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Rules of Engagement

Brief for Inquiry into Operation Burnham

The Inquiry has sought a briefing on the following matters:

- What Rules of Engagement are - (legal underpinnings and function)
- Process for developing, approving, and revising them (including by whom) (including Government's process for approving ROE generally)
- How ROE ensure congruence with International Humanitarian Law (IHL) and other relevant law (e.g. collateral damage, duty to injured, others)
- How ROE apply to SAS
- Modifications in Afghanistan (the complexity of ROE and their modification to meet changing conditions)
- How ROE operate in joint operations context (relationships with ISAF, NATO, and command and control framework)
- What training is delivered to officers on IHL/ROE (officer training and PDT)
- How ROE/IHL ops advice is delivered in the field – role of Legal advisers or other precautions
- How NZ's ROE and training compare with those of ISAF, NATO, US

In order to answer this requirement, I will be addressing the following matters:

- The nature, purpose and function of rules of engagement;
- The legal framework within which ROE are applied and operate;

- The political, legal and military imperatives involved, and how they interrelate;
- How ROE are written and approved.

Brigadier Ferris will be addressing the remaining questions. Needless to say, there will be some overlaps between our presentations.

It is important to note that I will be talking about rules of engagement generally and I will not be addressing the content of particular rules of engagement from Afghanistan, or any other operation.

When I do refer to generic examples from past missions - I will be using material drawn from publicly available sources. I will not be referring to any material that is classified.

I will not be referring to material that is subject to legal professional privilege.

WHAT ARE RULES OF ENGAGEMENT?

ROE are 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. They are, in effect, a mechanism for ensuring that political imperatives, legal imperatives, and military imperatives are aligned.

BRIEF HISTORY

The exact date of the emergence of rules of engagement is hard to pinpoint but seems to have been in the late 1950s. In much earlier times commanders in the field were given very broad instructions on how to meet the requirements of the government, or might simply be given a literal *carte blanche* to conduct the campaign as they saw fit. From the beginning of the modern era, however, the use of armed force was considered to be essentially a tool at the disposal of political aims, which could not, therefore, be left ungoverned.[1]

An early New Zealand example of written rules governing the use of force is to be found in the “rules for the fight” instituted by the Ngāi Te Rangi leadership at the

[1] As Georges Clemenceau put it: “*La guerre! C’est une chose trop grave pour la confier à des militaires"* - commonly paraphrased as "war is too serious a matter to be left to generals".

battle of battle of Pukehinahina (Gate Pa) in 1864. They were clearly intended to achieve political ends as well as humanitarian and spiritual ones since Ngāi Te Rangi and their allies were seeking an eventual political resolution with the Crown, not a war to the death.

Rules of engagement as a distinct form of governmental control over armed forces did not exist at the time of World War I, and were not known by that title in World War II. Orders at the time were more directed to ensuring that friendly forces did not engage each other by accident, rather than intending that any constraint be placed on the use of force against the enemy or other persons.

Although rules of engagement were applied to New Zealand forces in both the Malayan Emergency and the Borneo Confrontation, the expression first became a well-known term during the Vietnam War.

Cold War concerns that any excess of force could result in a nuclear response played a major part in the development of the concept. It was during the age of peace-keeping, however, that the routine use of ROE developed as a fundamental part of military planning and operations. The use of ROE can therefore be regarded as having been a standard feature of New Zealand operations for at least five decades.

New Zealand first needed to consider issuing rules of engagement outside the framework of an international organisation or coalition when Prime Minister David Lange directed the dispatch of an aircraft and NZSAS personnel to Fiji during the *coup d'etat* of 1987 to "act as required to protect New Zealand's interests". One of the many lessons learned from that incident was that to formulate rules of engagement there needs to be clear direction on the political aims that the Government seeks to achieve and the constraints within which the New Zealand Force is to act.

PURPOSE

The purpose of ROE is twofold:

- To impose the necessary limitations and restrictions on the use of force in furtherance of New Zealand Governmental policy; and

- to give members of the NZDF the confidence to use force appropriately, lawfully and without hesitation when the use of force is required.

The young men and women sent on operations on behalf of this nation do not have the luxury of hours, or even minutes, to weigh the competing strands of information and assess their legal significance in the way that a lawyer or commentator can later do in circumstances of retrospection, comfort and safety.

