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PUBLIC POLICY

# Respecting Human Rights and the Rule of Law: The New Zealand Defence Force

Prepared by  
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Minister and most recently Chair of the UN Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident; Rear Admiral Tony Parr, NZDF; Colonel Chris Parsons, NZDF; Commander Nigel Philpott, NZDF; Major Marie Peters, NZDF; Lieutenant Colonel Stephen Piercy, NZDF; Lieutenant Colonel Brett Rankin, NZDF; Lieutenant Colonel Duncan Roy, NZDF; David Rutherford, New Zealand Human Rights Commission, Commissioner; Squadron Leader Mike Salvador, NZDF; Lieutenant Colonel Andrew Shaw, NZDF Lieutenant Colonel Christopher B. Shaw, Deputy Staff Judge Advocate, US Marine Corps Forces Pacific; Monica Silverwood, International Committee of the Red Cross (ICRC) Regional Representative; Charlie O'Hara-Smith, NZDF; Lynne Smith, Equity and the Prevention of Discrimination and Harassment; Rear Admiral Jack Steer, Vice Chief of Defence Force, NZDF; Major Damon Taylor, NZDF; Commander Michelle Taylor, NZDF Legal Officer; Lieutenant Colonel (retired) Steve Taylor, NZDF Legal Officer; Professor Dr. Teresia Teaiwa, Victoria University; Captain Rebecca Thornley, NZDF Legal Officer; Group Captain Darryn Webb, NZDF; Lieutenant Colonel Brett Wellington, NZDF; Warrant Officer Chris Wilson, NZDF; Brigadier Mark Wheeler, LCC, NZDF; Lieutenant Colonel Gerald Wood, NZDF; Warrant Officer Kevin Yorwarth, NZDF; the librarians at the Defence House (Mary Slatter, Joan Keaton, Katrina Willoughby, and Carolyn Carr) and those who wish to remain anonymous. I further thank those on deployment in Timor-Leste in August 2012 who shared their insights and experiences with me, the Army Marae<sup>1</sup>, those on the June 2012 OSB candidates and selection panel, the June 2012 graduates of the Army Recruit Course, the 2012 Army Officer Candidate School staff and students, the 2012 Command and Staff College staff and students, those working deployments in 2012, the NZDF legal officers, and the many others with whom I had the opportunity to discuss these issues with at various opportunities to include impromptu conversations at the mess, on military installations, and other locations. In addition, I have many to thank who worked logistics and other time consuming issues which made it all happen. You know who you are. Thank you.

And, of course, to the editors and team at the Ian Axford (New Zealand) Fellowships in Public Policy.

I came to New Zealand seeking answers to questions, from a global perspective, which have gnawed at me the past years. I am grateful to the Ian Axford Fellowship in Public Policy and the New Zealand Defence Force for providing me the opportunity to find New Zealand answers.

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<sup>1</sup> In general, a New Zealand marae is a Māori communal or sacred place that is a vital part of everyday life.

## **DEDICATION**

To my daughter Couloir, the love of my life and seeker of universes. May she in twenty to thirty years, when she is an astrophysicist-psychologist-lawyer, have the privilege to come to New Zealand as an Ian Axford Fellow to delight in antipodean public policy and the Southern Skies. May the world be a world in which no person is thwarted, through violence or law, from those they love, their dreams, and the fulfilment of their highest potential.

Cornelia Weiss  
Wellington, August 2012





## EXECUTIVE SUMMARY

I came to New Zealand to understand New Zealand Defence Force (NZDF) respect for human rights and the rule of law in operations as lack of this respect in military operations undermines missions and can be fatal.

I found that New Zealand's respect for human rights and the rule of law in military operations is one of its great, unacknowledged strengths. While not flawless and with the complications of contradictions, New Zealand can offer the world the beginnings of a blueprint. While certain of the elements of the blueprint may not be transferable, others are.

During my six-month research, I had interviews and discussions with over 100 individuals (from recruits to former Prime Ministers, from current to retired NZDF members, and with members of the legal, political and academic communities). I observed the NZDF in Timor-Leste; visited the Burnham, Waiouru, Linton, and Trentham military camps; was welcomed onto the Army Marae; and worked out of Defence House. I also observed Laws of Armed Conflict (LOAC) training, Rules of Engagement (ROE) pre-deployment training, a court-martial, an Officer Selection Board (OSB), Command and Staff College Leadership training, part of a Land Warfare Officer (LWO) Selection Exam (a multi-day oral exam for potential commanders), and a NZDF military law conference.

This paper addresses the *whether, why, what, and how* of NZDF respect for human rights and the rule of law in operations: *whether* it happens; *why* it is important; *what* enables this for the NZDF; and *how* it is demonstrated in operations.

This paper highlights policies and practices which enable respect for human rights and the rule of law in operations through military thinking and actions at the tactical, operational, and strategic levels. The New Zealand Defence Force (NZDF) selection process, training, self-leadership, size, types of operations, force composition, and culture as well as New Zealand political leadership and New Zealand culture may contribute to NZDF respect for human rights and the rule of law. Proactive respect for human rights and the rule of law – as demonstrated in the examples of Bosnia, Bougainville, Timor Leste and Afghanistan – enabled operational success.

This paper concludes with recommendations for the present and the future to improve and enhance respect for human rights and the rule of law in operations.

In summary form, these recommendations are:

1. Further ingrain the purpose for military force, respect for human rights, and respect for rule of law in tactical, operational, and strategic military thinking, training, and actions.
2. Include language in the *Defence White Paper* that New Zealand has, at its core, a self-identity based on respect for human rights and rule of law.
3. Eliminate the push for “e-learning” as a viable substitute for face-to-face training and interaction.

4. Maintain constant vigilance against disrespect for human rights and rule of law.
5. Apply a similarly rigorous selection board to potential enlisted members of the NZDF as is currently being applied to potential officers.
6. Engage with partner militaries, in exercises and otherwise, to actualise respect for human rights and rule of law.
7. Be a proactive gender leader.
8. Draft the New Zealand UNSCR 1325 National Action Plan. UNSCR 1325 recognises the ineffectiveness of peace and security plans which exclude, ignore, and reject women.
9. Create a seamless interagency process to transition from security to policing to reconstruction to nation building.
10. Do not retain those NZDF members who fail to uphold the values of the NZDF.

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## INTRODUCTION

I came to New Zealand to understand New Zealand Defence Force (NZDF) respect for human rights and the rule of law in operations.

This paper addresses the *whether, why, what, and how* of NZDF respect for human rights and the rule of law in operations: *whether* it happens; *why* it is important; *what* enables this for the NZDF; and *how* it is demonstrated in operations. This paper concludes with recommendations to improve and enhance respect for human rights and the rule of law in operations.

My analysis is based upon six months of intensive interactions with the NZDF and the broader New Zealand community. This paper highlights policies and practices which enable respect for human rights and the rule of law in operations through military thinking and actions at the tactical, operational, and strategic levels.

This paper uses the term “human rights” to include those rights articulated in various human rights instruments to which New Zealand is a party. New Zealand is a party to seven instruments which it considers the “core” of international human rights obligations:

- International Covenant on Civil and Political Rights (ICCPR),
- International Covenant on Economic, Social and Cultural Rights (ICESCR),
- International Convention on the Elimination of All Forms of Racial Discrimination (CERD),
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),
- UN Convention on the Rights of the Child (UNCRC), and
- the UN Convention on the Rights of Persons with Disabilities.<sup>2</sup>

As articulated by the *September 2011 UN Report of the Secretary-General’s Panel of Inquiry on the 31 May 2010 Flotilla Incident*, chaired by former New Zealand Prime Minister Sir Geoffrey Palmer, “(f)undamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict”.<sup>3</sup>

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<sup>2</sup> In addition, with regard to international humanitarian law, New Zealand is a party to the four Geneva Conventions and Additional Protocols I and II (legislation required to implement Additional Protocol III is currently being considered by Parliament). New Zealand is also a party to the Hague Convention on Cultural Property, with legislation required to implement the two Hague Protocols, according to MFAT, being considered by Parliament. New Zealand was among the first six nations in the world to sign and ratify the Cluster Munitions Convention. New Zealand has also made itself subject to the jurisdiction of the International Criminal Court (ICC). Per conversations and emails with MFAT 2012.

<sup>3</sup> *September 2011 UN Report of the Secretary-General’s Panel of Inquiry (Panel of Inquiry) on the 31 May 2010 Flotilla Incident*, chaired by former New Zealand Prime Minister Sir Geoffrey Palmer, copy in author’s archives, at p. 98 citing the UN General Assembly G.A. Res. 2675 (XXV), Para 1, U.N.

This paper uses the term “rule of law” to include the purpose for rule of law. Sir Kenneth Keith, an International Court of Justice (ICJ) judge, defines the rule of law as a limit on discretionary power.<sup>4</sup> According to the New Zealand Human Rights Commission, the “rule of law is an essential function for ... full and effective protection of human rights”.<sup>5</sup> The Commission defines the rule of law through five core elements.<sup>6</sup> The second element of New Zealand’s definition of the rule of law is adamant “(f)undamental human rights must be protected by the law”.<sup>7</sup>

## **NZDF Respect for Human Rights and the Rule of Law in Operations**

During my six-month research, I had interviews and discussions with over 100 individuals (from recruits to former Prime Ministers, from current to retired NZDF members, and with members of the legal, political and academic communities). I observed the NZDF in Timor-Leste; visited the Burnham, Waiouru, Linton, and Trentham military camps; was welcomed onto the Army Marae; and worked out of Defence House. I also observed Laws of Armed Conflict (LOAC) training, Rules of Engagement (ROE) pre-deployment training, a court-martial, an Officer Selection Board (OSB), Command and Staff College Leadership training, part of a Land Warfare Officer (LWO) Selection Exam (a multi-day oral exam for potential commanders), and a NZDF military law conference. I found a NZDF that believes it respects human rights and the rule of law in operations. As stated by a commander in Timor-Leste when New Zealander Len Manning was killed in operations,

In Timor the locals were traumatised by 24 years of occupation resulting in 200,000 deaths and in 1999 a series of human rights abuses that are still being investigated by the UN's Serious Crimes Section. ... locals had a natural fear of anything military or in uniform. Our job was not only to protect them but win their confidence by demonstrating that we were there to defend their human rights.

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Doc. A/8178 (Dec. 9, 1970). In addressing the International Court of Justice (ICJ) advisory opinions on the *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226 (July 8) and the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, 2004 I.C.J. 136 (July 9), the Panel of Inquiry acknowledges the difficulty of making “generalized statements on the exact nature of the relationship between human rights law and international humanitarian law” with the application heavily dependent on the “factual context of the situation”, p. 99, and asserts the International Court of Justice has “repeatedly confirmed the continued application of human rights provisions in armed conflict”, p. 98.

<sup>4</sup> Interview of Sir Kenneth Keith, 2012.

<sup>5</sup> *Human Rights in New Zealand 2010*, p. 29.

<sup>6</sup> Definitions for what constitutes “rule of law” are numerous and differ widely. Given this paper addresses respect for human rights by the New Zealand Defence Force, I use the New Zealand Human Rights Commission definition. The five elements of New Zealand’s definition of rule of law are: 1) The law must be accessible, intelligible, clear and predictable; 2) Fundamental human rights must be protected by the law; 3) Civil disputes, which the parties themselves are unable to solve, should be resolved through established procedures without prohibitive cost and in a timely fashion; 4) Ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers; and 5) Adjudicative procedures provided by the State should be fair. *Human Rights in New Zealand 2010*, p. 29.

<sup>7</sup> *Human Rights in New Zealand 2010*, p. 29.

## The Importance of Respecting Human Rights and the Rule of Law in Operations

*Violating human rights and rule of law degrades the ability to shape the peace you want at the end. For success, you need for all parties to remove animosity, hatred, bitterness; therefore, you want responsible, ethical conduct of conflict. This applies to both intra and interstate conflict. Even at the height of the conflict, you need the self-discipline and the self-belief. War is not an excuse to commit human rights violations.*<sup>8</sup> NZDF Chief of Defence Force (CDF) Lieutenant General Rhys Jones, 2012.

