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Rules of Engagement

Introduction

Tēnā koutou, tēnā koutou, tēnā koutou katoa.

Tēnā koutou e aku rangatira

Ki a paptuanuku – tēnā koe

Ki te hunga mate

Ki te hunga ora

Tēnā koutou, tēnā koutou, tēnā tatou katoa

1. I am Brigadier Lisa Ferris, Director of Defence Legal Services. I was commissioned into 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. I also went to Iraq in 2015 to support the planning for the deployment of NZ force elements.
2. 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.
3. I have direct experience in the generation, promulgation, and training of rules of engagement to NZ Defence Force personnel both in NZ and overseas.
4. In my presentation today I am going to cover the following areas:
 - Law of Armed Conflict (which I will refer to as LOAC) and rules of engagement training;
 - LOAC and rules of engagement training provided to SAS personnel;
 - The delivery of LOAC and rules of engagement legal advice in the field; and
 - Modifications in Afghanistan and how national rules of engagement operate in the context of coalition operations.

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

6. I am conscious that there is a significant amount of NZ Defence Force 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.

LOAC and rules of engagement training

7. 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 mandates the NZ Defence Force approach. This training is briefly summarised as follows:

8. On enlistment or transfer into the NZ Defence Force all personnel receive a comprehensive brief about LOAC, known 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; women peace and security; and of particular importance, the NZ Defence Force Code of Conduct card, which the Judge Advocate General has highlighted.

9. At present, NZ Defence Force personnel will receive further, advanced LOAC training in certain circumstances (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 handling Prisoners of War, including members of operational units that could have direct contact with the enemy, and personnel who could be involved in 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. LOAC Levels 2 and 3 are delivered during promotion courses, or during attendance at Command and Staff Courses (for officers and warrant officers). Additional, specific training is provided to units on request; training that focuses

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upon the 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.

10. The system of LOAC training in the NZ Defence Force 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 objectives at the various Defence Training Institutes that Defence Legal Services supports. The new system of training will be implemented in stages. Stage 1, a revision of the 'basic' LOAC training that all NZ Defence Force personnel receive, is complete. Stage 2, the replacement of the more enhanced training provided to personnel during promotion courses is nearing completion. Stage 3, which will allow for enhanced flexibility in the training delivery, is under development.

11. Rules of engagement form part of the LOAC instruction modules – in order to highlight what is taught to members of the Armed Forces, I have a few slides from our LOAC training that show what is taught, with a focus on the training of rules of engagement.

11.1 SLIDE 1 – This slide provides a high level overview highlighting the factors affecting the formulation of rules of engagement. You will note that the Judge Advocate General has already drawn this diagram up, and this slide is what is shown and discussed with members of the Armed Forces as part of their LOAC training package

11.2 SLIDE 2 – This 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.

11.3 SLIDE 3 – Again, this slide will look familiar to you from the previous presentation and again explains the subordinate relationship rules of engagement have with the law.

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11.4 SLIDE 4 highlights that 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.

12. In addition to classroom and theoretical training, NZ Defence Force 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 every two to three years, has specific LOAC and rules of engagement scenarios built in to test participants.

13. 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 the 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.

14. Members of my staff provide the training in relation to rules of engagement and LOAC. Typically, personnel will receive an overview of 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 the 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.

15. As part of their training, personnel receive instruction on what to do if they witness breaches of Rules of Engagement or LOAC, including intervening if appropriate, and reporting any misconduct through their chain of command. This obligation is also clearly articulated in the code of conduct card which has already been discussed by the Judge Advocate General.

16. This 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

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the 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. This training provides personnel with an opportunity to 'rehearse' certain scenarios and to assimilate information including acceptable responses.

17. 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.

18. The inquiry has also requested information about the 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 the other Five Eyes nations and NATO. For most modern militaries, the delivery of training in relation to LOAC and rules of engagement typically begins with classroom based briefings. This is reinforced with scenario based training, which is undertaken in battlefield simulators, using a form of virtual reality, or in a traditional exercise environments, or a combination of both.

19. 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 that training modalities will differ.

20. Looking specifically at the NATO model of LOAC and rules of engagement training – as a multinational organisation, interoperability in all areas is key, including training of forces in LOAC. NATO Standardisation Agreement (STANAG) 2449 sets out a minimum standard of necessary training for NATO forces and provides an outline of a training

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program for use by NATO forces. This STANAG also includes consideration of interoperability of rules of engagement in the NATO context.¹

21. NATO has its own rules of engagement as part of its integrated alliance command and control structure which 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.²

22. 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.

LOAC and rules of engagement training provided to Special Operations Forces

23. The inquiry has requested information on LOAC and rules of engagement training provided to Special Operations Forces. All members of the NZ SAS receive training on LOAC as part of their initial training as I have previously described. As most NZ SAS personnel have significant prior military experience they will also have received LOAC training to various levels in accordance with their previous roles.

24. 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.

