



# New Zealand Policy Framework for the humane treatment of detainees in offshore deployments

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## Definitions

The following definitions apply to this Policy Framework.

Term	Definition
Detainee	A person deprived of their liberty during the course of a Deployment.
Detention Operation	A deliberate or contingency operation conducted during the course of a Deployment in which a person is deprived of their liberty for security purposes.
Agency	The relevant New Zealand Government agency deploying New Zealand Personnel and/or responsible for New Zealand Personnel.
New Zealand Personnel	<p>Any of the following when deployed outside New Zealand territory or territorial waters:</p> <ul style="list-style-type: none"><li>i Members of the Armed Forces, as defined in the Defence Act 1990;</li><li>ii Police employees, as defined in the Policing Act 2008;</li><li>iii Other employees or agents of the New Zealand Government, when deploying alongside those personnel in categories (i) and/or (ii).</li></ul> <p>New Zealand Personnel does not include those seconded to another nation's forces.<sup>1</sup></p>
Deployment	<p>A deployment which is outside New Zealand territory or territorial waters and either:</p> <ul style="list-style-type: none"><li>i A "Defence Military Operation"<sup>2</sup>; or</li><li>ii A "Police Operational Activity with Coercive Powers".<sup>3</sup></li></ul> <p>A Deployment does not include any other deployments or activities that are not captured in category (i) or (ii) above. For the avoidance of doubt, this also excludes extraditions or deportations, which are subject to their own separate laws and procedures; and any law enforcement activities<sup>4</sup> conducted under the Maritime Powers Act 2022, and other law enforcement activities governed by New Zealand domestic law.</p>

<sup>1</sup> New Zealand personnel are frequently seconded into partner forces. Occasionally the overseas unit in which New Zealand personnel are on exchange will be deployed to an operational area (a third-country deployment). New Zealand personnel seconded to another nation's forces are under the command and control of that Government and so, for practical reasons, are not considered within the scope of this Policy. As part of the Government's approval process for third-country deployments, advice will, where relevant, take into account the standards and obligations contained in the partner nation's detention policy.

<sup>2</sup> A "Defence Military Operation" means an international military operation in support of security, stability, and the international rules-based system. This includes deployment of personnel and/or platforms to security and stability operations in support of New Zealand's national interests. Such deployments might include Coalition deployments; Maritime security activities in support of international collective security efforts; or multilateral peacekeeping missions (subject to paragraph 11). Refer Annex A for more details.

<sup>3</sup> A "Police Operational Activity with Coercive Powers" means a Police contribution to international operations in support of security, stability, and the international rules-based system. Such deployments might include Coalition deployments; or multilateral peacekeeping missions (subject to paragraph 11). Refer Annex A for more details.

<sup>4</sup> Including arrest and detention under the Armed Forces Disciplinary Act 1971.

## Introduction

1. The New Zealand Defence Force, the New Zealand Ministry of Defence, New Zealand Police, and other government agencies work together to protect and advance New Zealand's defence and security interests. These agencies cooperate to promote a safe, secure, and resilient New Zealand, and operate alongside our international partners to promote global security and to strengthen the international rules-based order.
2. In their deployments, New Zealand Personnel often operate in complex and dynamic settings and in a variety of roles. They are deployed to conflict zones, or post-conflict theatres where law enforcement, military, and justice systems may be disrupted, nascent, or entirely absent. Local forces may face serious threats to security, and may be less experienced in exercising certain capabilities, or in tactical and strategic planning. New Zealand Personnel may partner with local forces and operate within host state systems to assist in strengthening such systems towards self-reliance, compliance with human rights obligations, and the rule of law.
3. New Zealand's deployments will occur in the context of three different situations, namely: international armed conflicts; non-international armed conflicts; or situations not amounting to an armed conflict. In certain instances, it will be necessary to detain people during the course of a deployment. This may occur for example in armed conflict, during the course of law enforcement tasks or in capacity-building activities in which New Zealand plays a supporting role, or in the context of unforeseen contingency circumstances, such as during humanitarian assistance and disaster response operations.

### *Purpose and application*

4. This Detention Policy Framework seeks to ensure that New Zealand Detention Operations comply with New Zealand's obligations under international and domestic law, and that New Zealand Personnel maintain public trust and confidence, and embody and promote the values of New Zealand. It responds to recommendations made by the Government Inquiry into Operation Burnham and Related Matters.
5. The Detention Policy Framework focuses on the humane treatment of Detainees: it articulates obligations of New Zealand in relation to the treatment of Detainees under International Human Rights Law and International Humanitarian Law (also known as the law of armed conflict), as well as obligations to promote adherence by others for the same. The Policy Requirements in this Policy Framework apply where New Zealand is a Detaining Authority. It also sets out specific Policy Requirements in relation to Detainees who are detained in the course of Detention Operations in which New Zealand Personnel are "directly and substantially" involved.

### *Assessment of "direct and substantial" involvement*

6. For the purposes of this Policy Framework, there is no bright-line test to determine whether New Zealand Personnel are "directly and substantially" involved in a Detention Operation. A distinction based purely on whether an operation is "New Zealand-led" or "partner-led" will not be used. Instead, an assessment of the extent of New Zealand's involvement will depend on multiple factors, including:

6.1. The overall level of control and the nature of involvement of New Zealand Personnel in the initiation, planning, and preparation of the Detention Operation:

- (i) Direct and substantial involvement in a Detention Operation may arise from a significant role in the initiation, planning, or preparation of a Detention Operation.
- (ii) Involvement is unlikely to be direct and substantial where New Zealand Personnel are involved only in a purely ancillary or supporting manner, such as carrying out preparatory work at the direction of a partner, but not otherwise having a significant role in the initiation, planning, or preparation of the Detention Operation.
- (iii) For the purposes of this Detention Policy Framework, the sharing of intelligence, by New Zealand or New Zealand Personnel, will not constitute direct and substantial involvement in the initiation, planning or preparation of a Detention Operation. Such intelligence contributions are instead governed by separate legislation and policy processes.<sup>5</sup>

or

6.2. The overall level of control and the nature of involvement of New Zealand Personnel in the execution of the Detention Operation, including:

