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CDF

DETAINEE ARRANGEMENTS – AFGHANISTAN [UPDATED]

Reference:

A. C10004560 – WLN dated 2/9/10

INTRODUCTION

Background

1. The High Court of England and Wales has recently handed down a judgment (“*Evans* judgment”) in respect of a judicial review challenge to UK Ministry of Defence (UK MOD) detainee transfer policies in Afghanistan.¹ The Court considered in detail the UK policy and practice on detainee handling as well as a considerable amount of disturbing evidence relating to the mistreatment of prisoners by the Afghan National Directorate of Security (NDS). The Court concluded that the British Forces could continue to transfer detainees to the NDS facilities in Lashkar Gah and Khandahar, but that the UK moratorium on handing prisoners across to the NDS in Kabul was correct and should be maintained.²

2. NZSAS operating in Afghanistan work in support of an Afghan police unit called the Crisis Response Unit (CRU). A small number of the persons arrested by the CRU are handed across to the NDS in Kabul. The fact that these are the same facilities that the UK High Court considered should not be used by the UK Forces has caused you to seek legal advice about the consequences of the *Evans* decision for NZDF operations. It has also given rise to public questions about whether NZDF personnel are breaching law of armed conflict (LOAC) or international human rights law obligations in providing assistance to the CRU.

The legal issue for the NZDF

3. There is no evidence, or even a suggestion, that any member of the NZDF operating in Afghanistan has tortured or ordered the torture of any person. There is equally no suggestion that any member of the CRU has tortured or ordered the torture of any person. All evidence at our disposal suggests that the CRU have acted very well in respect of the persons that they have arrested.

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

² PSR(IC)4, PSR(R)1

4. It is accepted that after they have entered the Afghan criminal justice system a small number of the persons arrested by the CRU have been transferred to the NDS facility in Kabul. There is no allegation that any New Zealand official has any role in this decision – and in fact none do. There is no allegation that any person arrested by the CRU has actually been tortured or mistreated by the NDS. The suggestion made in the media, and now by Amnesty International, is that given the human rights record of the NDS the mere fact of a person ending up in their control is enough to give rise to a real risk that they will suffer from torture or inhuman or degrading treatment, a situation which exposes New Zealand / NZDF to legal risk. The narrow legal issue is therefore whether the involvement of the NZDF in the operations of the CRU is enough to import complicity by virtue of:

- a. The State responsibility of New Zealand; or
- b. Individual criminal responsibility of members of the NZDF.

5. The importance of this issue goes far past the current operations in Afghanistan. It does not apply simply in respect of the NZSAS, the NZDF or the relationship with the CRU or NDS. It applies equally to the operations of the NZ PRT and the NZ Police³ and would apply in principle regardless of the Afghan legal authority involved in the arrest or subsequent detention.⁴

6. Peace-support operations and armed conflict operations seldom require forces to operate in liberal democracies. It is to be assumed that the bulk of our future operations, as has been the case in the past, will require NZDF force elements to operate collaboratively with the law enforcement authorities of States in which respect for the rule of law is not strong. Decisions made in the context of this particular case are likely to have long-term and wide-ranging implications for the future of NZDF operations.

7. Because this matter has implication in respect of the legal liability of New Zealand, as well as for members of the NZDF, it is my recommendation that this opinion be passed to the Solicitor-General for his view. Copies should also be provided to MFAT and NZ Police.

DISCUSSION

The *Evans* decision

8. The *Evans* decision is a detailed 52 page judgment (Flag A). It is important to note that the *Evans* case proceeded almost entirely on a relatively narrow question of

³ See, for example, [PSR\(sen\)1](#)

⁴ See *Evans* paragraph 54 which found "Statistically, most torture and other cruel, inhuman and degrading treatment was in the police (259 of the 398 interviewees). The next highest category was 59 persons who said they had been tortured in the offices, departments and sections of national security (NDS)".

Public Law. Although referring to the human rights law background to the policy, and certain jurisprudence of the European Court of Human Rights, the essential question before the Court was not based on the international law obligations of the UK, but rather the question of whether the UK MOD was complying with its own policy.⁵ The broad framework of Public Law in this country would make a claim such as that raised by Evans at least possible here.