*The soldier trade, if it is to mean anything at all, has to be anchored to an unshakable code of honour. Otherwise those of us who follow the drums become nothing more than a bunch of hired assassins walking around in gaudy clothes – a disgrace to God and mankind.*<sup>9</sup> German military practitioner-philosopher Clausewitz well before the articulation of human rights conventions.

Violating human rights is not only military unprofessionalism;<sup>10</sup> it arguably impacts military missions negatively. The first quarter of 2012 is illustrative.

In January 2012, a group of US military members urinated on dead bodies of suspected insurgents in Afghanistan.<sup>11</sup> An Afghan soldier, purportedly after seeing the video of the urination, killed and wounded French soldiers.<sup>12</sup> France threatened to withdraw early from Afghanistan.<sup>13</sup>

In February 2012, various US personnel burned Korans.<sup>14</sup> Certain Afghan soldiers and police then killed foreign troops. US General Allen, Commander International Security Assistance Force (ISAF) Afghanistan, testified to the US Congress that some of the Afghan soldiers and police who killed non-Afghanistan troops "were motivated, we believe in part, by the mishandling of religious materials".<sup>15</sup> New Zealand soldiers were not among foreign troops attacked. Anecdotal evidence suggests no New

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<sup>8</sup> Interview with Lieutenant General Rhys Jones, CDF, 2012.

<sup>9</sup> *Serve Proudly, Lead Wisely (Kia Tu Karatete, Aratakina I Te Mohiotanga)* (2008), p. 39.

<sup>10</sup> And arguably illegal depending which international instruments a nation believes itself bound by, customary international law, and other related legal interpretations. Practice regarding violations of human rights can differ greatly depending on jurisdiction. For example, the Inter-American Court of Human Rights ruled in *Case of Radilla-Pacheco v. Mexico*, Judgment of November 23, 2009 para 274, that no military justice system should have jurisdiction over human rights violations. In Colombia, the military has no jurisdiction over human rights violations. In Mexico, the military still retains jurisdiction over human rights violations. The Mexican government, based on the latest information available to me, has still not enacted legislation to change such jurisdiction. In the US, the US military justice system would not conceive of relinquishing jurisdiction over human rights crimes.

<sup>11</sup> See discussion by the International Red Cross Committee (ICRC) regarding Treatment of the Dead in which it states "(e)ach party to the conflict must take all possible measures to prevent the dead from being despoiled" and "mutilation of the dead bodies is prohibited." Rule 113.

<sup>12</sup> Army News Staff Report, 'Marine video prompted Afghan to kill' (23 January 2012), *Army Times*.

<sup>13</sup> *Ibid*.

<sup>14</sup> According to Sir Geoffrey Palmer, at minimum, such would be "offensive behaviour" under New Zealand law and possibly failing to allow for freedom of religion under the ICCPR. Interview with Sir Geoffrey Palmer, 2012.

<sup>15</sup> *Senate Armed Services Committee Holds Hearing on the Situation in Afghanistan* (22 March 2010).

Zealand soldiers were attacked because Afghan locals understood the Koran burning was not a New Zealand action.

In March 2012, a US soldier allegedly gunned down Afghan children and adults as they slept in their homes in Afghanistan.<sup>16</sup> For two months after, US military forces in that area ceased all operations and opposing forces re-established themselves.<sup>17</sup>

From a pragmatic military operational perspective, human rights violations require commanders to use their limited time and energy to focus on the violations rather than on the mission. As such, not only does committing human rights violations create danger for the broader mission, it also creates danger for the daily missions because the commander cannot focus on them. Instead, the commander's attention is diverted to assessing and addressing the human rights violations. Thus, committing human rights violations is not only a "non-valued added activity"; it is a "negative value" activity. That is, human rights violations are not mission-enhancing. Instead, at minimum, they distract the mission and detract from it.

From a strategic military and political perspective, human rights violations shape perceptions. The memory of Vietnam is not that of winning the hearts and minds but of the civilian massacre at My Lai. The memory of a recent conflict is again not winning the hearts and minds but of Abu Ghraib. Perceptions shaped by conduct have implications for the ability to influence the future.

And yes, from a legal perspective,<sup>18</sup> militaries have the legal obligation to respect human rights.<sup>19</sup>

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<sup>16</sup> Whitlock (23 March 2012). Army Staff Sergeant. Robert Bales will be charged with 17 counts of murder in the massacre of Afghan villagers.

<sup>17</sup> Montagne (9 May 2012).

<sup>18</sup> Famed US pilot General Robin Olds, whom I interviewed as a fourteen-year-old on an extracurricular project, said, "Deviation from the law usually brings punishment of some sort, yet compliance out of fear of punishment is weak. Compliance because of one's conviction or acceptance is true discipline". Olds (2010), p. 359. In my discussions with, and observations of, countless military members the world over since that interview, I have not come to a contrary conclusion. That is, sculpting behaviour through fear (of court-martial or disciplinary measures) does not prevent the Abu Ghraibs. What prevents the Abu Ghraibs is the true discipline of conviction and acceptance.

<sup>19</sup> Militaries are not above the law. They are obligated to follow the law. As such, they are obligated to comply with criminal law, military justice, international humanitarian law, and human rights law. Human rights, international humanitarian law [also known to some as Laws of Armed Conflict (LOAC) and/or Laws of War], military justice, and criminal law are not mutually exclusive bodies of law. An example addressed by Professor Peter Rowe involves a UK Corporal Kenyon's ill-treatment of detained Iraqi civilians. According to Professor Rowe, "UK military law was perfectly adequate to enforce standards expected of any human rights instrument. The law of the UK, laws of war and human rights law all pointed in the same direction: that the individual Iraqi civilians should not have been treated in the way they were". Rowe, 4<sup>th</sup> Ruth Steinkraus-Cohen International Lecture, p. 11. Relying solely on international humanitarian law training fails to equip military members for today's reality that military engagements increasingly do not fall within the legal parameters of engagements addressed by international humanitarian law. As articulated by Professor Rowe, "We will all be aware, however that around the world soldiers kill or ill-treat civilians in a variety of situations other than during an international armed conflict. Strictly, the Geneva Conventions apply only to an armed conflict. Human rights law does not possess any such limitation". Rowe, 4<sup>th</sup> Ruth Steinkraus-Cohen International Lecture, p. 13. *See also* Riordan (2001), p. 24, "If there was some doubt as to whether LOAC was strictly applicable to operations in East Timor either before or after the creation of UNTAET, no such doubt could be entertained regarding the applicability of international human rights law".



Yet assertions such as, "This is just a natural part of war" and "There will always be incidents when violence in the extreme is encountered on both sides, whether it is in this case (U.S.) soldiers desecrating bodies or ... Taliban soldiers taking pictures of beheadings"<sup>20</sup> continue. Such assertions expect too little from our armed forces. Just as today it would be inexcusable to "mistakenly" drop nuclear weapons, so, in the future, excuses such as the assertions above will no longer be acceptable for human rights crimes. Respect for human rights and rule of law must be ingrained in our military thinking and actions.<sup>21</sup> It is the duty of military members to ensure wars or peace are not lost because of the illegitimising disregard for and abuse of human rights and rule of law.<sup>22</sup> It is the duty of militaries to ensure members selected are inculcated to respect human rights and the rule of law. In addition, it is the duty of militaries to ensure its members do not abuse human rights and violate the rule of law.

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Just as we live in an increasingly post-conventional warfare world, we also live in an increasingly post-international humanitarian law/law of armed conflict (LOAC) world. Yet we continue to train, equip, and act as if we live in the conventional warfare LOAC world. According to Major General Keating, Chief of the New Zealand Army,

Today war is closer and within the population. The Geneva Conventions are not enough. We are arming our soldiers with the mental skills needed to operate in complex environments. In East Timor, because the enemy was different, we adapted. Lessons were identified, but never learned from Vietnam. A leader must operate within a juxtaposition of turning humans into killing machines who can operate in civilisation. World War One was easy because the enemy was 'out there'. In World War Two, the enemy was, to some extent, 'out there'. Now, it is not that simple. We have now a three to four block war. The private soldier's actions impact strategically. It is very complex. In the early 1980s we knew the Geneva Conventions' language, such as not destroying churches, etc. Now, when preparing such as for Afghanistan, our mission is to help and enable the population and address the people who are trying to harm you and the population. We are there to protect the population. Therefore we must cauterise the belligerents from the population. The role of the modern warrior is to protect the population. That is what we prepare soldiers for: the modern warrior. I do not care for the word 'peacekeeper' as it is a word that has been corrupted. In Afghanistan our primary mission is engaging with the population; when we leave a village and get caught in an ambush our role changes, as we are fighting for our lives, and then after the fighting, those people leaving the area without a weapon, we do not shoot (even if we suspect they were part of the ambush).

Interview 2012.

<sup>20</sup> Bartlett (19 April 2012).

<sup>21</sup> Talk by retired Colombian Army General Ospina, former head of the Colombian military and police, to the Inter-American Defense College during academic year 2010-2011 during which he asserted the future of strategic thinking requires incorporating human rights and international humanitarian law into strategic thinking. In response to author's question regarding the future of strategic thinking during a strategic thinking panel conference at the Inter-American Defense College on 5 May 2011.

<sup>22</sup> Phillips (2010), p. 155, discusses how torture endangered US personnel by alienating allies and inciting anger against US forces. Alberto Mora, former US Navy general counsel, testified in front of the US Senate Armed Services Committee on June 17, 2008, "[T]here are serving US flag-rank officers who maintain that the first and second identifiable causes of US combat deaths in Iraq – as judged by their effectiveness in recruiting insurgent fighters into combat – are, respectively, the symbols of Abu Ghraib and Guantanamo. The net effect of this policy has been to weaken our defenses, not to strengthen them, and has been greatly contrary to our national interest".



## **INSTITUTIONALISING RESPECT FOR HUMAN RIGHTS AND RULE OF LAW**

The NZDF, in institutionalising respect for human rights and rule of law, relies on political leadership and public policy in setting the foundations for respect, the NZDF selection process, NZDF training, the size of the NZDF, self-leadership of NZDF members, the types of operations in which the NZDF engages, and culture.

### **New Zealand Security Foundational Respect for Human Rights and the Rule of Law**

New Zealand's security, as a matter of political leadership's articulation of public policy, is founded on respect for human rights and the rule of law. In any nation's military operations, leadership and policy creates the environment for upholding human rights and the rule of law.<sup>23</sup> New Zealand's leadership and policy may contribute to NZDF respect for human rights and the rule of law on operations.

According to the New Zealand *Defence White Paper*, the role of the New Zealand Defence Force is to make a "particular contribution" to the national security interests of a safe and secure New Zealand, including its borders and approaches, a *rules-based*<sup>24</sup> (emphasis mine) international order which respects national sovereignty, a network of strong international linkages, and a sound global economy underpinned by open trade routes".<sup>25</sup>

New Zealand specifically addresses its commitment to human rights in two of five National Security Outcomes.

The third National Security Outcome is "A political environment in the South Pacific in which national economies, societies and identities continue to evolve in a climate of good governance and internationally agreed standards of compliance with *human rights* (emphasis mine)".<sup>26</sup>

The fifth National Security Outcome is "A global approach that supports New Zealand's place in an international community committed to the maintenance of *human rights* (emphasis mine) and the collective security responsibilities enshrined in the UN Charter ...".<sup>27</sup>

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<sup>23</sup> Christopher Shaw, a US Marine deployed to Iraq from 2006-2007 as a legal advisor for a US Marine unit, argues, in the case of detainees held by the US during the war on terror, presidential leadership created an environment that allowed torture, and torture was not curtailed until presidential leadership stopped it. Shaw (2009). Shaw contends "definitions and proscriptions, by themselves, cannot stop torture – only leadership and policy can". Shaw (2009), p. 289.

<sup>24</sup> According to one NZDF commander, "We are small and weak. Therefore a rules-based international order is our best defence and our best opportunity".

<sup>25</sup> *Defence White Paper 2010*, p. 15.