- (i) Whether New Zealand Personnel exercise physical control over the Detainee.
  - Exclusive physical control will strongly indicate direct and substantial involvement in a Detention Operation. This may occur even where the period of exclusive physical control over the individual is short-lived.
  - Depending on the circumstances, non-exclusive physical control of a Detainee may also indicate direct and substantial involvement in the Detention Operation.
- (ii) Whether or not New Zealand Personnel direct the Detention Operation. Directing a Detention Operation will likely indicate direct and substantial involvement.
- (iii) Involvement is less likely to be direct and substantial where New Zealand Personnel are involved in a purely ancillary manner, such as only providing assets or equipment to support the logistics or security of a Detention Operation, but not supporting the execution of the Detention Operation in any other significant way.
- (iv) The quantitative contribution of New Zealand Personnel and assets to the Detention Operation as a proportion of the whole. Involvement is more likely to be direct and substantial when New Zealand provides the majority of the personnel or assets.
- (v) For the purposes of this Detention Policy Framework, the sharing of intelligence, by New Zealand or New Zealand Personnel, will not constitute direct and substantial involvement in the execution of a Detention Operation.<sup>6</sup>

7. Frequently, no single factor will be determinative in this assessment. The ultimate analysis will be a matter of judgement to be exercised reasonably and with due attention to all relevant factors.

*Contents, compliance, and exceptions*

8. This Policy Framework contains two parts:

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<sup>5</sup> Including, for example, the Intelligence and Security Act 2017 (ISA 2017) and the Ministerial Policy Statement issued by the Minister Responsible for the GCSB and NZSIS under section 207(1) of the ISA 2017.

<sup>6</sup> Such intelligence contributions are instead governed by separate legislation and policy processes including, for example, the Intelligence and Security Act 2017 (ISA 2017) and the Ministerial Policy Statement issued by the Minister Responsible for the GCSB and NZSIS under section 207(1) of the ISA 2017.

- 8.1. Part A: Legal Obligations and Policy Requirements on the treatment of Detainees during Deployments.
  - 8.2. Part B: Agency Procedures and Risk Mitigations before, during, and after Deployments to operationalise the Policy Requirements.
9. This Policy Framework does not provide, and is not intended to replace, the issuance of Deployment-specific, detailed operational-level guidance or procedures. The latter will be prepared by New Zealand Agencies in advance of any Deployment and will comply with the requirements of this Detention Policy Framework.
10. Responsibility for compliance with this Detention Policy, and for the judgements made within it (including the judgement as to whether New Zealand Personnel were directly and substantially involved in a Detention Operation), will lie with the relevant head of the deploying New Zealand Agency in question (for example, the Chief of Defence Force, Police Commissioner, or the relevant chief executive (or equivalent), who may delegate decision-making under this Policy to those within their organisation. Implementation of this Policy will be subject to independent oversight mechanisms, such as the Inspector-General of Defence or the Independent Police Conduct Authority, where appropriate.
11. In limited circumstances, where deviations from this Detention Policy Framework are required,<sup>7</sup> officials shall seek approval from appropriate Ministers and/or Cabinet and shall provide advice outlining: the reasons for deviating from the Detention Policy Framework; and how New Zealand and its personnel will comply with their legal obligations and ensure the humane treatment of any Detainees to standards comparable to those contained under this Policy.

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<sup>7</sup> The limited circumstances requiring a deviation from the Detention Policy Framework might include situations where New Zealand is practically unable to implement this Policy – for example, where deployed New Zealand personnel are not under New Zealand’s command and control.

## Part A: Legal Obligations and Policy Requirements

### Legal obligations

12. New Zealand and its Personnel will comply with their legal obligations in all Deployments. The core international legal obligations relating to the treatment of Detainees in Detention Operations stem from International Humanitarian Law<sup>8</sup> and International Human Rights Law<sup>9</sup> as found in relevant treaties and customary international law.<sup>10</sup> The applicability and nature of New Zealand's legal obligations will be determined by the situation into which New Zealand Personnel are deployed (including whether New Zealand or a force with which New Zealand is partnering is party to an armed conflict), the treaties to which New Zealand is a party, relevant customary international law, and the international law of state responsibility governing attribution of conduct to the state of New Zealand. The Attorney-General or Solicitor-General are responsible for conclusively determining the Crown's view of New Zealand's legal obligations.
13. For the avoidance of doubt, nothing in this Policy shall affect the obligations applicable to New Zealand Personnel and/or the state of New Zealand arising under domestic law (including, for example, Defence Force Orders) or international law.<sup>11</sup>

### Policy Requirements

14. The Policy Requirements set out below are underpinned by key International Humanitarian Law and International Human Rights Law obligations. However, they are not intended to be a mere restatement of existing legal obligations. Instead, they set minimum standards that New Zealand Agencies and Personnel will be expected to apply when deployed offshore, whether required by law or not. By taking a law plus values approach, this Policy ensures that the protective safeguards included below will be applied across a more comprehensive range of detention scenarios than previously (and in some instances, where they may not be required by law).
15. The Policy Requirements do not exhaustively detail all obligations relating to the treatment of Detainees. New Zealand will have additional or more specific obligations that apply to the treatment of Detainees, depending on the nature of the detention or internment, the Detainees in issue (e.g. children), and the legal regime governing detention. Advice regarding the additional or more specific obligations relating to particular forms of detention or internment anticipated in the Deployment will be produced as part of the Detention Risk Assessment process in Part B of this Policy Framework and will be effected through operational instructions and protocols specific to each Deployment. These are not set out below.

