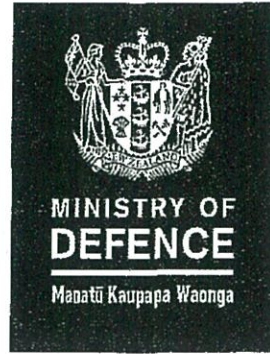




MINISTRY OF
FOREIGN AFFAIRS & TRADE
 MANATŪ AORERE



DS 769.
 DSO 177



15 February 2011

Minister of Foreign Affairs

For action by 16 February 2011

Minister of Defence

For action by 16 February 2011

AFGHANISTAN - NEW ZEALAND MONITORING OF DETAINEE

Submission: Issues

Purpose: Following the NZSAS's detention of an individual in Afghanistan, and his transfer into US custody, this submission seeks approval of a letter setting out the terms of that transfer. It also sets out a proposed detainee monitoring regime.

Comments: PSR(R)1

Recommended Referrals

Prime Minister

For information by 16 February 2011

Attorney-General

For information by 16 February 2011

Contacts

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Minister's Office Comments

Signed / Referred

Date: ___/___/___

Afghanistan - New Zealand Monitoring of Detainee

Key Points

- NZSAS personnel, acting on the instructions of ISAF, detained a mid-level Taliban commander in Afghanistan on 30 January 2011. The individual is being held in a US detention facility in Bagram.
- **PSR(R)1**
A draft letter of transfer is attached, for urgent approval.
- Having detained the individual, New Zealand is now subject to an ongoing obligation to monitor his treatment pending his release, or him being brought before competent Afghan judicial authorities.
- This submission sets out a proposed monitoring regime, and seeks direction as to how that monitoring ought to be undertaken.

Recommendations

It is recommended that you:

- 1 **Note** that NZSAS troops acting on the instructions of ISAF captured a mid-level Taliban commander, known as Musa Khan, on 30 January 2011; Yes / No
- 2 **Note** that Musa Khan is currently detained in the Battlefield Detention Facility at Bagram Air Field, but is scheduled to be transferred to the Detention Facility in Bagram, under US control; Yes / No
- 3 **Approve** the attached draft transfer letter, **PSR(R)1**; Yes / No
- 4 **Agree** that the Government commit to the monitoring of Musa Khan's detention, until he is either released or brought before competent Afghan judicial authorities; Yes / No
- 5 **Agree** that the minimal, credible monitoring regime will involve: Yes / No
 - a. New Zealand receiving appropriate assurances from the receiving forces that the detainee will not be subject to ill-treatment;
 - b. New Zealand authorities being confident, having taken all available means to obtain relevant information, that ill-treatment is not occurring in institutions to which the detainee is or could be transferred;
 - c. New Zealand exercising rights of access to, and monitoring of, the detainee;

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- 6 **Agree** that a designated New Zealand representative conduct regular monitoring visits, initially by travelling to the detention facility every month, with the frequency to be adjusted if conditions are found to be acceptable; Yes / No
- 7 **Direct** that oversight of this monitoring regime rest with the New Zealand Ambassador, but that the monitoring and support functions be undertaken by an appropriately qualified NZDF officer based in Kabul; Yes/No
- 8 **PSR(R)1** Yes/No
- 9 **Note** that, subject to Ministers' advice on the above options, officials will further develop the appropriate protocols for monitoring the detainee, including the funding and resource implications for the responsible agencies. Yes/No

PSR(IC)3
for Secretary of Foreign Affairs and Trade

R. R. JONES
Lieutenant General
Chief of Defence Force

J. MCKINNON
Secretary of Defence

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Report

On 30 January 2011 an element of the NZSAS in Afghanistan was tasked by ISAF to apprehend a mid-level Taliban commander, known as Musa Khan. The operation was conducted by the NZSAS independently, due to the limited time window available and the unavailability of a prosecutor from the Afghan Interior Ministry – a necessary precondition for the deployment of the NZSAS's partner unit, the Crisis Response Unit (CRU).

2 Musa Khan was detained by the NZSAS in the vicinity of Bagram Air Field at approximately 1500 hours. The individual was then inspected by the NZSAS doctor. As New Zealand does not operate a detention facility in Afghanistan, and lacks the capacity to establish such a facility, Musa Khan was transferred to the US-operated Battlefield Detention Facility at Bagram Air Field at approximately 1900 hours on the day of his capture. This transfer was authorised by the Chief of Defence Force in accordance with the NZDF *Individual Guidance for the Detention of Non-ISAF Personnel*, which has previously been considered by Ministers.