<sup>26</sup> See NZDDP-D 2008, *Foundations of New Zealand Military Doctrine*, para 2.3, referencing the *Government Defence Policy Framework, June 2000*.

<sup>27</sup> See NZDDP-D 2008, *Foundations of New Zealand Military Doctrine*, para 2.3, referencing the *Government Defence Policy Framework, June 2000*. The other three National Security Outcomes are: A secure New Zealand including its people, land, territorial waters, Exclusive Economic Zone (EEZ),

In the 2005 *Briefing for the Incoming Minister of Defence*, the NZDF elaborated on its commitment to human rights: “Except as part of peace support operations, New Zealand will not engage in military cooperation or exercises with the armed forces of states which sanction the use of their armed forces to suppress human rights”.<sup>28</sup> It further asserted,

The fifth defence policy objective is to contribute to global security and support New Zealand’s place in an international community committed to the maintenance of human rights, and the collective security responsibilities enshrined in the UN Charter. .... It has consistently demonstrated that we are prepared to use our capabilities to defend democratic values, human rights and the principles and obligations enshrined in the UN Charter.<sup>29</sup>

The NZDF *2012-2015 Statement of Intent* addresses the primacy of the rule of law in reducing the risks to New Zealand from regional and global insecurity<sup>30</sup> with the expectation from the Government that the NZDF is to “protect New Zealand’s wider interests by contributing to ... the international rule of law”.<sup>31</sup> The 2011 *Briefing for the Incoming Minister of Defence* addresses the rule of law three times.<sup>32</sup> The 2011 *Briefing to the Incoming Minister of Defence* does not address human rights.<sup>33</sup>

## Selection

Hiring the right people is the first and most important step for any organisation, be it a company or a military. As noted author Jim Collins asserts, “Those who build great organizations make sure they have the right people on the bus”. The right people are those who fit with the institution’s core values.<sup>34</sup> According to Jim Collins, “People often ask, ‘How do we get people to share our core values?’ The answer: you don’t. You hire people who already have a predisposition to your core values, and hang on to them”.<sup>35</sup>

The NZDF hiring process may weed out officers who may disrespect human rights and the rule of law and commission those who do respect human rights and the rule of law. NZDF’s hiring process<sup>36</sup> for its officers is intense. According to one young

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natural resources, and critical infrastructure; A strong strategic relationship with Australia in support of common interests for a secure and peaceful region; and An expanding role in the regional dialogue of South East and North East Asia and, where appropriate, a role in regional security consistent with New Zealand’s interests and capabilities.

<sup>28</sup> *Briefing for the Incoming Minister of Defence* (2005), p. 8.

<sup>29</sup> *Briefing for the Incoming Minister of Defence* (2005), p. 14.

<sup>30</sup> NZDF *2012-2015 Statement of Intent*, p. 27.

<sup>31</sup> NZDF *2012-2015 Statement of Intent*, p. 31.

<sup>32</sup> *Briefing for the Incoming Minister of Defence* (2011) at pp. 5, 7, and 29.

<sup>33</sup> *Briefing for the Incoming Minister of Defence* (2011).

<sup>34</sup> Collins (2009), p. 159. The NZDF core values include comradeship, courage, and commitment, and integrity (3CI).

<sup>35</sup> Collins (2009), p. 159. Collins elaborates using the example of Nordstrom (a high-end US clothing retailer) when it regained traction, “the Nordstrom team re-embraced the idea of hiring based on values and character, not skill”, Collins (2009), p. 174. That is, “We can hire nice people and teach them to sell, but we can’t hire salespeople and teach them to be nice”, Collins (2009), p. 174.

<sup>36</sup> According to the Head of the NZDF DRO (Defence Recruiting Organization), who originally served in the UK military, “I am not aware of any military in the world with a better system. Of course, this is

officer, it was the most stressful time of his military career.<sup>37</sup> The hiring process includes a multi-day Officer Selection Board (OSB).<sup>38</sup> During the OSB, NZDF psychologists, in addition to other NZDF officers, evaluate the applicants. The applicants undergo individual and group activities to include scenario based analysis as well as interviews. The NZDF psychologists concentrate on the Dark Triad, which is psychopathy, narcissism (hard to relate to others), and machiavellism. Dark Triad individuals have difficulty empathising and power over others is what stimulates them. NZDF psychologists use psychometrics to offset “blind spots” in other assessment methods. The OSB selection panel, composed of approximately one assessor to 1.5 candidates, assesses the candidates in multiple areas. They include organisational ability, problem solving, influence, awareness of others/the ability to empathise,<sup>39</sup> stress tolerance, communication, and drive. These indicators may be crucial for success in operations. For example, regarding empathy, Bruce Newsome, in *Made, Not Born: Why Some Soldiers are Better than Others*, asserts combat appears to demand the skill of empathy.<sup>40</sup> Empathy is vital both in training and in operations. According to one NZDF member, if cadets lack the ability to empathise, they will make victims of other cadets and the NZDF will lose good officers. If deployed military members lack the ability to empathise and lack stress tolerance, they may violate human rights and the rule of law and thereby jeopardise, not only NZDF’s missions, but coalition partners and the ability for the mission to succeed. Empathy implies acceptance of non-Pākehā<sup>41</sup> cultures and women as being equally deserving of respect.

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a journey with room for improvement”. To focus on improvement, the NZDF DRO is engaging in longevity studies. The NZDF has an attrition issue attributed to morale issues. One-fourth of the Army is leaving in 2012. Yet, according to one NZDF member, “The NZDF OSB now takes the best. Five years ago it was different”.

<sup>37</sup> And thereby incorporating former Prime Minister Jim Bolger’s “Rule Number One”; that is, “you judge people when they are under pressure -- that is how you get a closer look into their values and how they respond”. Interview of the Rt Hon Jim Bolger 2012.

<sup>38</sup> The Army has a five day board. The Navy and Air Force have three day boards. Multiple day officer selection boards are not a global military norm.

<sup>39</sup> “Empathise” means, according to Major General Keating, “understanding; it does not mean sympathising”. Interview 2012.

<sup>40</sup> Combat appears to demand self-awareness and the interpersonal skills of empathy and communications in particular. Self-awareness is the ability to understand our own emotions. The emotional stability of the self-aware is a source of group emotional stability. This is because emotions are contagious. Additionally, self-aware people tend to be able to manage the social signals they send. They make others feel better. This makes them charming and popular. Others are more likely to turn to them for help. When generalized across group members, these skills make groups ‘internally harmonious.’ Their members are generally self-aware enough to know their skills and weaknesses, and empathetic enough to relate well with others. Empathy is linked with self-awareness, because the more aware we are of our own emotions, the more skilled we are at relating to other people’s emotions. Empathy is the ability to know other people’s feelings. That knowledge is not always acquired by reasoned verbal communication, nor is it always conscientiously realized. Many emotional cues are picked up through speech tones, gestures, and facial expressions. Observers may be unconscious about the nonverbal cues they observe. Empathetic people have better relationships. They have greater influence. They contribute more to groups. They have advantages as leaders since they can set the emotional tone of a relationship. Their emotional expressivity dominates and influences – this is often called ‘emotional entrainment.’

Newsome (2007), p. 75.

<sup>41</sup> According to one member of the NZDF, “Pākehā” is Māori for New Zealanders who are of European descent.

## Composition

One argument advanced for NZDF respect for human rights and the rule of law in operations is the NZDF's composition of 17.5% Māori,<sup>42</sup> the Army's composition of approximately 25%-30% Māori, and the infantry's composition of approximately 45% Māori. According to Bougainville monitor Tracey Haines,

I think everyone would agree that the Māori, Fijian and ni-Vanuatu members of the PMG<sup>43</sup> have an advantage over other members because of their cultural affinity and rapport. They have been very effective as peace monitors and can provide valuable tips to others who are less culturally aware. They are recognised as brothers and sisters of Bougainvilleans, due to proximity in the region and cultural similarities. Their role and contribution made a good impact and helped the PMG facilitate and promote the peace process.<sup>44</sup>

In Bosnia, to develop better relations with, and between, the local Croat and Muslim communities, each New Zealand contingent established a Māori cultural group. The cultural groups performed in many different locations within the New Zealand AOR (area of operations). The NZDF believes the cultural groups played a significant part in developing better relations with the people of the Lasva Valley.<sup>45</sup> As such, the NZDF has a "unique ability to engage with different cultures".<sup>46</sup> According to one NZDF member, "That distinguishes us from other western cultures. It also breaks down the barriers because we are not viewed as the standard western military. The Solomon Islands and East Timor can relate to us more". Because of this, the NZDF believes they have an "in-between": a commonality which opens doors informally and breaks down barriers. When, in Bougainville, the NZDF did the Haka<sup>47</sup> on the jetty, according to one member of the NZDF, "The locals were taken aback and engaged with us. We were not just a modern warship". The Māori provide cultural awareness and credibility. According to Commodore Moore,

The NZDF is a cross-section of society. It is the way we are brought up. Yes, our multicultural society goes with us. I didn't realize how important this was until I was the PRT (Provincial Reconstruction Team) commander in Afghanistan. I had lots of soldiers, many under 20 years of age. I watched how we interacted with people in Bamiyan. There was none of this 'we're better'. Māori are brought up under hardship. There is an immediate affinity, a mutual respect.

While the majority of the NZDF is Pākehā male, the NZDF appears to accord great respect to Māori culture and identifies itself in part with "Māoriness". The belt buckle of the NZDF has the Māori words for "Children of the God of War". Often meetings are begun with words in Māori. The Army and the Navy have Maraes. Ships have "Kapahaka" Māori cultural parties performing with flax skirts and traditional

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<sup>42</sup> *Briefing for the Incoming Minister of Defence* (2011), as of September 2011, p. 20.

<sup>43</sup> Peace Monitoring Group.

<sup>44</sup> Haines (2007), "An Indigenous Monitor", p. 112.

<sup>45</sup> Crawford (1996), p. 67.

<sup>46</sup> *The Path to Peace: the New Zealand Defence Force in Bougainville, 1990-2003* (2003), p. 4 of unnumbered pages.

<sup>47</sup> According to one member of the NZDF, the Haka is a traditional Māori "challenge".

weapons. The Haka is an integral part of the NZDF from the graduation parade of new soldiers to the ceremony celebrated when entering a country on operations. This respect for a minority of New Zealand's population may translate, for both Pākehā and Māori, as well as other ethnic components of the NZDF, into respecting human rights and the rule of law while on operations.

The NZDF is composed of less than 20% women.<sup>48</sup> Today's post-conventional conflicts require that militaries engage with more than 50% of the population. As stated by a male operations officer in Bougainville, "The importance of a woman in each patrol cannot be overstated. For a patrol to be truly successful a link had to be made with women. No male can hope to make this link effectively. A patrol with a female performed better, and was a better small team".<sup>49</sup> Ignoring women carries risk. For example, in the Australian-led PMG in Bougainville,

The patrol commander had been told that the people were happy to remain there (Taurato Island), and had no desire to return to Buin. However, the women told me that they wanted to return but were deeply concerned for their safety on the Kangu Beach road. They had heard of law and order problems resulting from tensions associated with increased transport of cocoa along that route. Clearly the report we were about to make ignored this information from women – information that showed that the slow increases in cocoa production and transport in Telei could damage stability and law and order between Kangu and Buin. This sort of information disappears as the PMG forms its overview of Bougainville – information that seems small but can have a serious impact locally.<sup>50</sup>

One monitor in Bougainville with the Australians recounts a village complaining the previous patrol had spoken only to men, and women felt excluded and angry: "It is supposed to be neutral in politics; it should also be neutral in gender".<sup>51</sup> Gender-neutral engagement; that is engaging with – not excluding – women, provides a greater opportunity to discern "reality". "If you approach the chief of a village about problems in his village he may say 'there are no problems' because of his pride and the fact that he feels he may be losing power. If you consult women, they will tell you what really takes place, and give you an insight into the powers of influence of the Chief".<sup>52</sup> In the only NZDF-led operation in the NZDF's history – the first rotations of the TMG (Truce Monitoring Group) in Bougainville<sup>53</sup> – the NZDF's self-perceived respect for women and incorporation of gender-thinking in Bougainville appears to have contributed to its success.