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<sup>8</sup> International Humanitarian Law is the body of law contained in the Geneva Conventions of 1949, their Additional Protocols, and other treaties and customary international law pertaining to obligations in both international and non-international armed conflicts.

<sup>9</sup> International Human Rights Law is the body of law contained in the following: the International Covenant on Civil and Political Rights (ICCPR); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Elimination of All Forms of Racial Discrimination (CERD); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Convention on the Rights of the Child (CRC); Optional Protocol to CRC on the involvement of children in armed conflict (CRC-OPAC); other human rights treaties, and customary international law regarding obligations of minimum treatment owed to individuals by the state. International Human Rights Law applies extraterritorially to acts carried out in the exercise of New Zealand's jurisdiction. New Zealand will exercise jurisdiction extraterritorially where: i) it exercises effective control over a territory or place; or ii) where it exercises a sufficient degree of control or authority over an individual.

<sup>10</sup> Other sources may also include relevant United Nations Security Council resolutions adopted under Chapter VII of the UN Charter.

<sup>11</sup> Relevant obligations under domestic law may arise from the Crimes Act 1961, Geneva Conventions Act 1958, Crimes of Torture Act 1989, International Crimes and International Criminal Act 2000, and other relevant legislation. Relevant obligations under international law may arise under, *inter alia*, International Human Rights Law, International Humanitarian Law, international criminal law, refugee law, and customary international law.

16. The effective implementation of the Policy Requirements depends on effective pre-deployment planning and risk assessments, which are detailed in Part B.

Requirement 1: In any armed conflict, New Zealand will respect International Humanitarian Law and other applicable law

17. This includes the following:

- 17.1. In a situation of international armed conflict, including occupation, this includes the four Geneva Conventions of 1949, Additional Protocol I to the four Geneva Conventions of 1949, and customary international law.
- 17.2. In a situation of conflict not of an international character, this includes Common Article 3 of the Four Geneva Conventions of 1949, customary international law, and Additional Protocol II to the four Geneva Conventions of 1949 if applicable.
- 17.3. In any situation of armed conflict, this includes applicable International Human Rights Law.

18. To comply with international law and to reflect New Zealand's values, New Zealand Personnel will, when deployed in an armed conflict:

- 18.1. Comply with all relevant legal obligations related to all Detainees in their control.
- 18.2. Take reasonable steps to ensure that persons detained by other states or non-state armed groups in Detention Operations in which New Zealand was directly and substantially involved are treated in a manner that adheres to International Humanitarian Law and International Human Rights Law. Such steps may involve securing appropriate assurances and/or conducting appropriate monitoring of the Detainee's treatment.
- 18.3. Take reasonable steps generally to promote compliance with these obligations by other states or non-state armed groups with which New Zealand has partnered.
- 18.4. Take reasonable steps, within its lawful capacity, to prevent violations of these obligations by others.

Requirement 2: New Zealand will respect the absolute prohibition on torture, cruel, inhuman, or degrading treatment and the prohibition regarding unlawful killing or arbitrary deprivation of life

19. International law imposes an absolute prohibition on the torture,<sup>12</sup> cruel, inhuman, or degrading treatment<sup>13</sup> of individuals, and any unlawful killing or arbitrary deprivation of life. New Zealand recognises that the death penalty is incompatible with this prohibition and therefore has a strong and long standing opposition to the death penalty in all cases and under all circumstances.

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<sup>12</sup> Torture is defined to be any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from them or a third person information or a confession, punishing them for an act they or a third person have committed or are suspected of having committed, or intimidating or coercing them or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. Examples of torture include (but are not limited to) the infliction of severe mental or physical pain, such as torture of a physical nature (i.e. beatings; electric shock), a sexual nature (i.e. rape; sexual humiliation); or psychological nature (i.e. sleep deprivation; prolonged solitary confinement).

<sup>13</sup> Inhuman treatment is defined as an intentional act that causes serious mental or physical suffering or injury or that which constitutes a serious attack on human dignity. In practice, there is little difference between cruel treatment and inhuman treatment. Degrading treatment is considered to be treatment or punishment that grossly humiliates the victim before others or drives an individual to act against their will or conscience.

20. To comply with international law and to reflect New Zealand's values, New Zealand Personnel will:
- 20.1. Not commit, assist, encourage or condone any unlawful killing, the application of the death penalty, the use of torture, cruel, inhuman or degrading treatment, or arbitrary deprivation of life.
  - 20.2. Take reasonable steps to ensure that persons detained by other states or non-state groups in Detention Operations in which New Zealand was directly and substantially involved are treated humanely and not subjected to these unlawful acts.<sup>14</sup>
  - 20.3. Take reasonable steps generally to promote compliance with this prohibition by other states or non-state armed groups with which New Zealand has partnered.
  - 20.4. Take reasonable steps, within its lawful capacity, to prevent the commission of these unlawful acts by others.
21. Where there is evidence of widespread use of torture by a host or partner state, New Zealand will have obligations to cooperate to bring the breach to an end.<sup>15</sup> This may involve political or diplomatic means, assisting or ensuring access by bodies like the International Committee of the Red Cross, United Nations monitoring bodies, or other impartial humanitarian/human rights bodies, withholding aid or assistance generally, or other measures lawfully available.

