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Minister of Defence

NZDF OPERATIONS – AFGHANISTAN

1. You have sought a report on NZSAS operations in Afghanistan with respect to the transfer of detainees by partnered forces to other Afghan authorities and whether such partnering operations potentially render members of the NZDF complicit in torture. In providing advice to you on this matter I have considered reports from the members of the NZSAS, taken legal advice and read the reports of the meetings that you have had with Ministers of other nations, top-level officials and commanders.
2. The issue is an important one. Members of the NZDF operating in Afghanistan do a vital job in a difficult and dangerous environment, often at risk to their own lives. They have brought security and improved conditions of life to many people in Afghanistan. Allegations of that by so-doing they may be complicit in one of the most serious international crimes are potentially damaging to the morale and mana of the members of the NZDF operating in this demanding theatre if not adequately addressed.
3. The importance of this issue goes far beyond the current operations in Afghanistan. Peace-support and armed conflict operations seldom require forces to operate in liberal democracies. The bulk of our future operations, as in the past, will require NZDF force elements to operate collaboratively with the authorities of States in which respect for the rule of law is not strong. The issue has long-term and wide-ranging implications for the future of NZDF operations.

The decision to return to Afghanistan

4. The current NZSAS deployment arose from an invitation from the International Security Assistance Force (ISAF) whose activities in Afghanistan are mandated by the United Nations Security Council.¹ Overall respect for the rule of law in Afghanistan was well-known to be weak. The choice for states was to engage with Afghan forces in the hope of strengthening their professionalism and respect for the

¹ The current mandate UNSCR 1943 (2010) calls on States to further strengthen the force to meet all its operational requirements in the areas of personnel, equipment and other resources and encouraged ISAF and other partners to sustain their efforts to accelerate progress towards the goal of self-sufficient, professional, accountable and ethnically balanced Afghan forces.

rule of law, or to avoid such engagement and leave them to develop, or not, on their own. We have been careful to ensure that NZDF participation in Afghan security cannot be taken as tacit acceptance of human rights abuses. It is not possible, however, for the NZDF to mentor foreign forces in how to conduct their roles professionally and humanely if we are unable to interact with them.

NZSAS Operations in Afghanistan

5. Given the size of the NZ force, their duty to mentor, guide and train members of the Crisis Response Unit (CRU) cannot imply a responsibility to bring about changes throughout the whole of the Afghan legal system or society. Members of the NZSAS have no role in partnering or mentoring the National Directorate of Security (NDS). That responsibility falls upon other elements of ISAF who are performing their duties as diligently as we do ours.

6. Although assigned under the operational control of ISAF, members of the NZDF remain under my command and must comply with the standards that I set for their behaviour. I require all members of the NZDF to respect international and domestic law and the standards of decency that New Zealanders would expect of them. I regard it as my duty to ensure that members of the NZDF are not exposed to the risk of being implicated in any breach of the law simply through carrying out the mission set for them. I take this duty seriously, and I know that my predecessors have done so too.

Partnering operations with the CRU

7. As I have previously reported, recent media comments about NZSAS activities in Afghanistan are mistaken in a number of material respects. In partnering operations with the CRU the actual arrest of a person subject to Afghan jurisdiction is conducted by a member of the CRU. This is viewed as essential for cultural, operational and developmental reasons, as well as legal ones. Members of the NZSAS have been with the CRU on 58 occasions when persons have been arrested by the CRU. Most were arrested pursuant to a warrant issued by Afghan Attorney-General² and entered the criminal justice system from the outset. A prosecutor from the Attorney-General's office must be present. NZSAS may provide certain technical capabilities and assistance. Members of the NZSAS may need to become engaged or act in self-defence where a person poses an immediate threat to which the CRU cannot respond. Unlike the UK, Australian and other forces, the NZDF has no detention facilities in Afghanistan and does not have the resources or the mandate to operate such facilities.

8. The CRU is not a prosecution authority. It detains persons for short periods of time, but must either hand them over to a prosecution authority (e.g. the Ministry of Interior) or release them within 72 hours. A small number of the persons detained by CRU are transferred to the NDS in Kabul. The NZDF plays no part in this decision and does not have the legal ability or mandate to maintain oversight of the detainees once they leave the custody of CRU. There is no evidence, or even a suggestion, that any member of the CRU has tortured or ordered the torture of any person. All evidence at our disposal suggests the CRU have acted appropriately in respect of

² On occasions military aged men who are in the company of the suspect have been detained by the CRU in order to ascertain their identity.

persons that they have arrested. The CRU is now regarded by ISAF as the leading unit of its kind.

Transfers of Detainees

9. International law prohibits the transfer of any person to another State or authority in circumstances where the person is at risk of torture, cruel, inhuman or degrading treatment or arbitrary deprivation of life. NZDF personnel have been ordered to comply with *ISAF Standard Operating Procedures for Detention of Non-ISAF Personnel* (SOP 362). Annex D states in part:

The Islamic Republic of Afghanistan has overall responsibility for the maintenance of law and order within IROA and, when transferring a detainee to the control of the Host Nation, ISAF cannot seek to constrain the freedom of action of the Afghan authorities. However, bilateral agreements may be concluded between [troop contributing nations] and the Host Nation, according to national requirements.

...Consistent with international law, persons should not be transferred under any circumstances in which there is a risk that they will be subjected to torture or other forms of ill-treatment.