## Size

The small size<sup>54</sup> of the NZDF may contribute to respect for human rights and the rule

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<sup>48</sup> According to the *Briefing for the Incoming Minister of Defence* (2011), as of September 2011, males compose 84% and females 16% of the NZDF regular force gender breakdown, p. 19.

<sup>49</sup> Foster (2001), 'An Operations Officer', p. 120.

<sup>50</sup> Bray (2001), 'A Woman in Buin', pp. 132-133.

<sup>51</sup> Parry (2001), 'Peace Monitoring in Wakunai, 1998', p. 105.

<sup>52</sup> Ibid.

<sup>53</sup> Discussed in greater depth later in this part.

<sup>54</sup> *Briefing for the Incoming Minister of Defence* (2011), p. 19. New Zealand has a population of

of law because, as one NZDF member states, “My reputation with my mates – that personal connection – it is important what they think about my actions; that is, doing what is right”. As such, members of the NZDF may be able to positively influence each other to respect human rights and the rule of law.<sup>55</sup> As of September 2011, the NZDF regular force employs 9,307 individuals, the reserve force employs 2,317 individuals, and civilians make up 2,442 of those employed by the NZDF.<sup>56</sup>

## Training

*Combat is a peculiar task and uncharacteristic of the vast majority of civilian tasks. Combat personnel require peculiar cognitive, psychological, and physiological attributes that are uncharacteristic of civilians and therefore must be provided by their military employer. In other words, the desired attributes are more extrinsic than intrinsic. Careful management ensures that soldiers accumulate desired attributes, such as self-discipline, without accumulating undesired attributes, such as indiscriminate aggression. Soldiers, like most professions, are made more than born. To assume otherwise leads, at best, to wasted effort and unnecessary discrimination, and, at worst, retarded combat performance and increased illegal violence.<sup>57</sup> Bruce Newsome, *Made, Not Born: Why Some Soldiers are Better than Others**

The NZDF’s training, including the NZDF’s willingness to “unemploy” those who fail during training, to understand and have the discipline needed to respect human rights and the rule of law, may explain why the NZDF does not have such failures and why NZDF members have the internal discipline to respect human right and the rule of law regardless of the conditions.

Part of conflict always involves the possibility of being captured or, in the reverse, capturing. Given the reality that military members may be captured, the NZDF trains its people to survive such capture. Thus NZDF trains its members to withstand the possibility of illegal treatment by militaries or non-militaries which may not adhere to POW (prisoner of war) treatment responsibilities; that is, they have to be trained to withstand torture and like illegal conduct. Such training runs a high risk of abuse given the potential corruptive ability of power. Therefore, the NZDF makes it clear illegal treatment is not how to treat people in captivity. Likewise, during POW training, given the reality it is easier to justify “doing bad things” when feeling under threat (such as in a war), the NZDF always has a psychologist present to ensure there is no opportunity for “creep”.

Prior to deploying, NZDF members undergo pre-deployment training which includes role-playing of what can go wrong. The training is designed to enable the NZDF member to “think for yourself”. Pre-deployment training includes ROE (Rules of Engagement) training. Those selected to deploy are briefed on applicable deployment ROEs and then engage in hours of interactive computer simulations. The computer

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approximately four million people, thus, less than 0.5% of the New Zealand population serve as military members.

<sup>55</sup> The converse may be true as well.

<sup>56</sup> *Briefing for the Incoming Minister of Defence* (2011), p. 19.

<sup>57</sup> Newsome (2007), p. 156.



simulations test and train for ROE compliance. Despite the simulations being computer-based, and not live, the simulations bring to the surface individuals who may not be appropriate to deploy.<sup>58</sup> For example, an individual, when targeted by a rock-thrower, responding (inappropriately) by turning a firearm on the rock thrower and killing (virtually) the computer simulated rock thrower. Other examples include utilising inappropriate language such as calling a local a word which need not be re-created on these pages. Legal officers provide the ROE briefings and observe the computer simulation training. When they observe violations and inappropriate conduct, they may report such to the commanding officers of the pending deployment. This may result in the offending individual not deploying. Further, in pre-deployment training, according to a NZDF member, “we had practical scenarios such as detainee ops (operations), calling in airstrikes, and hostage issues”. I was not able to observe such at the time of this writing. Likewise with the SAS (Special Air Service), who assert they incorporate respect for human rights within their war games such as through “shoot/don’t shoot” scenarios.

From the start, officer candidates and enlisted recruits, as part of their training, undergo LOAC (law of armed conflict)<sup>59</sup> training. LOAC Level One<sup>60</sup> training involves a three to four hour lecture with student input followed by a written test to confirm whether or not the students understood the concepts. If it appears a student’s actions demonstrate an attitude failure, the legal officer conducting the training will raise the issue with that student’s commander. The possible outcomes run the gamut of a closer monitoring of that student to the failure of that student to graduate from the basic officer or enlisted training.

Respect for human rights and rule of law are also explored in the initial training for officers and enlisted as well as in subsequent training. Initial training for New Zealand officers is one year.<sup>61</sup> Initial training for enlisted is 16 weeks.<sup>62</sup>

## **Types of Operations**

The NZDF engages in human rights and rule of law operations. This engagement may explain NZDF respect for human rights and the rule of law in operations.<sup>63</sup>

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<sup>58</sup> The two examples given are ones I personally observed during a NZDF pre-deployment ROE training.

<sup>59</sup> Known also as international humanitarian law. In essence, it addresses, through the Geneva Conventions and their Protocols, how a military is supposed to act during an armed conflict.

<sup>60</sup> Level One is the initial LOAC training. The NZDF has three levels of LOAC training. I was able to attend Levels One and Three. LOAC Level Three is a two day course taught to students at the NZDF Command and Staff College. At the Command and Staff College, the rank level is generally Major to Lieutenant Colonel with about a quarter of the class composed of international students (including a Colonel) and civilians. Speakers and instructors for the 2012 LOAC Level Three course included Monica Silverwood of the International Committee of the Red Cross, Brigadier Riordan, the NZDF Director-General Defence Legal Services, Lieutenant Colonels Steve Taylor, Assistant Director Legal Training, Justin Emerson, Assistant Director Operations Law, and Major Leisha Pettigrew, Legal Officer. Topics included traditional as well as evolving issues.

<sup>61</sup> By means of comparison, initial training for US military officers who do not go through a military academy is three months in Officer Candidate School. New Zealand does not have military academies.

<sup>62</sup> By means of comparison, initial training for US enlisted ranges from eight weeks to 12 weeks, depending on branch of service.

<sup>63</sup> It is not axiomatic simply because military members participate in human rights and rule of law

In mid-2012, according to the NZDF website, 881 NZDF members were deployed with 150 in Afghanistan, three in the Indian Ocean, one in Iraq, three in Korea, 13 in the Middle East, 28 in the Sinai, 43 in the Solomons, three in Sudan, and 79 in Timor-Leste.<sup>64</sup> The remaining 553 deployed in other activities such as exercises and naval deployments.<sup>65</sup>

The NZDF's primary focus is multinational peace operations.<sup>66</sup> Thus its role is to protect human rights. Peter Rowe, Professor of Law at the University of Lancaster, asserts, in multinational operations, "protection by armed forces of the basic human rights of the civilian population ... is not a by-product of the operation but of its very nature".<sup>67</sup> He argues, "The ostensible purpose of deploying armed forces to a multinational force is not to engage in military operations but to protect the lives of civilians".<sup>68</sup> According to one NZDF commander, NZDF goes beyond the mindset espoused by Professor Rowe. That is, the NZDF "seeks to develop, or support the development of, a self-sustaining, legitimate authority which protects and prospers its people".

The NZDF's numerous peace operations include:

- the Military Armistice Commission in Korea,
- the UN Military Observer Group in India and Pakistan,

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operations that such members will respect human rights. Too many examples from other militaries abound of abuse of human rights and the rule of law to support such a conclusion.

<sup>64</sup> *NZDF Overseas Deployments*.

<sup>65</sup> *Ibid.*

<sup>66</sup> New Zealand's primary focus has not always been human rights and rule of law operations.

New Zealand, in World War One, sacrificed its population for war. Over 100,000 New Zealanders served overseas in military service during World War One. That is, nearly 10% of the New Zealand population. More than 40% of New Zealand male population of military age served overseas in WWI. Hackett Fischer (2012), p. 417. Over 18% of those who served died as a result of their service. Altogether, New Zealand troops who went overseas in WWI suffered 59,483 casualties, of which 18,166 were killed. Hackett Fischer (2012), p. 417. In proportion to population, New Zealand's almost 60% casualty rate was higher than any other combatant nation in WWI. Hackett Fischer (2012), p. 417. They fought and died in places like Gallipoli, the Western Front, and the Middle East.

New Zealand, in World War Two, again sacrificed its population for war. When the Japanese were advancing, the New Zealand troops did not return home to defend their country. Instead, they remained in the desert fighting Rommel and later went on to Italy. In lieu of the New Zealand forces returning home, US Marines came to protect New Zealand from anticipated Japanese aggressors. New Zealanders were among those hailed as heroes at El Alamein, the "great turning point of the North African Campaign". Travers (2001), p. 207. According to Winston Churchill, "Before Alamein, we never had a victory, after Alamein, we never had a defeat." Travers, p. 207. In WWII, New Zealand sent 135,000 men and women overseas and lost 27,300 killed and wounded, about 1 in 175 of its population. Hackett Fischer (2012), p. 422. By comparison, other Commonwealth nations lost 1 in 372 of its population, and the US 1 in 775. Hackett Fischer (2012), p. 422.

King, in 1981, wrote, "Like it or not, New Zealanders have to acknowledge that warfare has dominated their national experience". King (1981), p.1. As support, King cites, between 1840 and 1980, New Zealanders have fought one year in every three. King, 1. The NZDF has been in every major conflict since its creation. That is, New Zealand was in the Boer Wars (South Africa 1899-1902), in World War I (with major theatres of combat in Gallipoli, Sinai, Palestine, France and Belgium), in World War II (North Africa, Greece, Crete, Italy, and the Pacific), in Korea (1950-1953), in Malaya (1956-1960), in Malaysia (1964-1966), and in South Vietnam (1965-1972). King (1981), no page number. In 2001, in Afghanistan, New Zealand engaged in its first combat operations post-Vietnam.

<sup>67</sup> Rowe (2006), p. 224.

<sup>68</sup> Rowe (2006), p. 225.

- the UN Truce Supervision Organization in the Middle East,
- Detachments from UNTSO (UN Truce Supervision Organization),
- the UN Peacekeeping Force in Cyprus,
- the Commonwealth Monitoring Force in Zimbabwe,
- the Multinational Force and Observers in the Sinai Peninsula,
- the UN Iran-Iraq Military Observer Group,
- the UN Mine Clearance Training Team in Pakistan and Afghanistan,
- the UN Transition Assistance Group in Namibia,
- the Support for the Bougainville Peace Talks, the Gulf War (1990-1991),
- the UN Special Commission in Iraq, the UN Angola Verification Missions II and III,
- the UN Operations in Cambodia,
- the UN Protection Force and the Implementation Force in Former Yugoslavia,
- the UN Operations in Somalia,
- the UN Operations in Mozambique,
- the UN Humanitarian Relief Operations in Rwanda,
- the UN Mission in Haiti,
- and the Multinational Interception Force in the Arabian/Persian Gulf.<sup>69</sup>

As such, the NZDF is well skilled in respect for human rights and rule of law operations.

Peace operations are not implicitly “easier” than other operations, both on the physical safety level and on the complexity level. One example on the physical safety level involves a New Zealand observer, who, during his service in Sarajevo, was shot at 10 times and had his vehicle hit twice.<sup>70</sup> On the complexity level, peace operations seek to do what some may consider the toughest work of all. According to Crawford, “International peace-support operations are established to deal with complex and difficult situations, which often involve many different players with differing agendas”.<sup>71</sup> Such operations may contain or avert conflict and save lives.<sup>72</sup>

## **Self-Leadership**

Self-leadership may contribute to NZDF respect for human rights and the rule of law on operations.