Requirement 3: New Zealand will respect Common Article 1 of the Geneva Conventions

22. Common Article 1 of the Geneva Conventions of 1949 requires Parties to respect and to ensure respect for the Conventions in all circumstances. The obligation to 'ensure respect' is an obligation of means rather than result, the content of which will depend on the specific circumstances. These circumstances include the foreseeability of the violations and the state's knowledge thereof, the gravity of the violations, the means reasonably available to the state, and the degree of influence the state exercises over the persons concerned.
23. To comply with international law and to reflect New Zealand's values, New Zealand will:
- 23.1. Ensure respect for International Humanitarian Law by New Zealand Personnel through, for example: general training in International Humanitarian Law; a focus on compliance with International Humanitarian Law as a core aspect of armed forces culture; specific pre-deployment training; and ensuring accountability for any International Humanitarian Law violations by New Zealand Personnel.
  - 23.2. Ensure New Zealand Personnel do not commit, assist, encourage or condone violations of International Humanitarian Law.
  - 23.3. Actively promote compliance with International Humanitarian Law by other host states, partner states, and non-state armed groups with which New Zealand has partnered.
  - 23.4. Take meaningful steps, within its lawful capacity, to prevent violations of International Humanitarian Law by others.

Requirement 4: New Zealand will respect the prohibition on non-refoulement

24. International law prohibits a state from expelling, returning, or extraditing ('refouler') a person to another state where there are substantial grounds for believing that the person would be in danger of

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<sup>14</sup> Such steps may involve conducting appropriate monitoring of the Detainee's treatment and/or securing appropriate assurances for the humane treatment of the Detainee (noting that the Minister of Foreign Affairs must be satisfied as to the reliability of the proposed assurances).

<sup>15</sup> Under international law, a serious breach of a peremptory norm engages the interests of all states and requires their cooperation to bring the breach to an end.



being subjected to torture, cruel, inhuman or degrading treatment.<sup>16</sup> The prohibition does not depend on a transfer across territorial boundaries and will apply to transfers of jurisdiction or control within the territorial boundaries of a single country.

25. To comply with its legal obligations and to reflect New Zealand's values, New Zealand will treat this obligation as applicable whenever a Detainee is held in New Zealand's exclusive physical control or in an asset or facility that New Zealand controls, or when New Zealand Personnel are directly and substantially involved in a Detention Operation and they are practically and lawfully capable of controlling a transfer of a Detainee.
26. In those circumstances, New Zealand Personnel will:
  - 26.1. Prior to any transfer, assess whether there is a real risk that the person will be subject to: (i) unlawful killing; (ii) torture; (iii) cruel, inhuman, or degrading treatment; (iv) the death penalty; (v) extraordinary rendition; or (vi) a flagrant denial of justice;<sup>17</sup>
  - 26.2. Assess whether it is possible to mitigate any such risk, in light of lawful measures available (including, for example, monitoring and/or assurances);
  - 26.3. Where any such risk cannot be effectively mitigated, not transfer the person to the state(s) in relation to which the identified risk is present; and
  - 26.4. In light of the above, seek decisions from New Zealand Agencies (where required) regarding the handling of the Detainee (in accordance with the processes outlined in Part B).

Requirement 5: New Zealand will not aid or assist the commission of unlawful acts by other states

27. International law prohibits a state from aiding or assisting (i.e. being complicit in) the commission of wrongful acts by other states (such as torture, ill-treatment, and other human rights breaches). Complicity is likely to arise if the assisting state has actual or near-certain knowledge that its assistance will facilitate an internationally wrongful act.
28. To comply with its legal obligations and to reflect New Zealand's values, New Zealand Agencies will assess the anticipated treatment of Detainees by those with whom New Zealand intends to partner or support in Detention Operations. The results of such assessments will be kept under review for the duration of any partnering arrangement. If, at any time, New Zealand Agencies consider there is a real risk that their support or partnership is likely to assist the commission by a partner of unlawful killing, torture, cruel, inhuman, or degrading treatment, the death penalty, extraordinary rendition, or a flagrant denial of justice, they will:
  - 28.1. Consider whether steps can be taken to mitigate any such risk, in light of lawful measures available (including, for example, monitoring and/or assurances); and
  - 28.2. Where any such risk cannot be effectively mitigated, consider bringing the partnership or support to an end.

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<sup>16</sup> New Zealand recognises that the death penalty is inconsistent with the prohibition of torture and cruel, inhuman, or degrading treatment and therefore considers the non-refoulement obligation to apply where there is a real risk that the Detainee will be subject to the death penalty.

<sup>17</sup> The nature of such assessments will depend on operational and deployment-specific contextual factors. Decisions on transfers or planned transfers should be re-examined where further or new information is readily available or known about the human rights risks present (or conversely, lack thereof). Further guidance on this aspect is found in Part B: Pre-Deployment procedures/Detention Risk Assessment

Requirement 6: Allegations of mistreatment will be effectively investigated and addressed

29. In order to implement and ensure compliance with the legal obligations and Policy Requirements set out above, New Zealand will respond appropriately and effectively<sup>18</sup> to allegations of mistreatment of Detainees. This includes any allegations of torture, cruel, inhuman or degrading treatment, or treatment in violation of minimum standards of International Humanitarian Law and International Human Rights Law.
- 29.1. Allegations relating to the treatment of a Detainee by New Zealand Personnel or while in New Zealand control will be reported promptly to New Zealand Agencies and Ministers, and the appropriate New Zealand authorities for investigation (e.g. the Royal New Zealand Military Police and/or the New Zealand Police).
- 29.2. Allegations relating to the treatment of a Detainee by another state, or non-state armed group where that Detainee was detained in a Detention Operation in which New Zealand Personnel were directly and substantially involved, or in circumstances where Requirement 4 applied, or where it is alleged that New Zealand Personnel were complicit in the mistreatment:
- 29.2.1. Will be reported promptly to New Zealand Agencies and Ministers, and, where appropriate, the New Zealand authorities (e.g. the Royal New Zealand Military Police and/or the New Zealand Police);
- 29.2.2. Will, where appropriate<sup>19</sup>, be reported promptly to the authorities of the relevant state(s) or group alleged to be responsible for the mistreatment;
- 29.2.3. Will, where appropriate, be reported to the International Committee of the Red Cross and/or other relevant and impartial humanitarian/human rights institutions; and
- 29.2.4. Where the Detainee remains in custody, reasonably available steps will be taken by New Zealand Personnel to ensure the Detainee's humane treatment.<sup>20</sup>
- 29.3. Allegations relating to the treatment of Detainees by another state, or non-state armed group in a Detention Operation in which New Zealand Personnel participated but were not directly and substantially involved will be reported promptly to New Zealand Agencies and Ministers, and, where appropriate<sup>21</sup>, the authorities of the relevant state(s) or group(s) alleged to be responsible for the mistreatment and/or to the International Committee of the Red Cross and/or other relevant and impartial humanitarian/human rights institutions.
- 29.4. Agencies will assess on an ongoing basis whether, collectively, the nature and volume of allegations (referenced in paragraphs 29.2 and 29.3) require further mitigations to be put in place to ensure the humane treatment of future Detainees, or whether partnering with the state or group in question ought to cease.

