

UNDER

THE INQUIRIES ACT 2013

IN THE MATTER

**A GOVERNMENT INQUIRY INTO OPERATION
BURNHAM AND RELATED MATTERS**

Memorandum for New Zealand Defence Force regarding Rules of Engagement

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Rules of Engagement

1. During the course of the Module 2 hearings, the Inquiry posed questions regarding the Rules of Engagement (ROE) for Operation Wātea. To respond to the Inquiry at the appropriate level of classification, further information is provided below. It contains information regarding the ROE authorisations for the use of force, and their application to Operation Burnham.
2. This information should be read in conjunction with the presentations of Judge Advocate General Kevin Riordan and Brigadier Lisa Ferris about the formulation and application of ROE.
3. Further and more complete information regarding the application of the law of armed conflict (LOAC), and the concept of 'direct participation in hostilities' will be addressed in the Crown presentations during the Inquiry's Module 3 hearing, to be held on 29 - 30 July 2019.

ROE and authorisations of force

4. NZDF ROE do not 'predetermine' the use of force. Rather, ROE variously authorise the use of force for a specified purpose; against specified individuals or groups; in certain circumstances; and within certain temporal and/or geographical limitations. Authorisations for the use of force are subject to operational orders, situational context and other applicable ROE. ROE, including authorisations for the use of force, will reflect New Zealand's interpretation of the fundamental principles of LOAC.
5. For example, the use of force in Operation Wātea by TF 81 was subject to the restatement of the LOAC principle of proportionality, set out in Rule I,

“[a]ctions which could result in incidental casualties and collateral damage are permitted if the action is essential for mission accomplishment and the expected incidental casualties and collateral damage are proportionate to the concrete and direct military advantage anticipated.”
6. For the avoidance of any doubt, Rule I reflects the rule of customary international law that attacks which may be expected to cause incidental loss of civilian life, or damage to civilian objects, where these would be excessive in relation to the concrete and direct military advantage anticipated, are

prohibited. However, an expectation of civilian casualties or collateral damage does not in itself render an attack unlawful.

Force authorised by the Operation Wātea ROE

7. Under the ROE for Operation Wātea dated 24 August 2009, all engagements taken or authorised by NZDF forces during Operation Burnham would have been assessed to be in line with one or more of the following authorisations for force:
 - a. in individual or unit self-defence, or in defence of designated persons against a hostile act or demonstration of hostile intent;¹ or in defence of designated property (Rules A and B);
 - b. for mission accomplishment (Rule C);
 - c. against those individuals, forces or groups which had been declared hostile (Rule H).²

Use of force in self-defence

8. ROE may provide authority for a New Zealand force element to use force to defend itself against a 'hostile act' or a demonstration of 'hostile intent'. Such ROE provide for NZDF members to use force in individual or unit self-defence. That is, they may use such force as it is reasonable to use, in the circumstances as they believe them to be, to defend themselves. ROE may also specify particular persons to be 'designated persons', whom NZ forces are authorised to protect and may specify the level of force that may be used to do so.
9. However, the use of such force may be subject to constraint by lawful orders. A member of the NZDF may, for example, be ordered to hold fire or cease fire for tactical or safety reasons, even in circumstances where the use of deadly force in self-defence or defence of another would be justified in law.
10. Rules A and B did not authorise the use of force based on a target's 'identity' or 'status' in an organised armed group. Rather, the rules authorised the use of

¹ 'Hostile act' and 'hostile intent' were concepts defined in the ROE. Hostile intent could be judged by either an individual's or unit's capability and preparedness to inflict imminent or immediate damage, or information, particularly intelligence, which indicated an intention to conduct an imminent or immediate attack.

² This was later amended, as described below.

force, up to and including deadly force, to defend against a hostile act, or demonstration of hostile intent. That is, they permitted the use of force against those individuals posing a threat to the NZDF personnel, unit, to designated persons, or designated property.

Use of force for mission accomplishment

11. The level of military force for mission accomplishment will be authorised and governed by mission-specific ROE. Objectives govern what a force element aims to achieve through its mission. Therefore, Rule C authorised the use of force to achieve the mission objectives and hence mission accomplishments. A Rule of this nature is included in almost all ROE.

Use of force against enemy combatants and military objectives

12. The use of force by members of the NZDF against opposing forces in armed combat operations is not predicated on self-defence, or the need to protect particular designated persons or property. Consistent with LOAC, ROE in these circumstances will authorise the use of force on the basis that members of an opposing force or designated groups, and military objectives, are legitimate objects of attack per se. ROE may nevertheless constrain the circumstances and places in which they may be attacked and the level of force to be used.
13. Rule H permitted TF 81 to use offensive force against individuals who were assessed as being members of a certain named group, or groups that had been declared hostile. This meant that such individuals could be targeted, even if they were not engaged in a hostile act or demonstrating hostile intent at the time that they were targeted or engaged.³

Relation to the Law of Armed Conflict

14. Further information on the concept of 'direct participation in hostilities' (DPH) will be provided by Crown and/or NZDF presentations in the Inquiry's Module 3 hearing. A brief outline of some issues is provided here only to provide context

³ This Rule was later the subject of amendment, in December 2009, as described below, and was expanded to authorise attacks on individuals, forces, or groups directly participating in hostilities in Afghanistan against the legitimate Afghan government, including certain specified group(s) in the Rule.

for Rules A, B, and H, and the basis, under LOAC, on which those authorisations were made.