The NZDF Leadership Framework has seven possible levels of leadership. The

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<sup>69</sup> Crawford (1996), no page number.

<sup>70</sup> Crawford (1996), p. 60.

<sup>71</sup> Crawford (1996), p. 78.

<sup>72</sup> Ibid.

leadership expected of all NZDF members is the first level of leadership. The first level of leadership is “Lead Self”; that is, self-leadership.<sup>73</sup> Part of self-leadership, according to the NZDF Leadership Framework, is the ability to control emotion, make judgment based on NZDF values, and demonstrate supportive behaviour towards colleagues and team members. Every NZDF member must have self-leadership. Self-leadership enables the self-discipline, the judgment, and the empathy necessary to respect human rights and the rule of law in operations regardless of how “tough” it gets. Members are evaluated on their self-leadership abilities. For example, the generic evaluation criteria for performance reports evaluate the individual’s ability to maintain self-discipline. In addition, to meet standards, a NZDF member must “respect and understand gender, racial, and cultural differences”. Another area in which NZDF members are evaluated is in the area of building trust which includes adhering to codes of conduct and ethical principles. As such, the member is evaluated on the ability to “control temper and avoid taking out personal frustrations on others, even when provoked”, consistently treating others with dignity and fairness, respecting differences and perspectives, and seeking “to develop a better understanding of others from different backgrounds and cultures and interact(ing) well with them”. The subsequent levels of leadership, all the way to the Chief of the Defence Force, build on self-leadership.

## **New Zealand Culture**

Often the response as to why the NZDF respects human rights and the rule of law on deployment is “That is just how New Zealanders are”.

Part of “that’s just how we are” revolves around geography.<sup>74</sup> Because New Zealand is geographically isolated, the belief is New Zealanders have a more independent view and are discretionary in what they commit to. Many New Zealanders believe an important part of forming and being a New Zealander is the “OE” (Overseas Experience). As one New Zealander states, “That is about learning about the world. Those in the military similarly engage in a military OE”. New Zealanders I talked with believe they have no external security threats. However, given the trade reality of being an exporting nation, New Zealanders perceive the need to keep the sea lines of communication open. Many New Zealanders I spoke with believe they participate in international operations because they consider themselves to be international citizens. As such, they care about collective security.

In explaining New Zealand culture, one NZDF member states, “Our history of settlement is a greater respect to the Māori than that which was afforded to the Hottentot of South Africa and the Aborigines of Australia”.

In 1975, Whina Cooper led the Great Māori Land March for Justice in New Zealand in which many New Zealanders marched seven hundred miles at a pace faster than

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<sup>73</sup> Crucial in today’s reality of the “strategic private” whose actions, positive or negative, can have a greater impact than that of generals and admirals.

<sup>74</sup> “The geographical facts in New Zealand are we have no strategic resources, we’re surrounded by the world’s largest moat, we’re ‘on the road to nowhere’, and we would be difficult to subdue, having scattered centres of population and difficult terrain for those unfamiliar with it”. Gregory (1983), p. 26.

that of the New Zealand infantry on long route marches.<sup>75</sup> This march for human rights and rule of law was part of the renaissance of Māori culture. New Zealand culture arguably began with concern for human rights and the rule of law with the Treaty of Waitangi in which the British Queen promised to respect Māori human rights and rule of law.<sup>76</sup> Such promises of respect were not always fulfilled. The present day Waitangi Tribunal is used to address such issues. New Zealand's culture reflects the balancing of historical and present day tensions.<sup>77</sup>

One international perception is New Zealand has one of the lowest levels of corruption<sup>78</sup> in the world.<sup>79</sup> According to one New Zealander, "I think that equals integrity. That is honesty to yourself. You do not stand by and let things happen". Another international perception is New Zealand ranks among the top five of countries polled with respect to the freedom its news media enjoys from censorship and political interference.<sup>80</sup> Media can bring the transparency needed to dissuade corruption.

New Zealand, according to Brigadier Riordan, the Director General of Defence Legal Services, is at the forefront of international law and human rights; that is, New Zealand is "one of the signingest" countries of international agreements in the world.<sup>81</sup> The "signingest" tendency is not restricted to one particular political party. For example, the Labour Party signed the Cluster Munition Convention and the National Party ratified the Convention. New Zealand, under the National Government, accepted the jurisdiction of the International Criminal Court (ICC).

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<sup>75</sup> Hackett Fischer (2012), pp. 282-283.

<sup>76</sup> In Article 3 of the English version of the Waitangi Treaty, the Queen grants royal protection to the Māori and imparts to them all the rights and privileges of British subjects. In Article 2 of the English version of the Waitangi Treaty, the Queen "guarantees" the Māori the possession of their properties for as long as they wish to retain them. Treaty of Waitangi Poster, National Archives, New Zealand.

<sup>77</sup> According to Ambassador Tony Fautua, the New Zealand ambassador to Timor-Leste, because New Zealand works to address and rectify issues at home, it has the "ability and the integrity" to "walk the talk" on deployment. An example Ambassador Fautua gives is the New Zealand apology to Samoa. The apology enabled both countries to progress in their relationship. He believes, because New Zealand has the largest population of Pacific Islander immigrants, New Zealanders grow up in a society familiar with other cultures. This may impact the NZDF ability to be successful on deployment. Interview of Ambassador Fautua 2012.

<sup>78</sup> In addressing the linkage between corruption and the rule of law, NZDF Commodore Wayne Burroughs recounts a Sri Lanka police chief telling him the formula for corruption is "C=M-A". Corruption ("C") occurs when there is monopoly ("M") of force without accountability ("A"). Rule of law, according to Sir Kenneth Keith, is a non-corrupt system.

<sup>79</sup> New Zealand ranks at the top of the list, along with Denmark and Singapore, in the (Lack of) Corruption Perception Index 2010 Results, as being perceived to be one of the least corrupt perceived nations in the world. While New Zealand has signed the Anti-Corruption Treaty, according to MFAT, New Zealand has not ratified it.

If a military, through the wishes of its government, is supporting a corrupt system, as may be argued in many of the world's conflicts in which we engage, are we supporting and respecting the rule of law? If we are supporting corrupt governments, are we supporting the rule of law or are we upholding corruptness through military might? Or do we need to redefine "corruptness" based on cultural understandings. For example, according to one member of the NZDF, what we may perceive as "corrupt" may simply be an individual doing what is best for themselves and their family because loyalty to self and family (self-preservation) is valued higher than loyalty to country.

<sup>80</sup> Mackies (1999), p. 14, citing a 1994 Freedom House finding.

<sup>81</sup> That is, according to Brigadier Riordan, "New Zealand signs up to a significant number of treaties".

One of New Zealand's most defining characteristics, according to Brigadier Riordan, is a Law of Armed Conflict (LOAC) issue. That is, New Zealand's anti-nuclear stance. Brigadier Riordan asserts it is a LOAC issue because it concerns the lawful use of a weapon. New Zealand's anti-nuclear stance impacted not only the relationship with the US.

By 1990, New Zealanders were so militantly antinuclear that they found themselves in a bizarre new conflict, this time with Great Britain. Queen Elizabeth II planned a visit for the 150<sup>th</sup> anniversary of the Waitangi Treaty, aboard her royal yacht Britannia, officially a commissioned ship in the Royal Navy. New Zealand law required of every naval vessel of any nation a formal guarantee that the ship was not carrying a nuclear weapon. The Royal Navy had the same policy as the U.S. Navy and refused to confirm or deny the presence or absence of nuclear weapons aboard the Queen's yacht. Prime Minister Lange refused entry, and Britannia steered clear of New Zealand waters.<sup>82</sup>

And thus illustrating New Zealand's belief that no one, including the Queen, is above the law.

## **NZDF Culture**

A response as to why NZDF members don't violate human rights and the rule of law on operations is, "We are Kiwis. We don't do bad stuff".<sup>83</sup>

According to Major General Tim Keating, Chief of the New Zealand Army,

Human rights violations are a slippery slope. Al Qaeda wants us to go down that slippery slope. They want to draw us down it. Legitimacy is following the rule of law. It is in my DNA that 'we would never do that'. We treat prisoners right, we treat belligerents right. By doing so, we win at the end of the day. This is part of my upbringing. The aim of terrorism is to bring you down. Committing human rights violations taints you.

NZDF operational role models include Le Quesnoy, France, a walled medieval city, where, in 1918, a commander of the New Zealand Division, using ladders and the principle of surprise, saved the civilian population from becoming "collateral damage". A NZDF Army poster regarding the core value of "Integrity" displays the Le Quesnoy operation.

Even Nicky Hager, one of New Zealand's most critical journalists, describes New Zealand as having core values of respect for human rights and a belief in the rule of law.<sup>84</sup> According to Hager's interview with a NZDF squadron commander, "New Zealanders have a special ability to deploy and use our secret weapon: common sense and common courtesy".<sup>85,86</sup>

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<sup>82</sup> Hackett Fischer (2012), p. 365.

<sup>83</sup> As one NZDF commander states regarding this quote, "We're not perfect – but this is a good mindset!"

<sup>84</sup> Hager (2011), p. 187.

<sup>85</sup> Hager (2011), p. 65.

## The Chief of the Defence Force on ANZAC Day 2012 maintains

we come along to often dangerous places without a hidden agenda. New Zealand has always deployed its forces for the greater good, to do the right thing, not for self interest at the expense of those people we are helping. By our actions and by our ability to relate one on one with those people, we very quickly gain the trust of local people and can deal very well with social differences, ethnic differences, without any kind of inference of treating them as second-class citizens. I think we can look at someone who is poor or uneducated and not treat them like they are lesser citizens than us. I think that is a gift we have. We're not there to push our values but we live our values. We also go into dangerous places. We are able to cope professionally and personally with that. The places where we are deployed are often ravaged and destroyed by years if not decades of social destruction, warfare and rivalries so we have to help the people pick up their lives and recreate the fabric of their country.<sup>87</sup>

NZDF Borneo and Vietnam Veteran John Masters opined about the NZDF, "Their soldierly aggression could be quickly overcome by their essential humanity and Kiwi sense of decency. Yet they clearly work to important and valuable effect within a system in which they are well-trained and which they accept as vital to the cause".<sup>88</sup> Prior to Borneo, it had not occurred to John Masters "that others could look at him and his New Zealandness and see skills they needed such as ... his treatment of others as equals...".<sup>89</sup>

Unlike certain militaries, the NZDF has the opportunity to obtain and retain the wisdom and modelling of its older military members.<sup>90</sup> This is an attribute the NZDF should revel in. New Zealand's human rights legislation results in no age barrier to service. In 2011, the NZDF deployed a 64 year old military member to the PRT in Afghanistan for five months.<sup>91</sup> Max Boot, the Jeanne J. Kirkpatrick Senior Fellow for National Security Studies, argues for age maturity in stability operations.<sup>92</sup> He argues the aggressiveness of youth can backfire when facing the challenge of knowing when to shoot and when not to shoot.<sup>93</sup>

While NZDF members pride themselves on cultural sensitivity, others may not see

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<sup>86</sup> Common sense and common courtesy in most instances preclude a punitive approach. As one of New Zealand's greatest heroes, Sir Edmund Hillary, posits in another context, "I have yet to see the occasion when physical punishment achieved a really worthwhile result even under the best of motivation. Maybe there are occasions when as a last resort it is better than nothing, but generally it indicates an inability to handle the problem by more constructive means". Hillary (1975), p. 20.

<sup>87</sup> Email by from the Office of Chief of Defence Force, Message from CDF: A Defence Force and nation united this Anzac Day, Tuesday 24 April 2012, 12:26, copy in author archive.

<sup>88</sup> Marriott (2009), p. 57.

<sup>89</sup> Marriott (2009), p. 57.

<sup>90</sup> It also has as a strength impressive younger people including young enlisted and officer recruits I spoke with at Waiouru and young commanders such as a 23-year-old I met on operation in Timor-Leste.

<sup>91</sup> The NZDF also currently has a 60 year old military member deployed to Timor-Leste as well as a mid-50s military member who entered the military five years ago after completing a first career.