25. For those members of the NZ SAS deploying on operations, refresher training, including LOAC, 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.

¹ Jody M Prescott "Training in the Law of Armed Conflict – A NATO Perspective" (2008) 7 *Journal of Military Ethics* 66.

² Brian Brady "The North Atlantic Treaty Organization Legal Advisor: A Primer" (2013) *Army Lawyer* 4.

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26. In addition, members of NZ SAS regularly participate in domestic and international bilateral and multilateral exercises that have detailed rules of engagement. This experience ensures that adherence to rules of engagement in a coalition environment is routinely practised by members of Special Operations Forces.

27. Training with regard to LOAC and rules of engagement continues once in a theatre of operations. In the event that NZ SAS 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. Where there is a difference between partner rules of engagement and NZ rules of engagement, NZ rules of engagement will always have primacy.

28. Stepping down a level, prior to deploying on a task in theatre, personnel will be reminded about the applicable rules of engagement and other issues which 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 the personnel. As discussed above, there are clear obligations to report any misconduct promptly through the chain of command.

29. The key point to note is that NZ 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 NZ 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.

The delivery of LOAC and rules of engagement advice in the field

30. It is helpful at this juncture to highlight 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 Conventions 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"*

31. 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,

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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 known as the ISAF Joint Command or 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 various provinces in Afghanistan.

32. 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 to the achievement of the mission.

33. 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 members 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.

34. 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.

35. The benefits of having a lawyer deployed with a unit operating at the 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 the 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.

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Modifications in Afghanistan and National rules of engagement in the context of 'coalition rules of engagement'

36. 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 in Afghanistan.

37. In 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.

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

39. 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 be either:

39.1 accepted in their entirety;

39.2 accepted with amendments, caveats, amplifications, additions or deletions; or

39.3 rejected in favour of national rules of engagement.

40. 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. The New Zealand rules of engagement 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.

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41. The New Zealand forces were placed under the Operational Control of the Commander ISAF. Accordingly, despite differing rules of engagement, any pre-planned missions also required the approval of the ISAF command chain which would include advice on LOAC and rules of engagement compliance from the NATO/ISAF perspective.

42. 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. Rules of engagement 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 include a change in the mission objectives, a change in the operational situation, or identified deficiencies in the 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 deployment, they sometimes need to be adjusted in order to better suit the circumstances that are presented to NZ forces on the ground. Under our doctrine, changes to rules of engagement follow the same authorisation process as the described by the Judge Advocate General, namely they are drafted with the support of legal advisers and other experts, they are then reviewed by Headquarters Joint Forces New Zealand, and submitted through Headquarters New Zealand Defence Force to the Minister of Defence for endorsement and then to the Prime Minister for approval.

43. The rules of engagement for the NZ SAS deployment, OP WĀTEA 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.

44. 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.

45. Once approved, the amended rules were promulgated to NZ forces through HQ Joint Forces NZ.

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46. I will not discuss specific rules of engagement in this presentation. What I will say is that it is a misplaced assumption that rules over 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 well trained. Any issues of ambiguity with regard to 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.

Military justice framework and discipline

47. The Inquiry has 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.

48. Pursuant to section 74 of the Armed Forces Discipline Act, the NZ Defence Force 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 deployed.

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

50. Once an investigation is complete, the Military Police will make a recommendation to the Commanding Officer and 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 that the allegation is not well founded, either -

50.1 cause the allegation to be recorded in the form of a charge and to be investigated in the prescribed manner; or

50.2 cause the allegation to be referred to the appropriate civil authority for investigation.

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51. Accordingly, unlike the civilian system, there is no prosecutorial discretion for commanding officers – where an allegation is well-founded they must prefer a charge.

52. 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.

53. If an allegation is being dealt with within the military jurisdiction, when an allegation is recorded in the form of charge the charge will be referred to the applicable commander, based upon the rank of the accused and whether a particular commander is empowered to hear the charge.

54. The NZ Defence Force has a two tiered system, minor offences may be heard summarily, where a matter will be heard in the form of a summary trial in front of a Disciplinary Officer. The summary system 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).

55. All serious allegations 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.

56. If, as Director of Military Prosecutions, I determine that a prosecution should be committed for trial, the 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 legal representation at the Court Martial.

57. The Court Martial of New Zealand is a court of record that was established as an independent entity from the New Zealand Defence Force in 2008.

58. Breaches of rules of engagement are a serious matter 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 by the Judge Advocate General, rules of engagement are orders and are traditionally drafted in mandatory 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

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written order pursuant to section 39 or disobeying a lawful command pursuant to section 38. Other offences that exist solely within the military jurisdiction that may be relevant in an operational context include negligent performance of duty or conduct prejudicial to service discipline. There are no criminal 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 NZ Armed Forces and that training is continually reinforced during exercises, before deployment, and during operations. This training is of a 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, there are robust disciplinary mechanisms that exist for dealing with any allegations of breaches of rules of engagement.