3 PSR(R)1

4 PSR(R)1

The transfer will need to occur very shortly. US DFIB authorities require a formal legal transfer of the individual from New Zealand to US custody, via an exchange of letters. This is required by 16 February, or the US could be in breach of their regulations in holding the detainee and may have to release him.

5 NZDF have received assurances in writing PSR(R)1 that the individual will be treated humanely and in accordance with international law. An NZDF representative has also carried out an inspection of the DFIB facilities. To date Musa Khan has not been visited by any New Zealand representative and this is now an urgent requirement. A senior NZDF representative, accompanied by an NZSAS doctor, will make a preliminary visit this week.

Obligation under international law

6 New Zealand has a positive obligation under international law to ensure that no person under its effective control is subjected to torture, or cruel, inhumane or degrading treatment. One implication of this obligation is that New Zealand would incur State responsibility if it transferred a detainee which its forces had captured to the authorities of another State which, in the circumstances, it knew or ought to have known would mistreat that detainee.

7 In a recent case challenging the detainee transfer arrangements of UK forces operating in Afghanistan, the High Court of England and Wales placed significant weight on two aspects of the British detainee transfer arrangements,

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in finding that they were lawful.¹ The first was that the British Government obtained a written assurance from the receiving Government that the detainee would not be mistreated. The second was that British authorities monitored on an ongoing basis the circumstances in which the detainee was detained.

8 On 2 November 2010, Crown Counsel provided advice in respect of the prospective transfer of detainees captured by New Zealand forces to Afghan authorities, as part of a review of the implications of the Government's commitment of NZSAS personnel in support of the CRU. It was advised that, as a consequence of New Zealand's obligations under international law, if the transfer of such detainees were to occur:

- a. New Zealand must receive appropriate assurances from the responsible Afghan authorities that ill-treatment would not occur;
- b. New Zealand authorities must be confident, having taken all available means to obtain relevant information, that ill-treatment was not now occurring in institutions to which the detainee would be transferred or might be transferred; and
- c. New Zealand must continue to monitor the treatment of such detainees.

9 This advice reflected the view held by both the NZDF and MFAT, which led to the negotiation of a detainee transfer arrangement (known as the "ATD") between the NZDF and Afghan Foreign Ministry, which entered into force on 12 August 2009. NZDF also complies with ISAF's Directive on Detention Operations and Notification of 13 April 2010. In the ATD, the New Zealand Government reserves the right to have access to and monitor any detainee it transfers to the Afghan authorities.

10 Prior to 30 January 2011, NZSAS personnel had not detained anyone during their current operation in Afghanistan. Detention is only contemplated in exceptional circumstances. NZDF personnel have been in the vicinity when Afghan National Security Forces have apprehended individuals, but in such instances New Zealand does not have jurisdiction over the individuals who are then transferred to Afghan custody. To date, no monitoring has therefore been carried out by New Zealand in Afghanistan.

Immediate next step

11 New Zealand does not currently have any transfer of detainee arrangements with US forces. While the contexts of a transfer to US authorities and a transfer to Afghan authorities are clearly different, the applicable principles are the same. NZDF has prepared the attached draft letter which, if approved, would govern the transfer of the present detainee to US custody. As noted above, the transfer needs to occur very shortly. This letter, while not a formal transfer arrangement, is based on similar documentation PSR(R)1

The letter deals with the key provisions found in a transfer arrangement, such as the right to monitoring and

¹ *R. (on the application of Evans) v Secretary of State for Defence* [2010] EWHC 1445.

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inspection, the duration of the transfer, and assurances **PSR(R)1** as to how the detainee will be treated.

12 Officials consider that the draft letter is a sufficient basis upon which to conclude the legal transfer of the detainee, and upon which to found an ongoing right to monitoring by the New Zealand Government. **PSR(R)1**

It is proposed that the senior NZDF officer in Kabul sign on New Zealand's behalf.

Proposed monitoring regime

13 The New Zealand Government will need to decide whether, and how, to undertake monitoring of Musa Khan, following this transfer.

Is monitoring essential?

14 New Zealand could take the view that the transfer of an insurgent into the custody of US forces does not warrant ongoing monitoring. That is on the basis that the person will be treated in accordance with applicable US rules and procedures. However, officials consider that such an approach would be inconsistent with both New Zealand's international obligations and with previous statements by Ministers, as well as the approaches taken by all key coalition partners **PSR(R)1**

It would expose New Zealand to legal risk, in terms of adverse findings in international bodies (and, conceivably, domestic courts). It may also damage New Zealand's international reputation, as a long-standing supporter of international humanitarian law and of international human rights standards.