<sup>92</sup> Boot (2012).

<sup>93</sup> Ibid.

them this way. “The Fijians and ni-Vanuatu found some Australian and New Zealand military personnel vulgar, hedonistic and lacking in cultural sensitivity. New Zealand and most ADF (Australian Defence Force) personnel tended to treat them as interpreters and appeared condescending of their lack of military experience and skills”.<sup>94</sup>

The NZDF prides itself on “mateship”. As part of mateship, it has a *policy* of “zero tolerance” of sexual harassment as “it goes against the core values of our defence force”.<sup>95</sup> Sexual harassment violates, at minimum, the NZDF’s human rights obligations under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) to “refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation”.<sup>96</sup> Yet, military members, anecdotally and from personal observation, are reluctant to speak out against sexual harassment in the NZDF given the perception the NZDF is ineffective in addressing it. This has implications for failure in operations.<sup>97</sup> In addition, it brings discredit to the NZDF and what the NZDF attempts to accomplish in the wider world.

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<sup>94</sup> Breen (2001), ‘Coordinating Monitoring and Defence Support’, p. 44.

<sup>95</sup> Commander Shaun Fogerty, quoted by van der Stoep (6 April 2008).

<sup>96</sup> Convention on the Elimination of All Forms of Discrimination Against Women, Article 2(d).

<sup>97</sup> Not the least being the proven adverse health implications . Murdoch and others (2006), p. S7.



## NEW ZEALAND'S RESPECT FOR HUMAN RIGHTS AND RULE OF LAW IN MILITARY OPERATIONS

In analysing New Zealand's respect for human rights and rule of law from a military operation perspective, I have elected to limit this paper's focus to a sampling of conflicts in which members of the NZDF who participated still are members of the NZDF. It is from those who are still active in the NZDF that today's NZDF is shaped. It is these individuals who can give first hand accounts of the NZDF proactively actualising respect for human rights and the rule of law to achieve operational success.

The following discusses Bosnia, Bougainville, Timor-Leste and Afghanistan.<sup>98</sup>

### Bosnia

Major General David Gawn, now the NZDF Joint Forces Commander, was a Major when he deployed to Bosnia. Gawn focused on children.<sup>99</sup> According to Gawn, "If the parents trust you with their kids, they trust you". Gawn believed, "If people felt they had something to lose, they were less likely to fight". The minefields were claiming the lives of seven to nine people per week. The shooting had ceased. The Muslims were encircled by the Croats who were encircled by the Muslims who were encircled by the Serbs. Thus freedom of movement<sup>100</sup> – the ability to go to school<sup>101</sup> – was impacted. Several NGOs (non-governmental organisations) vehicles had killed children in front of the schools. There were 124 NGOs in the area. They would drive fast through the school zones because they were scared. Gawn's people installed speed bumps in front of the schools to protect the children.<sup>102</sup> They conducted mine awareness programmes for children.<sup>103</sup> The mines did not distinguish between Muslim and Croat. Mines killed both. Because the mine awareness programmes did not distinguish between Muslim and Croat schools, they resulted in the Croats and Muslims talking with each other.<sup>104</sup> Eventually both Muslim and Croat mine awareness instructors taught in the schools. Gawn wrote a play about a chicken pecking and getting blown up in a field.<sup>105</sup> They developed a comic strip.<sup>106</sup> They had

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<sup>98</sup> For some conflicts I had the luxury of obtaining more information; for others, a lesser quantity of information. Thus, for those whose sense of symmetry is disturbed by the disparate lengths of the conflicts discussed, the intent here is not disparate treatment of operations but to highlight examples of respect for human rights and the rule of law in conflict regardless of the conflict. These stories need to be preserved in writing for those who experienced them, for those in today's conflicts, and for those preparing for tomorrow's conflicts.

<sup>99</sup> Convention on the Rights of the Child.

<sup>100</sup> The right to freedom of movement, Article 5(b), International Covenant on the Elimination of All Forms of Racial Discrimination (CERD). The International Covenant on the Elimination of All Forms of Racial Discrimination defines "racial" to include race, colour, descent, or national or ethnic origin, Article 1(1), International Covenant on the Elimination of All Forms of Racial Discrimination.

<sup>101</sup> The right of the child to education, Article 28(1), Convention on the Rights of the Child.

<sup>102</sup> The obligation to take all feasible measures to ensure protection and care of children who are affected by armed conflict, Article 38(4), Convention on the Rights of the Child.

<sup>103</sup> The obligation to take all feasible measures to ensure protection and care of children who are affected by armed conflict, Article 38(4), Convention on the Rights of the Child.

<sup>104</sup> The obligation to encourage elimination of barriers between races, Article 2(e), International Covenant on the Elimination of All Forms of Racial Discrimination.

<sup>105</sup> Freedom to receive information in the form of art, Article 19(2), International Covenant on Civil

a newspaper, with a children's section, which talked about what they were doing.<sup>107</sup> They got timeslots on the radio.<sup>108</sup> Gawn and his people, before they distributed holiday gifts sent by New Zealanders to the Bosnian children, opened one. It had a bookmark with a Christian prayer in it. Because these gifts were being distributed to Christian and Muslim children alike, Gawn and his team had to ensure none of the gifts contained any religious preferences.<sup>109</sup> They unwrapped all the presents to take out Christian bookmarks before they had Santa throwing them to the children from the APC. By six months they got commanders to inspect troops on the other side. While only once was there a scuffle stage, there were a number of quite intense times. Gawn did not use a confrontational style such as show-downs with tank on tank. He used other avenues. For example, needing to open up an area where no one had been, and believing music breaks down barriers, his people hosted a concert with a Māori cultural group in an area where no one had been.

In Bosnia, the NZDF worked with the community on both sides. The NZDF did not give pejorative nicknames to ethnic groups.<sup>110</sup> It did not have groupthink such as driving through certain neighbourhoods at high speeds simply because one could get away with it. According to one NZDF member, "So, we could either be stupid about it or take the long-term view. We asked, 'How do we leave here with some respect?'"

## **Timor-Leste<sup>111</sup>**

*"I LOVE YOU MILITARY NEW ZEALAND TIMOR LESTE"*.<sup>112</sup> Graffiti on a wall in Timor-Leste.

New Zealand is active in training the Timorese Defence and Security Forces. Part of that training, according to a senior New Zealand military representative, is "to live by a similar ethos ... values to the NZDF and more importantly, to understand, represent and protect human rights". It may have made a difference. The UNMIT CMLO (UN Integrated Mission in Timor-Leste Chief Military Liaison Officer) developed a series of training packages "that do just that" with the "litmus test" being the "2012 elections where the F-FDTL (Falintil-Forças de Defesa de Timor Leste) performed superbly, despite some onlookers' initial reservations".

After 24 July 2000, when a militia that had crossed the border into Timor-Leste killed New Zealander Len Manning and Nepalese Devi Ram Jaisi during a firefight, according to the New Zealand commander, "there was no time to grieve ... we were determined to aggressively protect the local population".<sup>113</sup> To protect the local

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and Political Rights.

<sup>106</sup> Freedom to receive information in the form of art, Article 19(2), International Covenant on Civil and Political Rights.

<sup>107</sup> Freedom to receive information, Article 19(2), International Covenant on Civil and Political Rights.

<sup>108</sup> Freedom to receive information, Article 19(2), International Covenant on Civil and Political Rights.

<sup>109</sup> Respect with regard to religion, Article 18, International Covenant on Civil and Political Rights.

<sup>110</sup> The obligation to engage in no act or practice of racial discrimination, Article 2(1)(a), and the obligation to not sponsor, defend, or support racial discrimination by any persons or organisations, Article 2(1)(b), International Convention on the Elimination of All Forms of Racial Discrimination.

<sup>111</sup> Also referred to as East Timor.

<sup>112</sup> Wright (2007), photo on back cover of book.

<sup>113</sup> Dransfield (2012).

population, “we, with the help of the Timorese, removed these groups one by one. After three long and exhausting months ... they had returned to West Timor, knowing that they would never succeed in harming innocent civilians again. ... they never returned as armed Militia and many are now living in their sucos (villages) in Timor Leste, having gone through a reconciliation process”.<sup>114</sup> The New Zealand commander found his soldiers “professional, respectful of the local communities who were understandably scared, and continued to work in a determined way to protect them”.<sup>115</sup> Today when he talks with “locals” of Timor-Leste about that time, he asks them if they were scared. They answer they initially were, “but when the New Zealand soldiers arrived we felt safe”.<sup>116</sup> He found “they trusted us to protect them”.<sup>117</sup>

Other incidents in Timor-Leste demonstrate New Zealand’s respect for human rights and the rule of law in its constructive approach to issue resolution.

In one, a Chief of Staff on the mission recounts, because they could not identify a threat, they didn’t fire back. He recounts how they changed the focus by telling the Timorese running around to get down.

In another, a NZDF member recounts a meeting on the border for forgiveness issues. The head, Sergio Vieira de Mello (a charismatic Brazilian who later was killed by a bomb blast in the UN mission in Baghdad), said the day prior to the meeting, “Tomorrow is going to be a disaster. Tell them to do it like the New Zealanders. You need to tone it down”. This was in response to the helicopters that were going to be flown during the border talks. Sergio gave the order, “You will turn it down, move everything out of here”. Not having the helicopters shaped the environment. The meeting worked.

In a third, a former Commander of the Joint Forces in Timor-Leste recounts how one has to do something constructive, something to divert the young people.<sup>118</sup> The mothers were worried about their sons getting into gangs. He worked on schools<sup>119</sup> and getting fresh water<sup>120</sup> to the villages. He encouraged free speech and had a newspaper for the locals.

And when NZDF personnel behaviour was inappropriate, the NZDF “pulled people home from East Timor because”, according to Major General Gawn, “they were at odds with ethics/morals”. Major General Gawn went on to add, “You can have something that is okay within the ROE parameter but sends the wrong message to people. One individual was court-martialled with a long prison sentence”.

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<sup>114</sup> Ibid.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

<sup>118</sup> Under the Convention on the Rights of the Child, a child is defined as being under the age of eighteen years unless under the law applicable to the child the majority is attained earlier, Article 1.

<sup>119</sup> The right of the child to education, Article 28(1), Convention on the Rights of the Child. The right of everyone to an education, Article 13(1), International Covenant on Economic, Social, and Cultural

<sup>120</sup> Right to the continuous improvement of living conditions with the States Parties to take appropriate steps to ensure realization of this right, Article 11(1), International Covenant on Economic, Social, and Cultural Rights.

## Bougainville

If luck is preparation meeting opportunity, the success of NZDF peace operations in Bougainville was pure luck.<sup>121</sup> Brigadier Roger Mortlock<sup>122</sup> oversaw an NZDF entity in which he could direct study and prepare plans for whatever he deemed noteworthy. Thus six months before Bougainville,<sup>123</sup> he directed the study Papua New Guinea. He understood the culture as a result of that study and planning.

The NZDF went in to Bougainville unarmed. Brigadier Mortlock told the press he was going in with guitars. He did so to deflect attention from his strategy. According to Brigadier Mortlock, that the higher the status of the chief, the shorter the weapon the chief carries. That is a symbol of strength. Hence, going in without weapons, was an ultimate symbol of strength. Brigadier Mortlock wanted, when the NZDF left, that peace remained.

Part of the culture of Bougainville is matrilineal<sup>124</sup> and Catholic. Because Brigadier Mortlock understood the culture, he had a two-prong approach: gender<sup>125</sup> and religion.