Requirement 7: Where New Zealand is a Detaining Authority, it will ensure, at least, that minimum required standards of treatment and material conditions in detention facilities are met

30. Where New Zealand is a Detaining Authority, it will ensure that the standards of treatment and material conditions of Detainees in its power meet minimum standards prescribed by international law and, subject to security considerations/requirements, relevant non-binding international standards<sup>22</sup>. These

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<sup>18</sup> Effective investigations means investigations that are prompt, independent, and impartial; undertaken by experts; with appropriate resources allocated; with appropriate public disclosure; and, where possible, in line with accepted international standards

<sup>19</sup> In some circumstances it may not be appropriate to report allegations of mistreatment due to the need to protect the source of the allegation

<sup>20</sup> Such steps may include seeking access to the Detainee and seeking further assurances from the relevant state or non-state armed group. It is noted that the Detention Risk Assessment (normally undertaken pre-deployment) requires consideration of securing formal written assurances from a partner government, by way of an agreement or arrangement, to guarantee the humane transfer and detention of Detainees (see Part B).

<sup>21</sup> In some circumstances it may not be appropriate to report allegations of mistreatment due to the need to protect the source of the allegation.

<sup>22</sup> The applicable 'soft law' instruments include the following: UN Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules), Human Rights Committee General Comment No. 21 (1992) on humane treatment of persons

are to be detailed in operational instructions and will be sensitive to gender, age, physical and mental ability, language, culture, and religion. This will include standards governing:

- 30.1. observance of religion and culture;
  - 30.2. access to adequate age and gender sensitive medical attention and care (including hygiene);
  - 30.3. adequate and appropriate shelter, accommodation and protection;
  - 30.4. food and water;
  - 30.5. appropriate clothing;
  - 30.6. opportunities to exercise, sleep or rest;
  - 30.7. opportunities for educational and recreational activities, where practicable;
  - 30.8. subject to security considerations, opportunities to communicate with contacts in the outside world (such as their families); and
  - 30.9. opportunities to communicate with the International Committee of the Red Cross or other authorised and impartial humanitarian/human rights organisations as required.
31. Where New Zealand is a Detaining Authority, it will also ensure that appropriate processes and procedures are in place for the period immediately post-capture and prior to transfer to detention facilities. Such processes and procedures shall ensure that Detainees in its power are treated humanely and, as far as practicable given the circumstances, in accordance with this Policy Framework.
32. Where the detention of children is contemplated or foreseen, special guidance and procedures to safeguard their rights, in light of their unique and vulnerable position, will also be applied.<sup>23</sup>
33. Where relevant, New Zealand Personnel will ensure compliance with the *Copenhagen Process Principles and Guidelines*.

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deprived of liberty, Body of Principles for the Protection of all persons under any form of detention or imprisonment, UN Rules for treatment of women prisoners and non-custodial measures for women offenders (Bangkok Rules), UN Rules for the Protection of Juveniles deprived of liberty (Havana Rules). These are not all relevant to armed conflict-related detention, but they set out important guidelines/best practice.

<sup>23</sup> Special guidance and procedures for children should include, for example, efforts to keep family units together.

## Part B: Agency Procedures and Risk Mitigation

34. The implementation of the legal obligations and Policy Requirements set out in Part A depends on effective and appropriate pre-deployment planning, risk assessments, and the implementation of risk mitigations. This Part prescribes requirements for New Zealand agencies engaged in Deployments. For the avoidance of doubt, where agencies already satisfy these requirements through their own internal deployment procedures this Part does not require duplicative procedures.

### Pre-deployment Procedures

35. The following will be undertaken prior to a Deployment, as applicable, by the relevant New Zealand Agency:
- 35.1. Promulgate **Rules of engagement (ROE) or rules of conduct**, as approved by relevant Ministers, alongside any national caveats to coalition ROE.
  - 35.2. **Secure relevant pre-deployment domestic national authorisations by Cabinet or Ministers** (as applicable) regarding where New Zealand Personnel will be committed and on what basis, and the tasks expected to be undertaken during the Deployment. The national authorisations will, where possible and appropriate, reflect the factors outlined in paragraphs 36.1 – 36.54.
36. The following should be undertaken prior to a Deployment, unless circumstances make this impracticable (as noted in paragraph 37):
- 36.1. **Undertake a Detention Risk Assessment**, as set out in paragraphs 38-40.
  - 36.2. Where necessary, ensure the Ministry of Foreign Affairs and Trade **secures formal written agreements or arrangements** from host or partner governments, or appropriate arrangements with a non-state partner, detailing procedures regarding the transfer and detention of Detainees and including any necessary assurances as detailed below.
  - 36.3. Where necessary, confirm/finalise **national caveats** to coalition rules of engagement.
  - 36.4. Confirm/finalise appropriate **notification procedures** for Detention Operations, as set out at paragraph 42 and in line with Policy Requirement 6.
  - 36.5. Ensure all New Zealand Personnel to be deployed are given appropriate pre-deployment training, to include general training in International Humanitarian Law where applicable, International Human Rights Law, and specific training on this Detention Policy Framework and relevant operational procedures and guidance.
37. In certain circumstances it may be impractical to complete the Detention Risk Assessment and/or the other requirements listed under paragraph 36 prior to the Deployment commencing. Where circumstances render it impractical to complete the Detention Risk Assessment prior to a Deployment (for instance, due to the fast moving, unexpected, or emergency nature of a situation) then:
- 37.1. This must be noted in pre-deployment advice to Cabinet; and
  - 37.2. A Detention Risk Assessment should then be carried out, and any necessary arrangements or caveats secured, as soon as possible thereafter and advice provided to Ministers, as appropriate.