15. Under LOAC, civilians are protected against attack, unless and for such time as they take direct participation in hostilities. DPH refers to the behaviour or actions of a person, and deprives them of immunity from attack for such time as their direct participation lasts. That is, DPH, as a criterion, permits such individuals to be the objects of legitimate military attacks. Neither the Geneva Conventions nor their Additional Protocols provide a definition of DPH, and no uniform definition has yet developed in State practice. However, the assessment must be made in good faith and based on the information available to the decision-maker at the time. NZDF personnel are trained in LOAC and the ROE, including with reference to DPH where appropriate, prior to, and again on deployment.
16. For NZDF forces, the question of whether a person is DPH must be determined in good faith on the basis of the information available to the decision-maker at the time. The NZDF Manual on the Law of Armed Conflict notes that DPH means any deliberate action of a military nature, which is intended or likely to:
 - a. Cause death or injury to members of a New Zealand force or to coalition partners;
 - b. Destroy or damage the property of a New Zealand force, coalition partners, or any other military objective;
 - c. Substantially hinder the operations of a New Zealand force or its coalition partners;
 - d. Materially assist an opposing force; or
 - e. Cause death or injury to members of the civilian population or other protected persons, or destroy or damage civilian objects that it is the duty of the force to protect.
17. Persons could be assessed as DPH by virtue of either a specific act they are committing at the time or, by the fact and nature of their membership in an 'organised armed group' (OAG).

18. For the purpose of operations in Afghanistan, New Zealand took the position that while civilians who undertake DPH lose immunity from attack only for such time as the participation lasts, in certain circumstances, members of an OAG may be regarded as being involved in continuous DPH and thus as legitimate targets. That is, in certain circumstances, those who were 'farmers by day, fighters by night' lost protection from attack even in the periods between hostile acts. As a result, the NZDF's ROE did not preclude the inclusion of named armed groups in targeting.
19. However, a member of an OAG is only considered to be a person whose integration into an OAG is of such a level that they can be regarded as making a direct contribution to the combat effectiveness of that group.
20. Rules A and B authorised force in defence of oneself, one's unit, a designated person, or designated property against a hostile act or demonstration of hostile intent. That is, these Rules authorised force against an individual or group taking DPH through a specific hostile act or demonstration of hostile intent, at a given point in time.
21. Rule H authorised offensive force against those individuals who were considered to be members of an OAG, who made direct contributions to the combat effectiveness of that group, and were therefore legitimate military targets by virtue of this status. This entailed that an individual's membership of a certain armed group would be deemed to constitute taking DPH and entail a loss of immunity from attack, even if that person was not involved in armed action at the moment in time they were engaged.

Amendment to Rule H – December 2009

22. In September 2009, Rule H was identified as being inconsistent with the equivalent provision(s) in the ISAF ROE.
23. Rule H, which authorised offensive force against a group or groups that had been declared 'hostile', applied only to the insurgent group or groups named in the Rule. The equivalent ISAF Rules allowed for the offensive use of force against individuals and groups that forcefully resisted ISAF lawfully extending the authority of the Government of Afghanistan. Several insurgent groups were

operating in Afghanistan, and insurgency was not limited to persons who were identifiably members of the force(s) specified in Rule H.

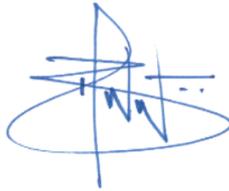
24. The Operation Wātea ROE did not permit direct action tasks against individuals or groups who were not members of those group(s) listed in Rule H. To use force against such persons or groups would have required TF 81 to rely on other Rules regarding self-defence, in response to a hostile act or demonstration of hostile intent. However, these Rules were intended to only be applied in limited situations and were specific to temporal circumstances.
25. This posed the potential difficulty of intelligence indicating an intended attack, which ISAF intended to pre-empt by direct action, but no indication whether the 'attackers' were members of the forces specified in Rule H. As originally phrased, Rule H did not authorise the use of offensive force against such insurgent attackers.
26. The wording of Rule H affected the ability of NZ forces to plan and conduct direct action missions against insurgent elements in cases where the intended target could not be identified as belonging to the force or forces specified in the text of the rule. It was considered that this impeded the ability of TF 81 to undertake part of its mission, 'to defeat the insurgency in Afghanistan'. It was also difficult to reconcile with the broad scope of the need to be prepared to conduct direct action tasks against insurgent networks in support of ISAF and the Government of Afghanistan.
27. To align the Operation Wātea ROE with that of ISAF, an amendment was recommended.
28. The amended Rule read:

Attack on individuals, forces or groups directly participating in hostilities in Afghanistan against the legitimate Afghan government, including [redacted], is permitted.

AMPU1/ Planned attacks subject to approval at the authorisation level for [redacted].

AMPL/2/Positive confirmation by [redacted] that a target is directly participating in hostilities is required.

29. In December 2009, this amendment was endorsed by the Minister of Defence, and approved by the Prime Minister.



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