9. The Court did not address some important constitutional and international law issues which were “put on one side” by agreement of the parties.⁶ It is by no means certain that the same thing would occur here.

UK MOD Detention policy

10. The *Evans* judgment examines the UK MOD detainee policy at some length.⁷ This policy requires that any person detained by UK Forces be transferred to Afghan authorities within 96 hours of detention or released. Detainees taken by UK Forces are not to be transferred if there is “a real risk that they will be tortured or mistreated.” The claimant’s case was that this real risk existed in all cases where detainees are handed to Afghan custody (in particular the NDS) and therefore all such transfers are in breach of the policy and thus unlawful. The consequence of such a finding, the Court acknowledges, is that all detainees would have to be released - which would have “implications” for British operations and security in Afghanistan. The reality is that such operations would no longer be possible.

11. The judgment relates to persons that the UK Forces have detained themselves and have transferred to Afghan authorities. The Court reinforces the obligation to monitor the welfare of persons transferred in those circumstances. The judgment does not address the issue of obligations that may arise if a person owing allegiance to Afghanistan is arrested or detained by Afghan authorities while UK Forces are present.

NZSAS operations in Afghanistan

12. On 10 August 2009 the Government announced that the NZSAS would return to Afghanistan for three rotations. The decision was debated in Parliament on 18 August 2009. Members of the NZSAS operating in Kabul assist a unit of Afghan Police working for the Ministry of the Interior (MOI). The CRU, as their name suggests, are involved in rapid action responses to crisis situations, as a result of which they may apprehend persons believed to be involved in actual or imminent attacks on the population and Government of Afghanistan.

13. The *Evans* judgment sets out a “broad factual background” some of which is relevant to NZDF involvement and some of which is not. For the sake of completeness the factual situation in respect of NZDF operations is as follows.

⁵ See *Evans* Judgment paragraph 240.

⁶ *Ibid* paragraph 238.

⁷ *Ibid* paragraphs 19 – 24.

14. United Nations Security Council Resolution (UNSCR) 1386 (2001) established the International Security Assistance Force (ISAF) in Afghanistan with the mandate to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas. This mandate has been expanded under UNSCR 1510 (2003) and 1623 (2005) to allow the security framework provided by ISAF to be progressively expanded to other urban centres and other areas beyond Kabul. These Resolutions, updated by UNSCR 1746 (2007) and 1817 (2008) and 1890 (2009) continue to authorise ISAF under Chapter VII of the United Nations Charter to take all necessary measures to fulfil its mandate. The current mandate authorised by UNSCR 1890 expires on 13 October 2010.

15. New Zealand's force elements in Afghanistan, including the NZSAS and the Provincial Reconstruction Team (PRT) have been assigned under the operational control of ISAF and are part of the ISAF coalition.

16. The conduct of operations is also supported by the Military Technical Agreement (MTA) between the NZDF and the Government of the Islamic Republic of Afghanistan (GIROA) which provides that NZ personnel conducting operations in Afghanistan may need to use force commensurate with the threat to NZ personnel. The MTA was most recently validated and updated in August 2009. The status of NZ forces is also governed by a MTA between ISAF and the GIROA executed in 2002. The combined effect of both MTAs is to grant NZ personnel immunity from the criminal jurisdiction of the authorities of Afghanistan by application of the status of "experts on mission" for the purposes of the Convention on the Privileges and Immunities of the United Nations 1946, or by express waiver of criminal jurisdiction. The effect of this is that NZDF personnel in Afghanistan are subject to the exclusive criminal or disciplinary jurisdiction of New Zealand.

17. Apart from troop numbers, the factual situation set out in paragraphs 14 – 19 of the *Evans* judgment broadly applies to NZSAS operations, except for one important distinction. While operations against insurgents continue to be conducted under the law of armed conflict when involving direct combat, the role and tasks of the NZSAS in Kabul itself are principally in support of law enforcement tasks, not an armed conflict role. Persons are therefore detained under Afghan domestic law, not the law of armed conflict.