## Detention Risk Assessment

38. The Detention Risk Assessment will be undertaken to assess whether there is a reasonable likelihood that New Zealand Personnel will participate in a Detention Operation, including in joint operations conducted with partners, whether New Zealand will be a Detaining Authority, or be responsible for the transfer of Detainees.<sup>24</sup> If so, it will identify the possible scenarios in which New Zealand's obligations under international law and this Detention Policy Framework will be engaged, and will articulate how New Zealand's legal obligations and Policy Requirements will be implemented (including whether New Zealand is likely to be a Detaining Authority or directly and substantially involved in a Detention Operation).
39. In addition, the Detention Risk Assessment will include details on the below, where relevant:
- 39.1. The **legal basis** for New Zealand to detain individuals during the Deployment (for example, as set out in relevant United Nations Security Council authorisation, or expressed through the consent of the host state in a Status of Forces Agreement).
  - 39.2. The **nature and modality of the Detention Operation** that New Zealand will likely undertake or participate in, for example: independent operations to capture persons, partnered operations with local forces, coalition partners, or non-state actors, where applicable. This will include details on where such Detainees might be held or transferred.
  - 39.3. **An assessment of the general human rights environment in detention facilities controlled by, and judicial processes applied by, the relevant detaining authorities (i.e. the host state and/or other relevant partners).** In carrying out this assessment, officials will consider publicly available information, such as credible reports by NGOs, United Nations bodies, humanitarian/human rights institutions, and/or the International Committee of the Red Cross, together with relevant intelligence received through other sources.
  - 39.4. **In light of the above, whether there is a real risk of New Zealand causing, contributing to, or being complicit in a breach of a Detainee's human rights or a breach of International Humanitarian Law regarding the treatment of Detainees.**
  - 39.5. Where the above assessment indicates **a real risk of New Zealand's involvement in a breach of International Human Rights Law or International Humanitarian Law**, the Detention Risk Assessment will detail:
    - (i) What, if any, Risk Mitigation Measures (paragraph 41 onwards) New Zealand may take to mitigate these risks.
    - (ii) Where effective Risk Mitigation Measures are available, **what resources would be required to implement such measures.** For example, what would be required for appropriate monitoring in the event of one or multiple detentions, how monitoring would be undertaken, how often, and by whom.
  - 39.6. Taking into account the scale and likelihood of the risk(s) together with the effectiveness of any proposed mitigation, **if the risk(s) above can be mitigated, or if no such risk is identified,** the Detention Risk Assessment will address:

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<sup>24</sup> In making such an assessment, officials will bear in mind that Detention Operations may be a planned part of operations or may occur in the context of other operations, as a contingency matter, that may not necessarily be foreseen to regularly occur.

- (i) **How allegations of mistreatment will be addressed and communicated** during the course of the Deployment – including when and how these will be escalated within New Zealand’s decision-making system (taking into account Policy Requirement 6).
- (ii) **When New Zealand’s responsibilities towards Detainees would end** – such as when a Detainee may be tried and convicted or released. Note that if measures like monitoring are necessary to mitigate risks to a Detainee’s human rights, the cessation of monitoring should be subject to a high-level decision in light of the risks to the Detainee in question of doing so. Ministers will be informed of any such decision.

39.7. Taking into account the scale and likelihood of the risks together with the effectiveness of any proposed mitigation, **if the risk(s) to a Detainee’s human rights cannot be appropriately mitigated**, the Detention Risk Assessment will address:

- (i) How it is anticipated that New Zealand Personnel will manage any Detainees who cannot be transferred, such as through continued detention managed by New Zealand Personnel, or release. Advice will include operational and diplomatic resourcing requirements for managing or releasing Detainees who cannot be transferred, as well as the risks to Detainees and New Zealand Personnel and partners.
- (ii) Procedures for alerting New Zealand Agencies who will then take decisions on next steps for handling Detainee/s in such circumstances, and who will then inform Ministers of such decisions.

39.8. **Any other relevant advice regarding implementation of New Zealand’s legal obligations and Policy Requirements** as they relate to treatment of Detainees (as articulated in New Zealand’s Detention Policy Framework). This could include, for instance, advice regarding interoperability issues or the humane treatment of and material conditions for Detainees.

40. Detention Risk Assessments will be reviewed regularly by agencies during the course of a Deployment to ensure the judgements made remain valid in light of changing circumstances.

#### **Risk Mitigation Measures**

41. The below measures are intended to assist in reducing risks of mistreatment or complicity in mistreatment of Detainees, and to help ensure the humane transfer and conditions of detention.