The first prong was the matrilineal culture. Women had power because they owned the land. The land passed matrilineally. The rebels had corrupted this through intimidation resulting in the uncles taking control of the land. Brigadier Mortlock realised he needed to bring power back to the women. He then summoned a NZDF female officer, Lieutenant Colonel Janet Castell. He directed her to bring the two opposing female leaders together and then go from village to village to spread the peace process. In Bougainville, about 20-30% of the force was female with a number in command jobs. Prior peace accords had been broken time and again. According to a NZDF publication, “the women were instrumental in encouraging and promoting an end to the conflict, and were encouraged by the presence of truce monitors”.<sup>126</sup> One quote in the official history states the Bougainvillean women “saw how our (NZDF) men and women worked together, and I think that helped increase their confidence

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<sup>121</sup> Part of that “luck” was the political groundbreaking by now Member of Parliament (MP) John Hayes who started the groundbreaking as the High Commissioner in Papua New Guinea. Through the years, he engendered the trust of the various parties to the conflict. This resulted in peace agreements and the enforcement of such agreements. Two-hour interview with John Hayes MP in June 2012.

<sup>122</sup> Now retired, Brigadier Mortlock had a haunting past that came to light when he was being considered for a top NZDF position after Bougainville. Brigadier Mortlock, through his own admission, covered up a friendly fire incident that killed a NZDF member during the Vietnam War.

<sup>123</sup> According to Brigadier Mortlock, when issues began heating up with regard to Bougainville, he was at a cocktail party. He overheard an individual saying there was nothing New Zealand could do about Bougainville. He interjected and said the NZDF could. The next day he was summoned into a superior’s office at the Defence House. He was asked about the conversation. He was asked if the NZDF really could undertake the operation. When he responded yes, the NZDF committed.

<sup>124</sup> Matrilineal is not matriarchal; that is, matrilineal is when property passes from mother to daughter and not to male offspring. Part of New Zealand culture is the opposite. The New Zealand Pākehā farming community commonly passes property to the eldest male offspring.

<sup>125</sup> Article 5 of The Convention on the Elimination of All Forms of Discrimination Against Women imposes the obligation to take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and other practices which are based on the idea of inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

<sup>126</sup> *The Path to Peace: the New Zealand Defence Force in Bougainville, 1990-2003* (2003), p. 10 of unnumbered pages.

and feel safe about getting together and voicing their opinions”.<sup>127</sup> Another quote in the official history states the Bougainvillean women “knew they had to reconcile the differences that had originally led to the conflict...”<sup>128</sup>

The second prong was religion. Brigadier Mortlock knew he had to dispel rumours of the enemy’s strength, planned attacks, and the like. He needed to recreate community and recreate a fundamental cultural identity and strength, create safety, public dialogue and entertainment. To do so, he told the NZDF chaplain(s) to get the churches reopened.<sup>129</sup> The churches had been closed for a decade because of the violence. They advertised the churches would be open the following Sunday. They got local priests to come out of hiding. He ensured chaplains had priority for everything including the helicopters. The clergy and the NZDF then used the pulpits to dispel rumours.

One of the first team commanders states the only way to succeed was complete trust by the locals. The local elders asked “Why should I trust you? You will be gone in several months. You need to tell the village why we should trust you”. This commander then told the village, “My government, I connect with you as a human, I am a father”. This then required the team going to the villages, unarmed, talking about the reconciliation process. They went swimming in the waterholes with the local children. They played rugby with the local children at the end of the work day. If the local elders permitted the team members to play with their children, the team members had the trust. According to this member, “You need to show ‘we see you as people’”.

## **Afghanistan**

The NZDF missions in Afghanistan included the SAS mission<sup>130</sup> and the PRT mission.

### **Afghanistan SAS**

Among other operations,<sup>131</sup> the SAS was in Afghanistan to conduct rule of law operations; that is, “partner-based/evidence-based operations” with the Afghan Crisis Response Unit (CRU).

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<sup>127</sup> Ibid.

<sup>128</sup> Ibid, unattributed quote.

<sup>129</sup> Questions as to how he protected the local population going to church, how many churches opened, whether the rebels tried to hinder as they had in the past through intimidation or worse should be examined by the NZDF for future operations.

<sup>130</sup> The SAS mission pulled out of Afghanistan in March/April 2012. According to Member of Parliament Iain Lees-Galloway, the Labour government in 2005 elected to no longer send the SAS into Afghanistan because of its belief “the Karzai government was not fulfilling its governmental role - corruption was too deep and there were concerns about human rights”. The subsequent government reinstated the SAS mission in Afghanistan.

<sup>131</sup> Hager (2011), pp. 237-238, asserts, “SAS soldiers, including Willie Apiata, were photographed by international media in January 2010 leaving a bloody battle with Taliban insurgents in downtown Kabul” and, in August 2011, “the first Afghanistan-led SAS member, Corporal Doug Grant, lost his life during a battle with Afghan insurgents at the British Council compound in Kabul”.

As one NZDF member states, “It is in our best interest to follow rule of law because we want to go outside of the compound. The only way we get out of the compound is if Afghanistan releases partner forces. The only way they do that is if the evidence is sufficient. Intelligence alone will not result in the release of partner forces”. NZDF intelligence had to be more than intelligence. It had to be evidence which could lead to search warrants and arrest. It had to be evidence that could convict in court. One NZDF member asserts, “If it can’t, then such insurgents are not pursued because they will simply be let out back on the streets”. One NZDF member states, “My first tour in Afghanistan, only five per cent of those arrested resulted in convictions. Going out on non-evidence based operations is a complete waste of time, scares children, and impacts credibility. We want to be impact players”.

Conducting evidence-based operations allowed the NZDF to be “impact players”. As a former SAS commander states,

Every action has an equal and opposite reaction. A village starts to change if you take the bad apples out. That is what we are doing in Afghanistan; to help bring people to trial. You need to get the ‘bad guys’ off the chessboard; that is, arrest them and make an example through rule of law in the courts. Blowing away the ‘bad guys’ is not the first option.

One of the SAS metrics was the percentage of missions with no shots fired. The SAS accomplished 90% to 97% of their missions with no shots fired. For example, in operations where the Afghan police were trying to execute arrest warrants including a “Bomber in Bagram”, the SAS assisted in the capture of him; they did not kill him. A former SAS commander asserts, “We were able to do so because of our skills and confidence in our skills. We were able to bring him to court”.

Rule of law issues raise tough questions. According to one NZDF member who twice instructed a course for police on high end operations, the Afghan police students would ask why they needed to go out in “the middle of the night to get some poor farmer out of bed”.<sup>132</sup> The police explained they could not go back to that village because they had “harassed” a poor farmer. The police would then discuss the corruptness and the buying of one’s way out of a situation. The Afghans did not want to be accused of arresting the wrong people. They understood “if you are ripping dads away from their wives and kids, you are actually perpetuating violence”. According to a NZDF member, “the Crisis Response Unit of the Afghan Police was more polite to those arrested than typical military training provides for”.

Human rights issues raise tough questions.

Michael Ratner, the president of the New York-based Center for Constitutional Rights, asserts the NZDF SAS in Afghanistan engaged in war crimes because it handed over captured individuals to the US.<sup>133</sup> According to Phil Goff, when he was Minister of Defence, New Zealand had “made clear” to the US regarding New Zealand’s “expectation that all detainees would be treated humanely and in

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<sup>132</sup> According to one former SAS commander, “We conduct night operations because it presents a dilemma for the subject of the warrant because their families are there. The end in mind was to reduce violence”.

<sup>133</sup> Stephenson (2009).

accordance with international law” and that “no person who has been held ... in New Zealand custody is currently in the hands of US authorities”.<sup>134</sup>

Amnesty International questions whether New Zealand meets its human rights obligations with regard to detainees arrested during joint operations with the Afghan CRU stating

if a state transfers someone to the effective control of another state where there are substantial grounds to believe he or she would face a real risk of torture or ill-treatment, they would be violating their legal obligations under the Geneva Conventions and Protocols, the UN Convention Against Torture, the International Covenant on Civil and Political Rights or customary international law.<sup>135</sup>

The then Minister of Defence, Hon Dr Wayne Mapp, publicly responded that NZDF had no lawful authority to interfere with the sovereign right of Afghanistan to arrest its own citizens for offences against its own law.<sup>136</sup> According to the Director-General Defence Legal Services:

This did not amount to a transfer as described in these international instruments. However, where NZDF detains any person, the NZDF directive on detainee handling requires that the person not be handed over to any other force, without the authority of CDF. No transfer will occur when there are reasonable grounds to believe that the person will be subjected to torture or inhumane treatment. The UN report on mistreatment of prisoners in Afghan detention facilities emphasised the need for partnering forces to mentor and encourage Afghan forces to comply with human rights obligations. Minister Mapp said this is what the NZ SAS were doing.

It is unclear whether Nicky Hager alleges human rights violations with regard to an SAS Kabul Christmas Eve 2010 operation.<sup>137</sup> It is not clear at this time, given the classified status of the SAS operation, what the facts and the ROEs were.

## **Afghanistan PRT**

Air Commodore Steve Moore, the current Air Component Commander for the NZDF, was a PRT (Provincial Reconstruction Team) commander in Afghanistan. According to Air Commodore Moore,

I think we should have been named the ‘Provincial Security Team’, not the PRT. We made it so to allow the locals to get on with their lives and prosper without fear. Therefore we had security teams out and about. We assigned patrols to live out in the districts”. Commodore Moore asserts, “Because of the respect shown to locals, they reciprocated. They were our force protection (the locals) because they would tell us when the Taliban were in the area”. An

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<sup>134</sup> 16 August 2006 Phil Goff Letter.

<sup>135</sup> Amnesty International Press Release (2 April 2012).

<sup>136</sup> New Zealand Government Press Release (11 October 2011).

<sup>137</sup> Hager (2011), pp. 237-238.

example of the trust and respect is, once when one of the PRT young soldiers lost his rifle, several hours later a family brought it back to the PRT.

In Afghanistan, according to Commodore Moore, the PRT accomplished more through women than through men; that is, the males were there for prestige and the women were concerned with the practicalities. According to Commodore Moore, the women gave better advice. This was possible due to female soldiers talking with female Afghans. For example, a female medic talked with women about a request made regarding electricity. She learned the reason for the request was to work the women and children for longer hours making rugs.<sup>138</sup> Therefore the PRT did not give the funding for the electricity.

According to another former NZDF PRT commander, “Whilst we have less than 20% women, unlike many armies our women are deployed with and as part of our combat troops. Accordingly, we are able to empathise with all components of the society we are deployed to protect”. His female medics were embedded in each of the patrols and thus “were able to strike a chord with the children, which in turn broke down a lot of perceptions of what we were there to do and our attitude to the Afghan people”. He encountered the perception, when speaking with various groups, particularly ex-Taliban leaders, “they thought that we were there to arrest them. However, through meetings, interactive patrol, joint projects that involved us working alongside the Afghans we were able to communicate that we were there to not only protect them but help them reconstruct their country”. His female medics were also able to work with the women in the Afghan hospitals, “thereby breaking down other barriers of communication”.

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<sup>138</sup> The right of the child to be protected from economic exploitation, Article 32(1), Convention on the Rights of the Child. Children and young persons should be protected from economic and social protection, Article 10(3), International Covenant on Economic, Social, and Cultural Rights. The right to reasonable limitation of working hours, Article 7(d), International Covenant on Economic, Social, and Cultural Rights.



## **CONCLUSION**

I found a New Zealand that offers hope of winning peace through respect for human rights and the rule of law.

New Zealand's respect for human rights and the rule of law in military operations is one of its great, unacknowledged strengths. Proactive respect for human rights and the rule of law enable its success.

While not flawless and with the complications of contradictions, New Zealand can offer the world the beginnings of a blueprint. While certain of the elements of the blueprint may not be transferable, others are.

The implementation of the following recommendations, on the policy as well as the practitioner level, will enhance New Zealand's ability to make a positive difference in the world.