Although they will have been advised by a legal officer on their rights and duties before, and during, their deployment - those at the front line of dangerous and difficult missions will seldom have the time to seek guidance as the incident unfolds. The time for consideration may be over in a flash. A wrong decision may cost the service member his or her life – it may cost the lives of comrades or protected persons. It may result in a failure of the mission. It is not possible to "weigh to a nicety" what is reasonable force – particularly in self-defence.[2]

Rules of engagement must be constructed in a manner that makes it possible to protect the force and achieve the objectives of the operation. Although the amount of force may need to be minimised so as not to allow the situation to needlessly escalate, the rules must be robust enough to enable the deployed forces to accomplish their mission and survive.

Rules that are too restrictive may result in the needless loss of life of New Zealand service personnel – or the deaths of civilians whom they are unable to protect. Rules that are too permissive may bring equally dire consequences. A minor issue may skyrocket out of control, drawing the Force, and this country, into an escalating conflict that may lead to many deaths.

APPLICATION TO THE NZSAS

Rules of engagement apply to the NZSAS just as they do to all other deployed service personnel. ROE are particular to the mission, not to the personnel who perform it.

It is not unheard-of to have different ROE for different force elements even within the one theatre of operations – simply because they are doing different jobs.

There is no "special law" that applies to special operations forces. Members of the

[2] *Palmer* v *R* [1971] AC 832, 1088).

NZSAS have the same legal rights and obligations as all other members of the Armed Forces. Because the New Zealand soldier is, in effect, a "citizen in uniform" most of the powers and obligations of these soldiers are derived straight from the common law. There is no reference to the NZSAS in statute law. Their powers and obligations in armed conflict are derived entirely from the fact that they are combatants, not from the fact that they are special operations forces.

THE SUBJECT MATTER OF RULES OF ENGAGEMENT

The type of force governed by rules of engagement may include deadly force such as the firing of small arms which will almost certainly either kill or seriously injure the person being shot at if he or she is hit.[3] It may include the use of other weapons, such as fire from artillery or from warships, or operations from the air. Other coercive measures governed by these rules may, however, also include techniques not expected to be lethal, such as the use of illumination, barriers, riot control agents and batons, or in a maritime environment, use of a ship to intercept or disrupt the navigation of other vessels.

Rules of engagement may also govern the apprehension, search and detention of persons regarded as a threat to a force or its mission.

ROE AND ROE CARDS

The expression "ROE" applies to the detailed directives issued to commanders. It may also cover smaller note-book sized cards carried by armed forces personnel.[4] These ROE cards are much simpler in their language and provide a basis for training and reminding service personnel of their duties both in training and on operations. The thought that a member of the forces could be expected to pull out the card in the heat of a fire-fight so as to resolve an unfolding situation is completely fanciful.

Such cards are not always issued, however, and may not be appropriate where very particular operations are specifically tailored to the ROE and are therefore incorporated in the orders for the operation itself.

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[3] See the comments of Lord Lloyd in Clegg v R [1995] 1 All ER 334 at 344.

[4] Internationally, these cards are sometimes referred to by colour-code, such as "yellow-card" or "red card". They are also sometimes called "orders for opening fire (OFOF) or "guidance for the use of force".

THE LEGAL, POLITICAL AND MILITARY DIMENSIONS OF RULES OF ENGAGEMENT

As will be clear from the previous comments, there are three major imperatives which forge the content and application of rules of engagement. These are:

- Legal requirements
- Political requirements
- Military requirements

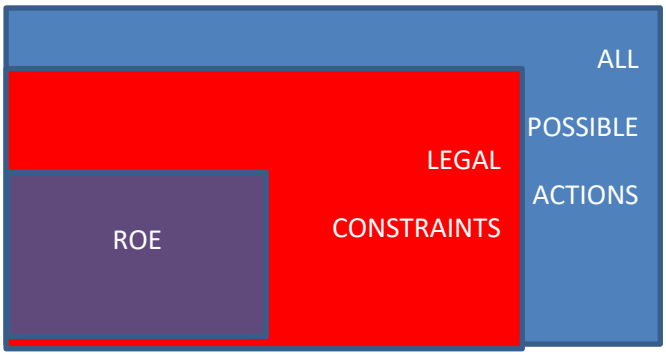
Each of these contributors to rules of engagement is discussed further below.

ROE AND THE LAW

I will graphically describe two concepts –

How the law applies to the spectrum of operational circumstances.