18. NZSAS members mentor, guide and train members of the CRU. NZSAS members do not take a leading role in the active part of the operation themselves although they will sometimes be in close support, provide certain technical capabilities, and assist with recording of names and other personal information of those detained. Most of the individuals detained by the CRU are arrested pursuant to an arrest warrant issued by the Attorney-General of Afghanistan and so enter the Afghan criminal justice system from the outset.⁸ On all occasions the actual arrest of a person subject to Afghan jurisdiction has been conducted by a member of the CRU, not the NZDF. Because the arrest warrant is issued to members of the CRU,

⁸ On occasions military aged men who are in the company of the suspect will also be detained in order to ascertain their identity. Once again this detention is achieved under Afghan law, by Afghan police.

members of the NZDF have no legal power to conduct the arrest, although they may exercise a right of detention in a situation where, for example, a person escapes the CRU cordon. So far, this has not happened. The NZSAS have not arrested or detained any person in Afghanistan during the current deployment and have no authority to interfere with the conduct of the criminal investigation or the judicial process.

19. Unlike the UK and Canadian forces, NZDF has no detention facilities in Afghanistan and does not have the resources or the mandate of the NZ Government to do so.

20. CRU is not a prosecution authority. CRU detains persons for relatively short periods of time in their compound, but must, under Afghan law, either hand them over to a prosecution authority or release them within 72 hours. Accordingly, detainees, if they are not released, are transferred to other agencies within the MOI or NDS. In either case the individuals are likely to end up in *Pol E Charki* prison in Kabul. NZDF does not have oversight of the detainees once they leave the custody of CRU.

NZ Detention policy

21. NZDF force elements operating within ISAF are required to comply with ISAF Standard Operating Procedures 362 – *Standard Operating Procedures for Detention of Non - ISAF Personnel* dated 3 August 2009. [Flag B]. In order to give this policy legal effect for the NZDF, in March 2007 CDF directed that NZDF personnel under operational control of Commander ISAF comply with SOP 362.

22. **PSR(R)1**

23. On 11 June 2007 CDF issued the New Zealand Guidance on Detention of Non-ISAF personnel in order to provide for two elements of NZDF policy to be read and implemented in conjunction with SOP 362. [Flag C] Paragraph 9 is of particular relevance. It 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.

24. This provision was specifically inserted into NZDF detainee handling policy to ensure that persons deprived of their liberty were not handed over in circumstances where their lives or safety are likely to be at serious risk. This enables CDF to “veto” any handover and (if possible) to make arrangements for another coalition partner to hold the individual if necessary.

25. Similar provisions appear in Draft Manual of Armed Force Law (2ed) Volume 4 [Flag D]. Although not yet promulgated, this provision is the basis of all NZDF training on this subject. All members of the NZDF know that they are not to hand-over detainees in circumstances where there is a real risk that the person will be tortured or mistreated.

Arrangement for Transfer of Detainees

26. On 12 Aug 09 a ‘less than treaty level’ arrangement came into effect between the Ministry of Foreign Affairs of the GIRoA and the NZDF concerning the transfer of persons between the NZDF and the Afghan Authorities (“ATD”). The ATD reflects the legal mandate of ISAF (particularly UNSCR 1386, 1510, and 1833), and reaffirms the authority of member states to take all necessary measures to fulfil ISAF’s mandate. The arrangement is treated as classified and has not been released out of respect for the wishes of the GIRoA. Its key provisions are:

- a. 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. Although silent on the question of transfers, most parties interpret their obligations under the Protocol to include a duty to discourage other states from practicing capital punishment.
- b. Persons transferred from the NZDF to the Afghan authorities will be treated in accordance with the international obligations of both Participants.
- c. NZDF will notify the ICRC and the Afghan Independent Human Rights Commission (“AIHRC”) when a person is transferred to the Afghan authorities.
- d. Representatives from the ICRC and AIHRC will have full access to such persons and to the facilities where they are held.
- e. Representatives of the NZDF will have full access to the detainees.
- f. Afghan authorities are required to advise the NZDF of any legal proceedings, transfers or significant changes concerning persons transferred under the ATD.

