

DOT-POINT BRIEF FOR CDF

DETAINEES IN AFGHANISTAN – AFGHANISTAN/NZ TRANSFER ARRANGEMENT

Introduction

- On 12 Aug 09 an Arrangement between the Ministry of Foreign Affairs of the Islamic Republic of Afghanistan and the NZDF concerning the transfer of persons between the NZDF and the Afghan Authorities was signed in Afghanistan ("ATD"). The arrangements are in relation to the transfer of any detainees by any NZ forces in Afghanistan, and are not related to any specific operation or NZ force element.
- The arrangements formalise and expand upon an unwritten arrangement between the former Minister of Defence and the Afghan Foreign Minister early in 06 ~~PSR(C)1~~
- The ATD is concluded as a 'less than Treaty level' arrangement and as such does not require ratification, and is not considered binding under international law. The Arrangement came into effect on 12 Aug 09 and will remain in effect until terminated by either party.

Consultation

- The ATD was developed over several months in 2009, and involved extensive consultation between and input by MFAT, NZDF and the Afghan Foreign Ministry. The final arrangement drew strongly from a separate arrangement recently entered into by Afghanistan and ~~PSR(C)1~~ for the transfer of detainees. Significant diplomatic efforts were expended to ensure the interests of both parties were met, particularly in relation to the death penalty issue.
- The development of the ATD was consistent with the continued progress of Afghanistan as a sovereign nation, and was identified as an important precursor to operations after the stabilisation of security during the NZDF operations from 02 to 05. Any individuals who might be deprived of their liberty in Afghanistan will either be citizens of Afghanistan or persons who have submitted themselves to Afghan jurisdiction through their presence in that country.
- Foreign affairs officials from both Afghanistan and New Zealand equally represented both countries interests in progressive talks that took place in Washington and Kabul. The final Arrangement was executed by the New Zealand Ambassador-designate to Iran with accreditation to Afghanistan, in consultation with the Afghan Ministry of Foreign Affairs.

Scope of the Document

- The ATD is reflective of and consistent with the legal mandate of ISAF (particularly UNSCR 1386, 1510, and 1833), and reaffirms the authority of member states contributing to ISAF to take all necessary measures to fulfil ISAF's mandate.
- The obligations of NZ under international law are consistently represented throughout the document.
- The ATD establishes the principles and procedures concerning the transfer of persons in Afghanistan from the NZDF to Afghan authorities. The ATD does not contemplate or provide for the transfer of persons by the NZDF to any other country or coalition party as part of operations in Afghanistan.
- The ATD is complementary to the extant NZ Military Technical Arrangements between GONZ and GoIRA, and current Rules of Engagement provisions specifying the circumstances and situations during which persons can be detained, including approval authorities required by the NZDF for detainees to be transferred. The latter provisions remain classified CONFIDENTIAL or SECRET.

Key Provisions

- The key provisions of the ATD are as follows:
 - New Zealand's obligations under the *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*. This protocol aims at the abolition of the death penalty. Parties are required to abolish the death penalty within their own jurisdiction. Although silent on the question of transfers, most parties interpret their obligations under the treaty to include a duty to discourage other states that practice capital punishment and may decline to surrender persons to such jurisdictions.
 - Persons transferred from the NZDF to the Afghan authorities will be treated in accordance with the international obligations of both Participants (ATD, paragraph 7).
 - NZDF will notify the ICRC and the Afghan Independent Human Rights Commission ("AIHRC") when a person is transferred to the Afghan authorities (ATD, paragraph 4).
 - Representatives from the ICRC and AIHRC will have full access to such persons and to the facilities where they are held (ATD, paragraph 4).
 - Afghan authorities are required to advise the NZDF of any legal proceedings, transfers or significant changes concerning persons transferred under the ATD.

- The ATD does not provide a complete assurance that no detainee transferred to the Afghan authorities by NZDF will be executed. However, the ATD does include an assurance that Afghanistan will meet its obligations under international law not to mistreat such detainees.
- The ATD complements the current NZDF risk mitigation strategy in respect of detainees, including:
 - A supplemental "NZFOR ISAF" detention policy which is currently issued to and followed by all NZ force elements in ISAF, including TF 81
 - The concept of operations, which is that the Afghan authorities will arrest and detain persons of interest. Only in exceptional circumstances is detention by TF 81 contemplated
 - Formal training being delivered to TF 81 on detainee handling and transfer procedures
 - Legal officer deployed with TF 81 with explicit instructions to assist SNO with legal compliance and monitoring of human rights issues
- There is no intention to release the ATD to any State or organisation (ie ICRC) at this stage, in light of MFAT advice that the ATD was negotiated in confidence and release should therefore be refused pursuant to section 6(a) of the Official Information Act 1982. MFAT and NZDF have currently agreed the ATD should be classified at a minimum of RESTRICTED.


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