How ROE fit within the constraint of law



RULES OF ENGAGEMENT AND THE LAW

Rules of engagement are not a separate source of substantive law. They are not explicitly authorised or recognised in any New Zealand statute.[5] Nor is there any international agreement or recognised customary law rules governing their content or application.

Legal obligations are, nevertheless, a major driving imperative in the formulation and application of rules of engagement.

[5] The only reference to the term in New Zealand legislation appears in the Tauranga Moana Iwi Collective Redress and Ngā Hapū o Ngāti Ranginui Claims Settlement Bill 2016 at cl 81.

Since it is fundamental to the concept of the **rule of law** that the legality of the Crown's actions cannot be subservient to either political or military imperatives, it is the legal element of ROE content which is most determinative and inflexible. The relationship between rules of engagement and the law is, nevertheless, a multifaceted one. The question is not "whether the law applies" but rather "how the law applies".

The use of force and the level of force which are authorised by the ROE must be consistent with international law, and may engage any, or all, of the following:

- The United Nations Charter.
- Customary international law on the use of force.
- The law of armed conflict (LOAC) as applicable to international armed conflict, non-international armed conflict, or both.
- Customary law relating to peace support.
- New Zealand's obligations regarding the prohibition, or restriction on the use of, certain weapons.
- International human rights law as applicable.
- Relevant United Nations Security Council resolutions, especially the precise mandate of the mission.
- The law of the sea / the law relating to overflight of territory.
- The law of neutrality / state sovereignty.
- Agreements and arrangements with coalition partners and the host nation.
- Other general international law principles.

ROE must also comply with domestic law. In particular, they must take into account:

- New Zealand constitutional conventions
- the Defence Act 1990
- the Crimes Act 1961
- the Geneva Conventions Act 1958, the Crimes of Torture Act 1989, the New Zealand Nuclear Free Zone, Disarmament and Arms Control Act 1987, the Chemical Weapons (Prohibition) Act 1996, the Anti-Personnel Mines Prohibition Act 1998, the Cluster Munitions Prohibition Act 2009, the International Crimes and International Criminal Court Act 2000, the Cultural Property (Protection in Armed Conflict.) Act.2012.

Particularly relevant to the use of force is the mandate under which the force operates. Where, for example, the mission is operating under a United Nations Security Council Resolution authorising the use of “all necessary means”, it is obviously contemplated that force will be used for measures other than self-defence. In such circumstances, the force used must still comply with New Zealand law and international law. A completely different regime relating to the use of force applies in the case of an armed conflict from that applicable in a peace-support mission.

The fact that rules of engagement provide that personnel or force elements may use force in certain circumstances does not mean that they must do so. Indeed, the permissive nature of rules of engagement must always be interpreted in light of the situation. For example, rules of engagement may entitle a service member to engage with deadly force any identified fighter of an insurgent group. This would not, however, entitle the soldier to open fire at peace-talks at which insurgent members were present. At the other extreme, a soldier who is a member of a force lying in ambush is not entitled to open fire “in self-defence” the moment a hostile fighter comes into view. He or she must await the order to fire, and furthermore, must cease fire when ordered to do so.

Rules of engagement may, in accordance with international law, allow a force element to use force that may cause incidental civilian casualties where such casualties are proportionate to the concrete and direct military advantage anticipated. However civilian casualties must never be the intended result of any action, and the recognition that a force’s actions may entail incidental casualties can never be interpreted as a licence to set about to do so.

LEGAL STATUS

NZDF ROE are orders issued by the Chief of Defence Force and are expressed in mandatory language. They are therefore written orders for the purposes of Armed Forces Discipline Act 1971 and a failure to comply with them constitutes an offence.

This removes any doubt as to whether these rules are merely "guidance" (as has been the case in some nations) which can be applied or not according to command discretion.

While some individual ROE will require the application of judgement in their execution

- for example whether a particular act reveals a hostile intent - the express prohibitions and limitations are mandatory.

Rules of engagement do not, however, define the legal rights and obligations of members of the forces under statute or common law.[6]

RELATIONSHIP BETWEEN ROE AND THE LAW OF ARMED CONFLICT

Any use of force during armed conflict must comply with the law of armed conflict (LOAC) – also known as International Humanitarian Law (IHL). The basic principles of LOAC also apply to peace support operations when actual combative force is used.

ROE may not authorise a use of force which is in contravention of LOAC. They are not a separate source of LOAC. ROE cannot, therefore, relieve members of the NZDF, or commanders, or their political masters, of their personal legal responsibilities under LOAC or international criminal law.

