BRIGADIER FERRIS: As you highlight, it is difficult even for lawyers to grapple with. The distinction between an international armed conflict and non-international armed conflict, less than armed conflict scenarios. As I say, this is part of our job to try and distil that and simplify that for members of the Armed Forces so at least when they deploy on a mission they have a clear understanding of the paradigm they're operating in and their use of force.

SIR GEOFFREY: When the people have got no uniforms, how do you know whether they're dealing with hostilities?

BRIGADIER FERRIS: Helpfully, we've just recently published our Law of Armed Conflict Manual which highlights a range of factors where we would consider a person to be directly participating in hostilities. I note, it is quite a controversial and unsettled topic in international law at the moment. What we have attempted to do is clarify that to the extent we possibly can from an operational level.

SIR GEOFFREY: Yes well, thank you, thank you very much.

SIR TERENCE: Thank you, Brigadier Ferris.

Well, that brings today's proceedings to an end and we will start tomorrow at 10.00, so thank you for your attendance.

Hearing adjourned at 3.45 p.m.