#### *Notification Procedures*

42. New Zealand Agencies will ensure appropriate and consistent notification procedures for Detention Operations are in place. Such procedures will include:

- 42.1. Clear identification of New Zealand Agency contact points with respect to the Deployment. At a minimum, agreed Agency contact points will be established within the Deploying Agency (i.e. New Zealand Defence Force, Ministry of Defence and/or New Zealand Police) and the Ministry of Foreign Affairs and Trade;
- 42.2. A requirement to promptly notify Ministers and Agencies, and to seek guidance from the agreed Agency contact points, where appropriate, in regards to any of the following:
  - (i) the participation of New Zealand Personnel in any Detention Operation;
  - (ii) whether New Zealand Personnel were directly and substantially involved in any Detention Operation; and
  - (iii) next steps for handling Detainees (advice should be sought from New Zealand Agencies at the earliest practical opportunity), with Agencies then informing Ministers of such decisions;
- 42.3. A requirement to promptly notify Ministers, agreed Agency contact points, partners, and/or international organisations (as applicable/appropriate) of any issues of concern (including any

- allegations of torture or mistreatment) in accordance with the processes outlined in Policy Requirement 6;
- 42.4. Guidance for reporting to/engagement with relevant international organisations, international partners and the host country as appropriate.

#### *Recordkeeping Procedures*

43. As outlined in Requirement 6, Agencies will keep comprehensive records of any serious allegations, under paragraphs 29.1 – 29.3, should they arise, and the relevant decisions taken. In that regard:
- 43.1. In military led Deployments, the Ministry of Defence will maintain a central repository to document any allegations of torture or mistreatment, should they arise, relating to persons detained in Detention Operations in which New Zealand Personnel participated.
- 43.2. In non-military led Deployments, the lead deploying Agency will establish a central repository to document allegations of torture or mistreatment, should they arise, relating to persons detained in Detention Operations in which New Zealand Personnel participated.
- 43.1. The repository shall record the complaint, any response by the responsible state or authority together with the relevant summary of investigation, judicial determinations, exonerations and convictions.

#### *Assurances and National Caveats*

44. Taking into account the legal obligations and Policy Requirements in Part A and the results of any Detention Risk Assessment, it may be necessary to seek formal written assurances from a partner, by way of an agreement or arrangement, to guarantee the humane transfer and detention of Detainees. Any such arrangement or agreement must ensure, as necessary:
- 44.1. That Detainees will be treated humanely, in accordance with relevant international obligations;
- 44.2. That Detainees will not be subjected to torture, cruel, inhuman, or degrading treatment, the death penalty, unlawful killing or arbitrary deprivation of life where relevant;
- 44.3. That Detainees will not be transferred to a third party where there is a real risk of any such treatment;
- 44.4. That New Zealand Personnel will have agreed access to certain Detainees for the purposes of detention visits (either by New Zealand officials or an agreed delegated partner or another government). In addition, full access should be given to the International Committee of the Red Cross or any other impartial humanitarian/human rights institutions.
45. Before agreeing to any agreement or arrangement, the Minister of Foreign Affairs must be satisfied as to the reliability of the proposed assurances. If appropriate or reliable written assurances cannot be secured, then consideration will be given as to whether any alternative options/arrangements can instead be put in place.
46. Taking into account the legal obligations and Policy Requirements in Part A and the results of any Detention Risk Assessment, Agencies will also consider whether it is necessary to lodge national caveats to coalition Rules of Engagement.

#### *Monitoring Procedures*

47. Monitoring procedures will be articulated in the Detention Risk Assessment where New Zealand Personnel may undertake or be directly and substantially involved in a Detention Operation. Monitoring procedures will be consistent across relevant deploying agencies and include:
- 47.1. Monitoring of the general human rights environment in detention facilities controlled by, and judicial processes applied by, the host state and other relevant partners. In carrying out this

monitoring, officials will consider publicly available information, such as credible reports by NGOs, United Nations bodies, humanitarian/human rights institutions, and/or the International Committee of the Red Cross, together with relevant intelligence received through other sources.

- 47.2. Monitoring by the lead deploying Agency of specific Detainees. Where New Zealand has been responsible for the transfer of a Detainee to the control of another state, and when New Zealand has been directly and substantially involved in a Detention Operation where a partner has carried out a detention, it will carry out ongoing monitoring of relevant Detainees to ensure their humane treatment. The type and regularity of monitoring will be appropriate to the situation at hand, the protective measures put in place by the detaining state, and the risks to the Detainee. The monitoring under this paragraph requires the consent of the detaining state which will be recorded in the Detention Risk Assessment.
48. The Detention Risk Assessment will specify Agencies' resourcing requirements for monitoring specific Detainees. Both types of monitoring will explicitly include gender-sensitive perspectives, including assessments of the risks of sexual and gender-based violence in detention, and consideration of the rights of and protection of children.
49. The information received through monitoring may require the Detention Risk Assessment to be updated during the course of a Deployment. If monitoring suggests that Detainees in the custody of partners face a real risk of International Humanitarian Law or human rights violations, New Zealand Agencies will provide advice to Ministers on the mitigation of such risks. This might include measures such as no longer partnering with certain forces, or avoiding certain detention facilities where they do not meet the standards and material conditions expected by the New Zealand Government.

## Review process

50. This Detention Policy will be reviewed periodically to consider lessons learned and to ensure the Detention Policy Framework remains fit for purpose. Reviews shall be undertaken in accordance with the following guidelines:
- 50.1. The Detention Policy Framework will, at a minimum, be reviewed at five-year intervals following the finalisation of this Detention Policy ("Five-Yearly Policy Review") to ensure it remains fit for purpose.
- 50.2. In the event New Zealand Personnel undertake or are directly and substantially involved in a Detention Operation as part of a Deployment, consideration will be given as to whether or not a review of the Detention Policy is required, in light of any lessons learned or issues arising during the course of the Detention Operation. Any such review shall be undertaken within six months of the Detention Operation occurring.
51. The following process will be followed:
- 51.1. The reviews will be conducted jointly by the Ministry of Defence, the New Zealand Defence Force, the Ministry of Foreign Affairs and Trade, and any other contributing Agency.
- 51.2. The views of any other relevant New Zealand Agencies may also be sought as part of the review process, by way of a cross-Government working group.
- 51.3. The reviews will involve public consultation on any proposed amendments, and will involve the participation of relevant international organisations and international partners.