## RECOMMENDATIONS

1. Further ingrain the purpose for military force, respect for human rights, and respect for rule of law in tactical, operational, and strategic military thinking, training, and actions.<sup>139</sup>
2. Include language in the *Defence White Paper* that New Zealand has, at its core, a self-identity based on respect for human rights and rule of law.
3. Eliminate the push for “e-learning” as a viable substitute for face-to-face training and interaction.<sup>140</sup> As stated by one New Zealand commander, “This subject has to be alive, it needs commanders to relate stories that demonstrate what human rights is about, when and where abuses have been committed, and that our duty is to protect each and every civilian and their human rights”. E-learning should be supporting, not replacing, face-to-face training. The *Defence White Paper 2010* asserts a “major focus” is to reduce training time.<sup>141</sup> It proposes to increase e-learning with “as much training as possible out of the classroom”.<sup>142</sup> The White Paper asserts the more than \$150 million spent per year on training results in excess capacity of about ten per cent.<sup>143</sup> Reducing face-to-face training places the NZDF in grave peril. Without such face-to-face training, the nuances of identifying individuals who should not be deployed, given their lack of respect for human rights and the rule of law, will be lost. If e-learning is substituted for face-to-face learning, individuals disrespecting human rights cannot be identified. They might then be sent on deployment, commit human rights violations, and thereby jeopardize an entire mission. It is not “value for money” to risk jeopardising New Zealand.
4. Maintain constant vigilance against disrespect for human rights and rule of law. As one NZDF psychologist asserts, referring to *Zimbardo’s* work,<sup>144</sup> “It is dangerous to assume we are immune. It is not about bad people, it is about bad systems”.

Constant vigilance should occur formally and informally through frequent interactions with and among the troops. Recommend serious conversations, formally and

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<sup>139</sup> I respect those whose regard for human rights and the rule of law cause them to proactively provide more than the minimum. Such impacts the conduct of operations. A US Marine example is provided by Lieutenant Colonel Shaw, a US JAG (legal) officer, who, regarding his deployment, states, “My moral compass led me to believe that the Marines could provide better levels of care than the law required. I briefed my commander on both the legal requirements and my aspirational goals. He, in turn, ordered a level of care for detainees that far exceeded the legal requirements and the CAT (Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment)”. Shaw (2009), p. 295.

<sup>140</sup> Even Steve Jobs, a “denizen of the digital world”, advocated engaging face-to-face. Isaacson (2012), p. 100.

<sup>141</sup> *Defence White Paper 2010*, p. 61, para 6.25.

<sup>142</sup> *Defence White Paper 2010*, p. 61, para 6.26.

<sup>143</sup> *Defence White Paper 2010*, p. 60, para 6.23.

<sup>144</sup> Zimbardo (2007). Zimbardo conducted the Stanford Prison Experiment in 1971. In *The Lucifer Effect: How Good People Turn Evil*, he addresses his life-long study of “evil” to include Abu Ghraib. He served as a defence witness in a court-martial involving one of the Abu Ghraib guards. He argues it is “the system” - “the bad barrel”, rather than the “bad apple”, p. 331. He also argues there is “always a minority who resisted, dissented, and disobeyed”, p. 487, in “cruel acts against innocent others”, p. 486. It is this “ability to resist powerful situational forces that so readily entrap most people”, p. 487, which militaries must have.

informally, with troops, regarding why violations occur and what troops can do to prevent violations.

Formal discussions should happen on a routine basis, using the works of those who study why such violations occur, to enhance understanding and vigilance about attitudes which can lead to human rights violations.

An analysis of the recent US Iraq and Afghanistan incidents of the “kill team”, the Haditha killings, the canal killings, the Samarra murders, the Tigris River bridge incident, the Mahmudiya murders and rape, Abu Ghraib, and Bagram detainee abuse, identifies nine psychological and emotional constructs which enabled such violations of human rights and the rule of law. These nine constructs are “authorisation”, “transfer of responsibility”, “routinisation”, “dehumanisation / disqualification”, “moral disengagement”, “bracketed morality”, “misplaced loyalty”, “peer pressure”, and “groupthink”.<sup>145</sup>

In addressing a broader historical perspective of human rights violations, Hugo Slim found ten factors which could lead to human rights violations. He defines them as:

- “An extreme construction of enmity that de-humanizes the enemy group”;
- “Powerful forms of coercive authority, obedience and conformity”;
- “Techniques of bureaucratic and euphemistic distancing”;
- “Entry into an ‘altered state’ and the adoption of a different war persona”;
- “Mobilizing heart-felt and hatred from feelings of injury, grievance and humiliation”;
- “Acceptance of certain traditions of human rights violations”;
- “Involvement in some form of active induction to human rights violations which serves to ‘blood’ you in some way”;
- “Repeating and normalizing human rights violations to make them habit-forming”;
- “Some form of pleasure from a social bond around human rights violations, from the thrill of power and excitement in the violation, or the cool satisfaction of a job ‘well done’”; and
- “Some group and individual mechanisms of denial which serve either to deny that one’s actions were really human rights violations or, by deeming it to be necessary human rights violations, to deny that it was bad”.<sup>146</sup>

Informal discussions should also happen on a routine basis – be it at a tea break or on a night hike. Stories found in daily newspapers can enable informal discussions. For example, the day I wrote this section, the 29 May 2012 *Dominion Post* carried the stories: “Blame game over massacre”<sup>147</sup>, “Evidence Suggests army telling lies”<sup>148</sup>, and

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<sup>145</sup> Doty (2012), pp. 83-85.

<sup>146</sup> Slim (2008), p. 217.

<sup>147</sup> Reuters, *Dominion Post*, p. B1.

<sup>148</sup> Thomson, *Dominion Post*, p. B1.

“Patience thinning as Nato strike kills family”.<sup>149</sup> Discussing such daily newspaper reportings is convenient and low-cost. And it exercises intellectual and visceral vigilance.

5. Apply a similarly rigorous selection board to potential enlisted members of the NZDF as is currently being applied to potential officers.<sup>150</sup> Today’s reality is the “strategic private”<sup>151</sup> with powers formerly attributed only to hierarchical leaders. As stated by Jim Collins in *How the Mighty Fall*, “while no leader can single-handedly build an enduring company, the wrong leader vested with power can almost single-handedly bring a company down. Choose well”.<sup>152</sup> A selection board for enlisted should include opportunities to display spatial intelligence, logic problem solving skills, leadership abilities, thinking outside the box exercises to include “Number 8” wire technology, and mental toughness scenarios throughout which respect for human rights and rule of law are interwoven. The selection board should identify those who will have the discipline and innovation to uphold and respect human rights and the rule of law.

6. Engage with partner militaries, in exercises and otherwise, to actualise respect for human rights and rule of law. The lives of New Zealand troops depend on partner nations also respecting human rights and rule of law. In situations in which such respect is lacking or violated, the backlash against troops may result also in the killing and injuring of New Zealand troops. Such engagement may also include encouraging other militaries to apply rigorous selection process and criteria to prospective military

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<sup>149</sup> Times, *Dominion Post*, p. B3.

<sup>150</sup> The enlisted selection process is a one day assessment. It consists of a psychological test, a physical test, and a script interview through which leadership and values are ascertained. The centralised selection officer then receives these assessments and scores them. One NZDF officer, in discussing whether the scrutiny for enlisted should be as rigorous as the scrutiny for officers, issued the challenge, “If they do not go into the military, they will go into the gangs”. This brought me back to my war college days. We were on our class trip to Guatemala and El Salvador. There were conscript soldiers on seemingly every corner of the capital cities. Yet, when asked for directions to a location one block from where they were standing, they had no geographic awareness of where they were. I asked one of my Latin American classmates what was the purpose of having military members in a city if they did not even have an understanding of the geography within a block of where they were standing. The answer I received was the purpose of such conscripts was not for the protection of citizens. It was not for presence. It was for employment. Otherwise, the argument went, such individuals would not be employed. If the NZDF is used as a social instrument to employ those who would otherwise enter gangs; such individuals could be employed in productive work such as helping with the reconstruction through manual labour of earthquake-stricken Christchurch. I would not advocate providing the means of violence and the knowledge to use such means of violence to individuals who would otherwise go into gangs. The contracts for enlisted members are not a lifetime contract. Hence, if the whole purpose of the NZDF enlisted corps is to keep its people from entering gangs, the training and equipping of such individuals regarding more effective use of weapons of violence appears to defeat such a purpose. Further, if the primary deployments which the NZDF engages in are peace operations, it is a brilliant military which can convert such potential gang members into peacemakers.

<sup>151</sup> Breen (2008), p. VII, in describing the “strategic corporal”, which has transformed into the “strategic private”, include “junior military leaders whose judgment, personal conduct and tactical decisions on operations may have a strategic significance that reaches far beyond their individual actions. The outcomes of error can vary from embarrassment of adverse media attention, the alienation of the local populace, or the outbreak of war with a neighbouring country. Conversely, the fruits of success can range from the projection of positive images of military intervention to viewers and commentators around the world, to the defeat of hostile groups thereby granting downtrodden and traumatised families hope for the future”.

<sup>152</sup> Collins (2009), p. 62.

members, both on the officer and enlisted side, and to apply rigorous training for Law of Armed Conflict (LOAC), Rules of Engagement (ROE), ethics, *and respect for human rights and the rule of law*.

7. Be a proactive gender leader. As a country which prides itself on being the first to have women with the vote and as one of the first nations to eliminate gender as a consideration for combat roles, New Zealand has the unique opportunity to seize the lead in the gender area. The cost is nil. The potential pay-offs are huge. Most military operations have failed to include gender. The sole operation in which New Zealand took the lead did not. New Zealand's lead in Bougainville incorporated gender, both in deploying a greater percentage of women than appears to be the norm for New Zealand deployments and in focusing on women too, instead of simply on men.

UN Security Council Resolution (UNSCR) 1888 recognises

women and children affected by armed conflict may feel more secure working with and reporting abuse to women in peacekeeping missions...the presence of women peacekeepers may encourage local women to participate in the national armed and security forces, thereby helping to build a security sector that is accessible and responsive to all, especially women.

UNSCR 1888 encourages member states to deploy more female military and police. To ignore gender in the planning and carrying out of operations ignores reality. To succeed, gender must be addressed.

8. Draft the New Zealand UNSCR 1325 National Action Plan. UNSCR 1325 recognises the ineffectiveness of peace and security plans which exclude, ignore and reject women. More than a decade has elapsed since the passage of UNSCR 1325, but New Zealand still has no National Action Plan. If New Zealand is to expend personnel and money in overseas operations, it must have a National Action Plan. Otherwise the "value for money" is questionable.

9. Create a seamless interagency process to transition from security to policing to reconstruction to nation building. Address the plans and capabilities non-military entities have to engage in reconstruction and nation building; that is, address the resources, the talent, the experiences, and the funding for reconstruction and nation building. Develop a national policy of whether people need to see not military members engaging in reconstruction and nation building, but the person from agriculture providing seeds, the person from education teaching the teachers, and professional police and judiciary mentoring on the rule of law.

10. Do not retain<sup>153</sup> those NZDF members who fail to uphold the values of the NZDF. Embedded in those values are respect for human rights and rule of law. Retaining and promoting those who fail to uphold the values of the NZDF devalues the NZDF. Such

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<sup>153</sup> "World class tolerates only 'A' players". Isaacson (2012), p. 99. A culture of mediocrity not only devalues an institution through not having the best, it also results in the institution losing talent and thereby further devaluing an institution. According to US Brigadier General Mark C. Arnold, a reservist and CEO of a multinational company, a 2010 Army Research Institute study found the main reason talented people leave the military is because "mediocre people stay in and get promoted". He decries the failure to fire bad bosses. Arnold (2012), p. 19.

devaluation further results in losing values-driven, highly valuable individuals who self-select to leave when they perceive values and value are not upheld. Should no other “qualified” individuals exist, due to the size of the NZDF, for a particular position, then look for options other than promoting and employing such individuals. Other options may include bringing an individual in retirement back on active duty,<sup>154</sup> employing a reservist in a full-time capacity,<sup>155</sup> employing a civilian,<sup>156</sup> and employing military members in leadership positions who do not come from rated positions or otherwise traditional leadership tracks.

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<sup>154</sup> The Colombian Navy did so a few years ago when it brought Admiral Roman back onto active duty out of retirement to head that which the Colombian Navy felt it was in need of help – instilling ethics.

<sup>155</sup> Two examples from the US Navy are two admirals, one the Director of the Inter-American School of Defense and one the Chief of Staff for US Pacific Command (PACOM).

<sup>156</sup> This is becoming a new norm in the US military. Most frequently they are retired military commanding officers being employed in a deputy position.





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