

LGL/SEC/PEACE/AFC. PT 22

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From: PSR(IC)3 (ISED)  
 Sent: Friday, 20 February 2009 12:24 p.m.  
 To: PSR(IC)3 (DSP1 Office); PSR(IC)3 (DSP7)  
 Cc: PSR(IC)3 (LGL); PSR(IC)3 (ISED); PSR(IC)3 (MEA)  
 Subject: FADTC: Icebergs: Detainees  
 Attachments: 2115437-v1-FADTC\_Icebergs\_Feb\_2009.doc

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Hi PSR(IC)3 - attached is the ISED/LGL FADTC Iceberg brief on Afghanistan detainees, for DSP7.

PSR(IC)3 - the first part of the brief is classified confidential for your background information only (PSR(IC)4). The second part of the brief is unclassified talking points to be used as a response to possible questions from FADTC. These answers are in the public domain (following OIA releases to PSR(IC)3

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Icebergs

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**Afghanistan Detainees**

There has been ongoing public and media interest in the treatment of detainees handed over by NZDF (SAS) to Afghan or other coalition forces (US) operating in Afghanistan and, in particular, around how New Zealand can assure itself that they will be treated appropriately. Official Information Act requests on the issue continue to be received on a regular basis – roughly one a month over the past year.

**Key Points**

*New Zealand action*

- NZSAS troops have been involved in actions where individuals were temporarily detained in order to capture Taliban and for Al Qaeda suspects believed to be among them. On two occasions during the first deployment in 2002, New Zealand SAS elements were involved in operations during which they temporarily detained individuals for up to five hours. The number detained was in the range of fifty to seventy in total.
- The NZDF understands that no person who has been held, even temporarily in New Zealand custody, is currently in the hands of the US or other nations represented in the international forces. To date, no persons have been detained by NZ PRT personnel. Given the nature of the NZ PRT's activities, it is unlikely that they will detain people.

*US assurances*

- **Details of NZ representations to US on detainees between 2002-2006**

*Afghan assurances*

- **PSR(C)1, PSR(IC)4**, Mr Goff, as Minister of Defence, obtained a *verbal* assurance from **PSR(C)1, PSR(IC)4**, that the death penalty would not be applied to any detainee transferred to them by NZ personnel and that their treatment would accord with the applicable IHL and HRL.

- We have subsequently proposed amendments to the Military Technical Arrangement (MTA) between New Zealand and the Government of Afghanistan which *inter alia* seeks to formalise these assurances.
- **NZ Representatives**  
have raised the issue of the proposed amendments to the MTA with Afghan authorities on a number of occasions between July 2006 and November 2008.
- While there is a willingness at some levels of the Afghan Government to discuss/consider our proposed changes to the MTA, despite repeated representations we have not received confirmation from Afghan officials that those changes will be accepted – and we are unlikely to receive word in the near future. The death penalty remains a political issue in Afghanistan and to this date remains in use.

#### *New Zealand's position*

- New Zealand's position is that detainees should be treated humanely and in accordance with international law. This accords with New Zealand's international obligations, including under the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. New Zealand has also ratified the Optional Protocol under the Torture Convention which establishes monitoring of States Parties places of detention.
- Freedom from torture and the abolition of the death penalty remain priority issues for New Zealand, and we continue to co-sponsor and support a resolution calling for a moratorium on the death penalty in the UN General Assembly.

**UNCLASSIFIED****Afghanistan Detainees: Talking Points, if required:**

*If asked about whether New Zealand has detained individuals and how many;*

- The NZSAS detained around fifty to seventy personnel during the course of their rotations of active duty in Afghanistan.

*If asked about who detained individuals were handed over to and where they currently are;*

- All detainees were handed over to US coalition personnel. We understand that no person who has been held, even temporarily in New Zealand custody, is currently in the hands of the US or other nations represented in the international forces.

*If asked about the US position;*

- New Zealand has conveyed to the US through diplomatic and defence channels its expectations that detainees are to be treated in accordance with international humanitarian law (IHL) and human rights law (HRL), noting New Zealand's opposition to the use of the death penalty. The US confirmed that its practices were in accordance with IHL and HRL.

*If asked about the Afghan position;*

- During the London Conference on Afghanistan in February 2006, Mr Goff, as Minister of Defence, obtained a verbal assurance from the then Afghan Foreign Minister, Dr Abdullah, that the death penalty would not be applied to any detainee transferred to them by NZ personnel and that their treatment would accord with the applicable international humanitarian and human rights law.
- We have subsequently proposed amendments to the Military Technical Arrangement (MTA) between New Zealand and the Government of Afghanistan which *inter alia* seeks to formalise these assurances.
- Representatives of the New Zealand Embassy in Tehran (accredited to Afghanistan), and the New Zealand Permanent Representative to the United Nations in New York raised the issue of the proposed amendments to the MTA with Afghan authorities on a number of occasions between July 2006 and November 2008.
- Those amendments remain under consideration by the Afghan Government.

## **Afghanistan: SAS and detainees: Possible Media/Parliamentary Questions**

### *Background to the SAS in Afghanistan*

New Zealand has deployed the SAS to Afghanistan on three separate occasions, for twelve months in 2001-2002, and for six months in 2004 and 2005, since the September 11 2001 attacks in the United States revealed the degree of threat emanating from that country under Taleban rule. New Zealanders died in those attacks and others have been killed and injured in subsequent terrorist acts, most recently in Jakarta.