10. The NZDF has an arrangement with the Afghan Ministry of Foreign Affairs concerning the transfer of persons between the NZDF and the Afghan Authorities (called the ATD). The arrangement is classified and has not been released out of respect for the wishes of the Government of Afghanistan. It requires that persons transferred from the NZDF to the Afghan authorities will be treated in accordance with the international obligations of both participants. The NZDF will notify transfers to the ICRC and the Afghan Independent Human Rights Commission (AIHRC) who will have full access to such persons and to the facilities where they are held. Representatives of the NZDF will also have full access to the detainees.

11. NZDF Guidance on Detention of Non-ISAF personnel paragraph 9 states:

Personnel detained by NZFOR ISAF personnel are not to be transferred or handed over to ANSF [Afghan National Security Forces] or other ISAF coalition forces without the prior approval of COMJFNZ [Commander Joint Forces New Zealand] and CDF.

12. This provision enables me to "veto" any handover and to make arrangements for another coalition partner to hold the individual in circumstances where his or her life or safety is likely to be at serious risk. If arrangements guaranteeing safety cannot be made, the person will have to be released.

13. The ATD, however, relates only to detainees transferred by the NZDF. When the person is arrested by the authorities of the host State, however, there is no "transfer". A visiting force cannot forcibly remove the individual from the authorities or deny the jurisdiction of the host State. To assert a right to do so would amount to an infringement of the sovereignty of the host State. There is no obligation or power under the ATD for members of the NZDF to visit or inspect detainees transferred by other forces. In other respects the members of the NZDF have no standing in Afghanistan to carry out such inspections.

NZDF detentions in Afghanistan

14. Since 2009 NZSAS has taken one person into detention in Afghanistan; a mid-level Taliban commander. This operation was at the direction of ISAF and was not conducted in partnership with the CRU. The NZDF has subsequently transferred that person to joint US / GIRoA custody. The ICRC and AIHRC have been informed of the detention. Monitoring of his well-being in accordance with the NZDF detention policy has commenced and will continue until he is released or brought before an Afghan court.

The situation relating to the NDS facility

15. The UK High Court decided in 2010³ that the MOD moratorium on passing detainees from British Forces to the NDS facility in Kabul should be maintained. The court concluded that there was a real risk that persons handed to the NDS might be tortured and that there were inadequate monitoring measures available to UK Forces in 2010 to address this risk. However ISAF regards the NDS facility in Kabul as the "detainee arrangement of choice" and directs troop contributing nations to make use of these facilities.⁴

16. Although at present the UK moratorium applies in respect of this facility, it continues to be used by other ISAF forces. It is regarded as the one to which ICRC has the best access and which has the best record-keeping.

17. In September 2010 you visited Afghanistan. As you identified, the structure, polices and procedures regarding the treatment of detainees have undergone rapid overhaul in recent years. There are substantial ongoing improvements in the standards of NDS with considerable support from the international community. An NDS Oversight Committee has recently been established to handle allegations of mistreatment, which Australia, Canada and the UK consider to be of considerable significance.

No complicity in Torture

18. The prohibition against torture is an especially strong rule of international law that applies in peace and armed conflict and cannot be derogated from even in times of emergency. Regardless of their status under the law, all persons deprived of their liberty must be treated humanely.⁵ Any member of the NZDF who tortures any person, orders a person to be tortured, or aids and abets torture is liable to be tried under the Armed Forces Discipline Act 1971. If found guilty of an offence under the Geneva Conventions Act 1958 he or she would be liable to imprisonment for life or a lesser term, under the Crimes of Torture Act 1989 to 14 years imprisonment, and under the International Crimes and International Criminal Court Act 2000 to life imprisonment or a lesser penalty. Torture, inhuman or degrading treatment of persons under the control of the NZDF is contrary to the values and ethos of the

³ *R (on application of Maya Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin) (*Evans*).

⁴ ISAF SOP 362 para 19 directs that those detainees taken by ISAF forces are, operational considerations permitting, to be handed over to the custody of the NDS office in their region.

⁵ All such persons are entitled, at least, to the protections of Geneva Convention Common Art 3, the protections of customary international law, the Convention against Torture and the International Covenant on Civil and Political Rights.

NZDF. The prohibition against torture forms a major part of the NZDF law of armed conflict training.

19. Complicity in torture requires knowledge that torture is taking place and a contribution by way of assistance which has a substantial effect on the perpetration of the crime. The person must know of the aims of the criminal activity and intend to contribute to its commission. I am satisfied that the actions of our personnel in Afghanistan do not even approach the threshold for complicity. Clearly there has never been an intention by the NZDF that persons arrested by the CRU be tortured by the NDS or anyone else. In fact quite the opposite. The ATD is clear that New Zealand expects Afghanistan to comply with its international law obligations. Furthermore under NZDF mentorship members of the CRU have been specifically instructed on the requirement to handle detainees humanely. The NZDF will continue to review information on detention practices. If credible indications of ill-treatment by partnered forces are identified, the NZDF will respond.

20. As suggested by COMISAF an NZDF legal officer joined the staff of the Office of the Legal Advisor in HQ ISAF in April. This officer advises NZ forces in a national capacity and works with the Ambassador on detainee issues.

21. We act under a UN Mandate in concert with 48 other states that, like New Zealand, respect international law. Partnering arrangements are an increasingly important part of ISAF's work as it moves towards handing over control of detention facilities to Afghans. ISAF is instigating rule of law programmes to improve transparency. Members of the NZDF in Afghanistan continue to display the highest standards of integrity and professionalism. They are performing their mission, at great personal risk, to improve the stability, security and well-being of a deeply troubled country. There is no complicity in torture or any other international crime by New Zealand or members of the NZDF by partnering with the CRU.



R.R. JONES
Lieutenant General
Chief of Defence Force