27. From the outset of the current operations in Afghanistan, NZDF has worked on the assumption that if an NZDF force element captures or apprehends a person and transfers that person to ANSF or other authority in Afghanistan then New Zealand will have an obligation to monitor the welfare of that person (see non-refoulement

obligations below). Based on the experience of our coalition partners, **PSR(R)1** we have assumed that this arrangement may need to continue for some time, potentially well beyond the return to New Zealand of force elements. It is the prevailing view amongst coalition partners that the monitoring should continue at least until the individual comes before an Afghan court at which point responsibility legally passes to the Afghan judicial system. There is, however, little law on this subject which can authoritatively guide us.

28. The ATD relates only to detainees transferred by the NZDF. This is the predicate for all of its other provisions to be engaged. Not only is there no obligation under this arrangement for members of the NZDF to visit or inspect detainees transferred by other forces, there is no power to do so. Right of access to Afghan facilities arises purely from the undertaking of the GIRoA given in the ATD. In other respects the members of the NZDF have no standing in Afghanistan to carry out such inspections.

ISAF policy on detention by ANSF

29. ISAF Detention Operations and Notification Directive dated 13 April 2010 [Flag E] sets out further guidance and intent on the conduct of detention operations. This is the first document to address "ANSF detention events" – i.e. detention conducted by the authorities of Afghanistan, not by ISAF forces. **PSR(R)1**

NZSAS have complied with this Directive and have supplied to the ISAF **PSR(R)1** information relating to all CRU detentions in which they have been involved or have been in their vicinity.

30. **PSR(R)1**

31. **PSR(R)1**

The law relating to torture

32. Torture, inhuman and degrading treatment are unlawful under international and domestic law. The prohibition is regarded as a peremptory or “super strong” rule of customary international law that is equally applicable in peace and armed conflict and cannot be derogated from even in times of emergency.⁹ Torture is prohibited by all four Geneva Conventions of 1949 and Additional Protocols I and II of 1977 and is therefore punishable in New Zealand under the Geneva Conventions Act 1958. Torture is also banned under the International Covenant on Civil and Political Rights (ICCPR), incorporated in to New Zealand law by the New Zealand Bill of Rights Act 1990 and by the Convention against Torture, incorporated in the Crimes of Torture Act 1989. Torture is punishable as both a crime against humanity and a war crime under the Rome Statute of the International Criminal Court (Rome Statute).

33. Any member of the NZDF who tortured any person or ordered that person to be tortured would be liable under the Crimes of Torture Act 1989 to 14 years imprisonment whereas under the International Crimes and International Criminal Court Act 2000 a person can be sentenced to life imprisonment or a lesser penalty. Torture and inhuman or degrading treatment is also prohibited by Afghan domestic law.¹⁰

34. The prohibition against torture forms a major part of the NZDF LOAC training. The Code of Conduct card issued to every member of the NZDF states in part:

Do not harm anyone who surrenders, is detained or is under your control. Treat them humanely; protect them from rape, abuse, torture or degrading treatment. Respect their property.

Non-refoulement obligations

35. The principle of non-refoulement has its genesis in refugee law but now extends to a general obligation under international law not to transfer or hand over any person to another State or authority in circumstances where the person is at risk of torture, cruel, inhuman or degrading treatment¹¹ or arbitrary deprivation of life. In recent years human rights lawyers and bodies have pushed an ever more expansive interpretation of the doctrine.¹² It is not necessary for the purpose of this advice to examine the strengths of these various views. It is enough to conclude that NZDF personnel should never transfer persons to the custody of another State where there is a real risk that that person will be tortured. Simple assurance that they will not may not be enough. It is generally accepted that where doubt exists some form of monitoring is required.

⁹ ICCPR Art 4(2) and Art 7.

¹⁰ Constitution of Afghanistan 2004 (1382) Art 29. See also Law on Prisons and Detention Centres (2005) and Police Law 2005.

¹¹ Convention against Torture, Art 3.

