

February 2011

Minister of Foreign Affairs
Minister of Defence

**NZSAS OPERATIONS IN AFGHANISTAN:
TRANSFER OF DETAINEE TO US CUSTODY**

Background

1. On 30 January 2011, an element of the NZSAS in Afghanistan was tasked by ISAF to apprehend a mid-level Taleban 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 Ministry of the Interior – 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 an area known as the Old Range, in the vicinity of Bagram Air Field, on 30 January 2011 at approximately 1500 hours.
3. 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 on Non-ISAF Personnel*, which has previously been considered by Ministers.
4. The International Committee of the Red Cross ("ICRC") has been advised of Musa Khan's detention.

Issue

5. The US forces in Afghanistan intend to transfer Musa Khan to the Detention Facility in Bagram ("DFIB"), which is a facility currently undergoing planned transition from US to Afghan control. At the present time, one block is under Afghan control with US mentoring; the remainder of the facility is under US control.
6. The transfer needs to occur very shortly, but the US authorities in control of DFIB will not consent to the transfer unless an arrangement is entered into between the Governments of New Zealand and the United States at diplomatic level, formally transferring custody of Musa Khan to the United States.
7. This note seeks the approval of Ministers for the New Zealand Ambassador resident in Kabul to enter into an arrangement, by way of an Exchange of Letters,

transferring custody over Musa Khan to the US authorities and establishing the conditions subject to which that transfer would occur.

Obligation under international law

8. New Zealand has a positive obligation under international law to ensure that no person under its effective control is subjected to torture, or cruel, inhuman 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.

9. 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, 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 the circumstances in which the detainee was detained by the receiving Government on an on-going basis.

10. 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 detainees would be transferred or might be transferred; and
- c. New Zealand must continue to monitor the treatment of the detainees.

11. This advice reflected the view which had previously been taken by both the NZDF and MFAT, which led to the negotiation of an *Arrangement concerning the Transfer of Persons between the New Zealand Defence Force and the Afghan Authorities*, which entered into force on 12 August 2009. New Zealand does not have an equivalent arrangement with the United States.

12. While the contexts of a transfer to US authorities and a transfer to Afghan authorities are clearly different, the applicable principles are the same.

Options

13. Ministers have three options in respect of the transfer arrangement for Musa Khan:

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

- a. **No monitoring.** This option would have the advantage of no immediate cost. It would however potentially expose New Zealand to a risk of reputation damage or even legal proceedings, particularly if something untoward were to occur in the treatment of Musa Khan. Following this approach would be inconsistent with the approach taken by all of New Zealand's usual coalition partners (eg Australia, Canada, the UK, and major EU States).
- b. **Monitoring led by MFAT, with NZDF support.** Under this option, MFAT would take the lead in monitoring the treatment of Musa Khan, acting through the New Zealand Ambassador accredited to Kabul. The NZDF would support the Ambassador by attaching a legal officer to the Ambassador's staff to carry out the physical monitoring task and provide advice as required. The legal officer would also provide advice, as required, to all New Zealand forces remaining in Afghanistan. A bid will also be made to embed the legal officer in ISAF Headquarters, as PSR(C)1
- c. **Monitoring led by NZDF.** Under this option, MFAT would have no directive role in respect of the monitoring of Musa Khan's detention. This would permit the Ambassador to focus on other tasks. However, there may be a perception that monitoring led by the NZDF of a person whom it captured does not provide an adequate degree of independent oversight.

14. Option b is recommended.

Proposal

15. It is proposed that Ministers approve the negotiation of an arrangement with the United States authorities, which would formally transfer custody of Musa Khan to those authorities and establish the conditions subject to which that transfer would occur, including provision for New Zealand authorities to monitor his detention.

16. PSR(C)1

Recommendations

17. It is recommended that Ministers:

- a. **Note** that NZSAS troops acting on the instructions of ISAF captured a mid-level Taliban commander, Musa Khan, on 30 January 2011;
- b. **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.

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- c. **Note** that the DFIB authorities require an Exchange of Letters to occur before they will accept custody of Musa Khan;
- d. **Agree** that the New Zealand Ambassador in Kabul be instructed to enter into an Exchange of Letters in the terms indicated in the enclosed document;
- e. **Agree** that the Government commits to the monitoring of Musa Khan's detention, led by MFAT but with NZDF support, until Musa Khan is either:
 - (1) Released; or
 - (2) Brought before a judicial authority of the Government of the Islamic Republic of Afghanistan; and
- f. **Note** that the recommended monitoring option will potentially provide additional benefits to New Zealand's relationship with NATO by committing an NZDF legal officer to ISAF Headquarters.

R.R. JONES

Lieutenant General
Chief of Defence Force

John McKinnon

Secretary of Defence

John Allen

Secretary of Foreign Affairs and Trade

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