The NZSAS is held in very high regard internationally. In December 2004 1 NZSAS Group received the United States Presidential Citation for 'extraordinary heroism in action' during their first deployment to Afghanistan. In July 2007 Corporal Willie Apiata was awarded the Victoria Cross for New Zealand for 'exceptional bravery under heavy fire'.

*The Sunday Star Times and Keith Locke - Green Party MP, have commented on the SAS' handing over of detainees to the US in Afghanistan in 2002, and the detainees alleged subsequent mistreatment by the US.*

In the event that members of the NZDF detain persons, NZDF detainee handling procedures require that the person detained be treated humanely and in accordance with applicable international law, including the Geneva Conventions, while in NZDF hands.

In Afghanistan in 2002, the SAS briefly detained around fifty to seventy persons, who were then transferred to the US for processing. Following the transfer, the NZSAS Commanding Officer raised the issue of handling of detainees with the local US Command, and received assurances that the practice observed was consistent with US procedures prior to internment in a detention facility.

The SAS acted in good faith in 2002 in entrusting detainees, captured in a conflict zone, to the US - the only coalition partner with facilities for handling detainees and a State Party to the 1949 Geneva Conventions. Allegations of mistreatment by US forces of detainees in Afghanistan, Iraq and Guantanamo Bay, have arisen subsequently. In 2004 and 2005, New Zealand conveyed through diplomatic and defence channels to the US our expectations in writing that detainees are to be treated in accordance with international humanitarian law and human rights law. The current US administration, under President Obama, has placed an emphasis on the non-use of torture and the humane treatment of detainees, as evidenced by the decision to close its detention facility in Guantanamo Bay.

*How will the SAS deal, in future deployments to Afghanistan, with people they capture or detain?*

If the SAS were to redeploy to Afghanistan, and in the event they were again required to detain persons, it is most probable that the detainees would be transferred to the Afghan authorities. (In 2002, decades of conflict in Afghanistan had destroyed state infrastructure, including the country's legal system, and diminished the capacity of the police and armed forces to process detainees. Today, Afghanistan has a functioning legal system and the capacity to carry out the appropriate actions). Afghanistan is also a State Party to the 1949 Geneva Conventions.

New Zealand has received assurances from the Afghan government that all transferred detainees will be treated humanely and in accordance with international humanitarian and human rights law. Ensuring that standard of treatment being upheld would be of the utmost importance to New Zealand.

The NZDF would also inform the International Committee of the Red Cross (ICRC) of the fact that persons had been detained. Other steps include liaison with Afghan human rights groups.

#### *Consideration of re-deployment of the SAS*

Decisions about putting New Zealanders in harm's way are never taken lightly. These decisions always proceed from careful consideration of how New Zealand can best contribute to international efforts, in the case of Afghanistan under United Nations auspices, to deny terrorists the breeding grounds of political chaos and material hardship. Given Afghanistan's recent history of warfare and political tumult over several decades, New Zealand recognises that a stable future there cannot be secured without containing the threat of violence, which is once again on the increase. This is why New Zealand's continuing involvement will maintain a balance between security and development, between containment of violence and furtherance of social and humanitarian goals.

For this reason the government is conducting a review of New Zealand's future deployments in Afghanistan. I expect Cabinet to decide on the review's recommendations in mid-August. The eventual mix of military and civilian deployments will reflect Cabinet's view of how New Zealand can best contribute to the 42-nation effort to help Afghanistan combat the threat of violence so that civilian efforts can take root amid peace and stability. New Zealand is justifiably proud of how its aid contributions and the presence of NZ Defence personnel have helped Bamyan to become one of the most peaceful and prosperous provinces in Afghanistan. The requests for New Zealand again to deploy SAS

troops reflects the high regard in which they are held by Afghanistan and our ISAF partners - precisely for their earlier contributions to creating that stability in less fortunate parts of the country.

*What is the legal basis for the future deployment of the SAS?*

The legal basis for New Zealand's current military deployments in Afghanistan, including the potential future deployment of the SAS, lies in UN Security Council resolutions mandating the International Security Assistance Force (ISAF), as well as the consent of the Government of Afghanistan.

*Would the deployment of the SAS be a response to US pressure?*

No. It is a fact that the US and other countries have expressed interest in our re-deploying the SAS, because our special forces have an excellent reputation, but the decision is ours. As I pointed out after the recent Jakarta bombing, and as the Afghanistan policy review makes clear, there is a link between events in Afghanistan and the security of New Zealanders.

*Where will the SAS, if deployed, be based and what operations do you expect them to be engaged in?*

It is not the practice to discuss operational matters such as those raised in your question and I intend to respect longstanding practice.

*Won't sending the SAS make New Zealanders more likely to be targets of terrorists?*

We have already seen New Zealanders killed and wounded in terrorist attacks. That risk continues. We already have NZDF personnel in Afghanistan performing a wide range of roles. I don't believe that adding an SAS presence would change the risk profile for New Zealanders outside Afghanistan.

*What about the risks to SAS personnel?*

The SAS are elite professional soldiers who are trained to recognise and to minimise risk as they go about their work. They have considerable experience of Afghanistan, and know the risks they may have to deal with.

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Ministry of Foreign Affairs and Trade  
3 August 2009