¹² PSR(R)1

36. Where this doctrine runs into difficulties is when the person in question is not actually transferred or “refouled” to another State but is in fact a person owing allegiance to that State by nationality or through having submitted by presence. A foreign visiting force has no legal basis under which it can deny the jurisdiction of the host State over such a person within its own territory. The visiting force cannot remove the individual from the jurisdiction nor can it detain the person indefinitely. The only option, if safe transfer is not possible, is to simply release the person. However facially counter-productive or damaging to the interest of security such an action may be, this reality forms part of the detention policy of many ISAF States and would, if necessary, be applied by the NZDF as well.

37. When, however, the person is arrested or detained by the authorities of the host State itself, there is no “transfer” and, *ipso facto*, no power or ability for the assisting foreign force to release the individual. To assert a right to do so (especially by force) would amount to an infringement of the sovereignty of the host State.

Complicity under international and national law

38. The international law prohibiting complicity is a secondary form of responsibility applicable to States which aid or assist other States in violating international law. The International Law Commission’s Draft Articles on State Responsibility¹³ sets out to codify this concept in Article 16¹⁴ which states:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) That State does so with the knowledge of the circumstances of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by that State.

39. The first inherent limitation contained in Article 16 is that the aiding State must have knowledge of the circumstances that make the conduct of the assisted State unlawful. The Draft Articles are accompanied by a detailed commentary¹⁵ which explains that in providing assistance a State does not normally assume the risk that its assistance or aid may be used to violate international law. However “knowledge” can be assessed in light of public statements and official policies of the relevant organs of the State. There may be occasions when constructive knowledge (i.e. knowledge that can be expected from reasonable inquiry) is enough. In the present case, for all of the reasons set out in the *Evans* decision, it can be assumed that New Zealand is constructively “on notice” that the NDS has used torture. What is more

¹³ The Draft Articles were commended by the General Assembly and annexed to Resolution 56/83, “Responsibility of States for internationally wrongful acts”, UN Doc. A/RES/56/83, 12 December 2001.

¹⁴ See also Article 41(2) which has a narrower application, i.e. where the most egregious violations of international law are being perpetrated.

¹⁵ James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, Cambridge, 2002, p. 149, paras. 3–6

contentious is the imputed knowledge that they will continue to do so. For a number of reasons set out below this cannot be regarded as a given.

40. A second and related limitation concerns the requirement that to amount to complicity the aid or assistance must have been given with a view to facilitating the commission of the wrongful act. According to the Commentary, "[t]his limits the application of Article 16 to those cases where the aid or assistance given is clearly linked to the subsequent wrongful conduct." A State is only responsible if "the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct...". Clearly there is not, and never has been, an intention by New Zealand that the persons arrested by CRU be tortured by the NDS. In fact the direct reverse is true. The terms of the ATD are clear that New Zealand expects Afghanistan to comply with its international law obligations. Furthermore members of the NZDF have specifically instructed members of the CRU in the requirements of LOAC and human rights law relating to the prohibition against torture. NZDF activities do not, in my opinion, qualify as complicity under this test.

41. State practice is an element of customary international law. ISAF currently comprises contingents from 46 States. Amongst this number are many States which, like New Zealand, actively advocate the rule of law and respect for human rights. For example the roles and tasks now performed by the NZDF were previously performed by special forces from Norway. All ISAF States are involved directly or indirectly in the support of Afghan security organisations.¹⁶ The roles and tasks are assigned to NZSAS elements by Comd ISAF flow directly from the UN Security Council mandate. If such assistance, *per se*, gives rise to complicity, then that complicity would by natural extrapolation apply to the command structure and political leadership of ISAF and the 46 states of which it comprises, as well as NATO and elements of the United Nations.¹⁷ This would be a surprising result indeed.

42. The threshold for complicity as a basis for individual responsibility under international criminal law is, if anything, even higher. The International Criminal Tribunal for Yugoslavia¹⁸ has held three elements must be established in order for the offence of complicity to have been committed:

- a. knowledge that torture is taking place;
- b. a contribution by way of assistance, which

¹⁶ Partnering arrangements are becoming an increasingly important part of ISAF's work. ISAF JTF435 is working at handing over control of all detention facilities in Afghanistan to Afghan control, including training and monitoring. ISAF is also instigating measures through rule of law programs to improve transparency in this regard.