An action which complies with ROE, but seriously breaches LOAC, may still be tried as a war crime. The very limited applicability of the defence of superior orders means that any justification or defence based on the fact that ROE appeared to authorise the action is unlikely to succeed if the person knew it to be unlawful or it was manifestly unlawful.[7]

For military or policy reasons ROE may restrict the use of force to a level which is lower than that which it would otherwise be lawful to use under LOAC. The political situation may, for example, require restraint in the use of force which appears quite sound from a strategic or tactical viewpoint, and which is entirely legal. Targets that are lawfully available under LOAC may be excluded from attack on the grounds that attacking them will adversely affect the overall aims the mission, or escalate the conflict.

ROE may also be used to reiterate LOAC or other legal principles in a form that provides concrete direction to commanders and personnel on the application of those principles in the context of the particular operation. It is impracticable, however, to include every rule from the over 60 treaties and vast body of customary law into ROE. They would be rendered unworkable. LOAC obligations which are

[6] [1975]NI, 203, 206.
[7] See Rome Statute of the International Criminal Court Art 33. See International Crimes and International Criminal Court Act 2000. See DM 69 (2 Ed) *Manual of Armed Forces Law*, Volume 4.

constant to all operations are therefore addressed in the Code of Conduct Card and the Law of Armed Conflict training package – and are not generally addressed in ROE.

THE POLITICAL NATURE OF ROE

Rules of engagement exemplify two very important constitutional conventions:

- Subordination of the military to civilian authority.
- Subordination of government action to the rule of law.

Under the constitutional prerogative of defence and security, and the foreign affairs prerogative, it remains the sole right of the government of the day to initiate, escalate, de-escalate, maintain or cease military operations in accordance with its views of the defence and security needs of the nation.

Operations by the NZDF are conducted in furtherance of New Zealand national policy and are therefore governed by the political aims to be achieved.

Defence Act 1990 s 7 provides that the Minister has "the power of control of the New Zealand Defence Force, which shall be exercised through the Chief of Defence Force". There is no question, therefore, that the Minister of the day has the ultimate responsibility for ensuring that the ROE completely reflect the Government's wishes. The Prime Minister, as head of government, ensures that the collective responsibility of cabinet is met. There are, however, further safeguards:

The Attorney-General has responsibility for ensuring that the operations of executive Government are "conducted lawfully and constitutionally".

The overseas deployment of the Defence Force has very significant impact on New Zealand's foreign affairs and diplomatic interests. The Minister of Foreign Affairs and Trade has a particular role in protecting those interests and in upholding New Zealand's obligations under international law.

The use of armed force is usually just one of the several means available to Government to achieve its national objectives – including diplomacy. The use of armed force may therefore be restrained in manner or degree or circumstance so as to coordinate with those other measures.

MILITARY CONSIDERATIONS

Military considerations in rules of engagement, inevitably, are subservient to both political and legal ones.

Any purely military reason for constraint which must be achieved, such as the need to conserve ammunition, is dealt with through orders and is therefore not a topic for rules of engagement. ROE are not used to assign missions or tasks nor are they used to give tactical orders. Missions and tasks are assigned through operations orders, directives or other orders as an exercise of command and control.

Nevertheless, rules of engagement still play a role in achieving military objectives at the strategic, operational or even tactical level. When allowed a choice of potential responses, a commander will choose one that best suits the situation faced and may demand restraint to stop a localised conflict from escalating beyond the resources of his or her command. With the relatively small size of New Zealand forces deployed in recent years, the capacity to deal with escalation of violence is limited.

Commanders are not authorised to issue orders that exceed ROE or are demonstrably inconsistent with them. Any order which does this is therefore an unlawful order. ROE do not, however, override the lawful authority of the commander to give orders such as “cease – fire”.

FORMULATION AND APPROVAL OF ROE

ROE are drafted for each mission, although similarities between missions may mean that ROE for different operations appear very much the same. The use of familiar language allows more instinctive knowledge of what is required. However, a "one size fits all" cannot be applied because there may be subtle but important differences in the mandate or objectives.

There is, at the outset, a distinction between ROE applicable to armed conflict and those applicable to other operations such as peace-support and aid to the civil authority.