What monitoring involves

15 Officials consider that New Zealand is under an international law obligation to monitor the well-being of the detainee until he is either released or placed before a competent Afghan judicial authority. In accordance with this obligation and in line with our **PSR(R)1** partners' approaches, monitoring should take the form of periodic visits by a competent New Zealand representative. That representative would visit the detention facility in which Musa Khan is held. During the visit, the official would meet with the detainee and inspect the conditions in which he is held.

16 The representative would need to receive appropriate guidance from a suitably qualified advisor about the objectives of the monitoring, how it should practically be undertaken, and appropriate follow up processes. Such processes would include how to respond if any instance of ill-treatment is identified or if rights of access are withdrawn.

17 The experience of New Zealand's key **PSR(R)1** partners is that detainee monitoring is a burdensome one. Not only is it time consuming, and often for an indeterminate period, it must be done conscientiously (which may involve raising difficult issues with the authorities who are responsible for the detainee).

18 PSR(R)1

19 While this is to date the first and only New Zealand-transferred detainee in Afghanistan, the resource implications nonetheless need to be carefully considered. The monitoring regime decided upon for this individual will set a precedent for any future cases. Depending on when Musa Khan is released or placed before Afghan judicial authorities, it could also commit agencies for the duration of New Zealand's engagement in Afghanistan, and possibly beyond then.

20 In line with Crown Counsel's advice, it is proposed that the minimal, credible monitoring regime in these circumstances would be as follows:

- a. New Zealand must receive appropriate assurances from the receiving forces that the detainee will not be subject to ill-treatment;
- b. New Zealand authorities must be confident, having taken all available means to obtain relevant information, that ill-treatment is not occurring in institutions to which the detainee is or could be transferred.
- c. New Zealand must exercise rights of access to, and monitoring of, the detainee.

21 Monitoring visits would have to be conducted regularly, and in person, by the designated New Zealand representative responsible for monitoring. It is proposed that this would involve that person travelling to the detention facility every month for several months. If the detainee's conditions are acceptable, the frequency of such visits could be adjusted – for example, to every two months, and later on to every quarter. Time would have to be found for travelling to and from the facility, for preparing for visits, for any necessary follow-up and for reporting.

Who should conduct monitoring visits?

22 NZDF considers that, to ensure maximum credibility for the monitoring regime, it should be undertaken by the New Zealand Embassy in Kabul. If the Government discontinues resident representation in Kabul, the New Zealand Ambassador in Iran, accredited to Afghanistan, would assume that responsibility. NZDF considers that such an arrangement would minimise any risk of any allegations of a conflict of interest arising from NZDF personnel both having detained the person and then monitored the conditions of his detention.

23 While understanding the rationale behind such an approach, MFAT notes that tasking the New Zealand Embassy with that function would be an

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onerous commitment, which the Embassy is not equipped to discharge. Most importantly, such a monitoring regime would detract from the Embassy's core diplomatic tasks. Already, as a sole-person post, the Embassy in Kabul undertakes a demanding programme and tasking will increase as Bamyán begins the formal transition process this year. Similarly, once the resident New Zealand Ambassador in Afghanistan is withdrawn, tasking the accredited Ambassador in Tehran with monitoring would be difficult, not least logistically. MFAT therefore invites Ministers to consider whether monitoring ought to remain a NZDF responsibility.

24 Given the NZDF and MFAT's respective concerns about either option, a proposed compromise is that the New Zealand Embassy in Kabul takes overall oversight and responsibility, but that the physical monitoring is undertaken by an appropriately qualified NZDF legal officer based in Kabul. A bid will be made to embed this legal officer in ISAF Headquarters, PSR(R)1

In addition to the ISAF HQ role, the NZDF officer would carry out the regular inspections of Musa Khan, would report to the New Zealand Ambassador, and would generally provide all necessary and appropriate logistical support. The legal officer would also provide advice, as required to all New Zealand forces in Afghanistan.

Follow-up

25 Subject to Ministers' advice on the monitoring options outlined above, MFAT will explore with NZDF the funding and resource implications for agencies and the appropriate protocols for monitoring the detainee will be further developed.

Consultation with external agencies (if required)

This submission has been prepared jointly with the New Zealand Defence Force and in consultation with the Ministry of Defence.