## Annex A: Scope of Policy Framework

### In-Scope:

- 1) **Defence Military Operation:** Means an international military operation in support of security, stability and the rules-based system

Scope / Description	<ul style="list-style-type: none"><li>• Multilateral peacekeeping missions</li><li>• Coalition deployments</li><li>• Maritime security activities in support of international collective security efforts</li></ul>
Out of scope	Third-country deployments. <sup>25</sup>
Possible deviation from Policy	The limited circumstances requiring a deviation from the Detention Policy Framework might include situations where New Zealand is practically unable to implement this Policy – for example, where deployed New Zealand Personnel are not under New Zealand's command and control. Per paragraph 11, in the limited circumstances, where deviations from this Detention Policy Framework are required, officials shall seek approval from appropriate Ministers and/or Cabinet and shall provide advice outlining: the reasons for deviating from the Detention Policy Framework; and how New Zealand and its personnel will comply with their legal obligations and ensure the humane treatment of any Detainees to standards comparable to those contained under this Policy.
Standard Approval level	Cabinet (or delegated authorities).

- 2) **Police Operational Activity with Coercive Powers:** Means New Zealand Police contributions to international operations in support of security, stability and the rules-based system

Scope / Description	<ul style="list-style-type: none"><li>• Multilateral peacekeeping missions with associated coercive powers</li><li>• Coalition deployments with associated coercive powers</li></ul>
Exceptions	<ul style="list-style-type: none"><li>• Third-country deployments (New Zealand Personnel seconded to another nation's forces are under the command and control of that Government.)</li><li>• Extraditions</li></ul>
Possible deviation from Policy	The limited circumstances requiring a deviation from the Detention Policy Framework might include situations where New Zealand is practically unable to implement this Policy – for example, where deployed New Zealand Personnel are not under New Zealand's command and control. Per paragraph 11, in the limited circumstances, where deviations from this Detention Policy Framework are required, officials shall seek approval from appropriate Ministers and/or Cabinet and shall provide advice outlining: the reasons for deviating from the Detention Policy Framework; and how New Zealand and its personnel will comply with their legal obligations and ensure the humane treatment of any Detainees to standards comparable to those contained under this Policy.
Standard Approval level	Cabinet (or delegated authorities).

<sup>25</sup> Third-country deployments are considered out of scope. New Zealand Personnel seconded to another nation's forces are under the command and control of that Government.

## Scope of Policy Framework (continued)

### Out-of-Scope

- 3) All other activities, except for those listed in paragraphs 1 and 2, are outside the scope of this Detention Policy Framework. For the avoidance of doubt, a non-exhaustive list of out-of-scope activities is included below:

<b>Third-country deployments</b>	The deployment of New Zealand personnel to an operational area, while seconded into the unit of another nation's forces.
<b>Defence Military Assistance</b>	<p>Deployment of contingent capabilities (personnel and/or assets) in support of obligations stipulated in Government priorities and Memoranda of Understanding with agencies. These obligations are reflected in the NZDF Outputs Plan and include activities in support of other government agencies such as:</p> <ul style="list-style-type: none"> <li>• maritime surveillance (maritime domain awareness);</li> <li>• search and rescue activities;</li> <li>• medical evacuations;</li> <li>• intelligence collection;</li> <li>• humanitarian assistance and disaster relief.</li> </ul>
<b>Defence Engagement Activities</b>	<p>Deployment of Defence personnel and/or platforms to activities including:</p> <ul style="list-style-type: none"> <li>• exercises that support interoperability and readiness;</li> <li>• training of NZDF personnel or <u>peacetime</u> training to regional security forces;</li> <li>• engagement, including through maritime deployments and ship visits.</li> </ul> <p>Defence engagement activities are considered routine in nature and are approved by the Chief of Defence Force, with notification to the Minister of Defence.</p>
<b>Defence Sustainment Activities</b>	<p>Periodic assistance to NZDF contingents in theatre to enable mandated functions. Sustainment activities could include such tasks as:</p> <ul style="list-style-type: none"> <li>• replacing or upgrading NZDF communications infrastructure in theatre;</li> <li>• auditing in-theatre armouries;</li> <li>• information management and assurance; or</li> <li>• deployment of military airlift for resupply or facilitating personnel rotations.</li> </ul>
<b>Defence Rotations, Reconnaissance and Extraction</b>	<p>The installation, rotation, and extraction of personnel from theatre, i.e.:</p> <ul style="list-style-type: none"> <li>• a command reconnaissance team that precedes the arrival of the main force being rotated into theatre;</li> <li>• the full or part rotations of the deployed force, which usually involves a handover period of less than one week; or</li> <li>• a force extraction team, which is a team of NZDF personnel that coordinate the withdrawal of deployed personnel from theatre.</li> </ul>
<b>Defence VIP visits</b>	The occasional deployment of additional NZDF personnel into theatre to support and facilitate VIP visits to deployed forces; including visits by leaders, Ministers, senior government or defence officials.
<b>Extraditions</b>	An official process allowing for the surrender of a suspected or convicted criminal from one state to another. New Zealand's extradition procedures are laid out in the Extradition Act 1999, which governs the extradition of persons to and from New Zealand.

<b>Law enforcement activities<sup>26</sup> conducted under the Maritime Powers Act 2022 and other New Zealand domestic law</b>	Any law enforcement activities <sup>27</sup> conducted under the Maritime Powers Act 2022, and other law enforcement activities governed by New Zealand domestic law.
<b>Police Capability Development Programmes</b>	New Zealand Police contributions to international capacity building projects and support operations (without coercive powers).

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<sup>26</sup> Including arrest and detention under the Armed Forces Discipline Act 1971.

<sup>27</sup> Including arrest and detention under the Armed Forces Discipline Act 1971.