In the former the ROE will concentrate on identifying opposing forces and persons taking a direct part in hostilities who are a threat to the force and its mission. While the ROE may impose restrictions on targeting and on the escalation of force, ROE in

such circumstances generally only require that the enemy, or civilians taking a direct part in hostilities, be properly identified and law of armed conflict obligations be complied with, before deadly force can be used.

In operations other than war, however, the use of force will generally be predicated on self-defence.

ARE ROE ALWAYS NECESSARY?

ROE are appropriate in all circumstances where it may be necessary for members of the NZDF to use force, whether amounting to combat operations or not. In some circumstances the nature of the operation is such that ROE are not considered appropriate. For example, when members of the NZDF deployed, unarmed, to Bougainville for Operation *Bel Isi* they were not issued with rules of engagement, but rather with "Rules of Behaviour". This was because the concept of operations did not envisage the use of weapons.

ROE INTEROPERABLITY

ROE may, as the circumstances require, be drafted *ab initio* by the NZDF, or adopted / adapted from the ROE of an international organisation (such as the UN) or coalition of states in which New Zealand is cooperating.

There is an advantage to having all national elements within a coalition working from the same ROE. This is now increasingly rare. Some nations will not, as a matter of policy or constitutional law, accept any foreign ROE. Disparate international law or domestic law obligations between partners may make commonality unwise or even unlawful.

Having a variety of different legal and political frameworks within the one coalition force is far from unusual and is simply another aspect of interoperability which must be factored into coalition building.

This may require an “interoperability-matrix”.

In every case it is the acceptability in legal, political and military terms from a New Zealand perspective that is the determinative factor in the authorisation of ROE. All ROE are therefore subject to the same consideration, alteration and approval

process. The fact that, a use of force may be both lawful and politically acceptable to one of our coalition partners does not make it lawful or acceptable to New Zealand.

DRAFTING CONSIDERATION

For obvious reasons the drafting of ROE requires a large measure of input from Defence Legal Services. Commanders and planners, however, verify that what is being written reflects their intent at every step of the proceedings.

ROE must:

- Accurately reflect the operational plan
- Authorise use of force levels appropriate to the aim of the operation
- Cover every weapon type and capability of the force
- Cover all relevant environments in which force elements will be operating
- Accurately reflect the constraints imposed on the NZDF in terms of the area of operations and period of application
- Express the rights and limitations in respect of the use of force in clear, consistent and unambiguous language
- Detail the process for amendment in a way which is clear and workable.

APPROVAL BY GOVERMENT.

It is New Zealand policy that ROE are issued at the highest level of military command, and are approved at the highest level of Government. This means that ROE are frequently signed by both the Minister of Defence and the Prime Minister.

Approval of Rules of Engagement carries a very significant weight of obligation which is well recognised by all involved.

If ROE do not accommodate the required needs of the force, then commanders have professional and legal duty to request a ROE change.

Since ROE are determined at the highest level, they can only be changed at the highest level. A commander in the field will not have authority to change ROE unless that authority has been specifically granted to him or her, a situation which almost never occurs. There may, however, be pre-written “dormant” ROE which anticipate

a possible change in circumstances, and which will be triggered if those circumstances arise.

OPPOSING FORCES WILL EXPLOIT ROE WEAKNESSES

International experience demonstrates that opposing forces and lawless elements may exploit any perceived weakness or uncertainty in ROE in order to manufacture situations in which the force will either over-react to a threat - thereby weakening its legitimacy; or under-react, possibly incurring casualties as a result.

ROE WITHOUT TRAINING ARE USELESS

It has been the consistent experience of armed force throughout the world that ROE supplied to members of the armed forces without the requisite training are at best useless, and at worst, dangerous.[8]

ROE must be trained and drilled by those members of the NZDF required to comply with them. This must involve realistic "shoot - don't shoot" scenario-based training.

ROE cannot contemplate every possible contingency which may arise in the complex environment of operations. There are some situations where it will always be necessary for the member of the NZDF on-the-spot to make a bold decision on the basis of the information they have before them.

Our young service men and women who have served throughout the world in many difficult and dangerous operations have, over the last fifty years, been frequently called upon to make rapid decisions on the use of force in complex situations. They have consistently demonstrated through their training, attitude, culture and instinct that they will get that difficult equation right, time after time. We should be very proud of them.

[8] Major Mark S. Martins **"**Rules of Engagement for Land. Forces: A Matter of Training**,** Not Lawyering". 143 MIL. L. REv., 1, 36 (1994),