¹⁷ The situation is quite different from issues which arise, not from the mandate itself, but rather from the way it is exercised. The existence a UNSCR clearly does not justify murder or torture by forces acting under that mandate. In this case, however, the objection to NZDF activity seems to be directly focussed on providing assistance to the CRU at all.

¹⁸ *Prosecutor v Anto Furundzija* (Case No. IT-95-17/1-T 1988). Article 7(1) of the ICTY Statute provides for individual criminal responsibility: "7(1) A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime."

- c. has a substantial effect on the perpetration of the crime of torture itself.

43. New Zealand is a party to the Rome Statute and gave effect to its obligations in the International Crimes and International Criminal Court Act 2000 (IC&ICC Act). Section 11 of that Act provides that the war crimes enumerated in Article 8 of the Rome Statute are punishable under New Zealand law. IC&ICC Act s 12 (1)(a)(iv) provides that Art 25 of the Rome Statute, which relates to the principle of individual criminal responsibility, also apply under New Zealand law. Article 25(c) provides that a person has individual criminal responsibility where "for the purpose of facilitating the commission of such a crime, he or she aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission". Once again an intention to facilitate the crime is necessary.

44. The Convention against Torture also expressly prohibits complicity in torture. Article 4(1) provides:

Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

In giving effect to this obligation in New Zealand law, the Crimes of Torture Act 1989 s3(1)(b) provides that it is an offence to aid the commission of torture, while s 3(1)(c) provides that it is an offence to abet torture.

45. Secondary participation in crime under New Zealand law is dealt with under Crimes Act 1961 s 66 (1) (b) – (d). It is well explained in *Adams on Criminal Law* Part 4 and Simester and Brookbank *Principles of Criminal Law* Chapter 6. Neither of these sources suggests any major departure from the principles relating to complicity under international criminal law. Normally an intention to encourage is an essential ingredient. In respect of that narrow class of complicity based on omissions (e.g. a purported omission to conduct inspections) it seems clear that for this principle to apply the person must have a legal duty to protect the victim of the crime, and "a right or power of control over [the offender and] fails to observe or discharge the duty..."¹⁹

46. The following points therefore arise:

- a. Members of the NZDF do not encourage the commission of the offence of torture; and
- b. Members of the NZDF do not have a right or power of control over the CRU or the NDS or any other element of the Afghan criminal justice system.

¹⁹ *R v Brough* CA507/96 27 February 1997. Non-interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent and had the power so to do, or at least to express his dissent, might under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted. *R v Coney* (1882) 8 QBD534 at 557 – 558.

Once again it is difficult to see how partnering forces such as the CRU with the intention of developing them in the proper and professional performance of their duties could constitute complicity under this test.

47. Lastly, at a more political level the issue of complicity in torture was addressed by the UK House of Lords / House of Commons Joint Committee on Human Rights.²⁰ The Committee considered that complicity in torture exists where a State:

- a. Asks a foreign intelligence service known to use torture to detain and question an individual.
- b. Provides information to a foreign intelligence service known to use torture, enabling that intelligence service to apprehend an individual.
- c. Gives questions to a foreign intelligence service to put to a detainee who has been, is being or is likely to be tortured.
- d. Sends interrogators to question a detainee who is known to have been tortured by those detaining and interrogating him.
- e. Has intelligence personnel present at an interview with a detainee in a place where he is being, or might have been tortured.
- f. Systematically receives information known or thought likely to have been obtained from detainees subjected to torture.

48. Doubtless the Committee did not intend this list to be exhaustive. Nevertheless it is instructive that partnering Afghan forces by UK Forces, which the Committee knew to be occurring, does not appear amongst these examples.

49. It is my view that the partnering of Afghan Forces by the NZDF does not, of itself, amount to complicity in any subsequent actions of elements of GIRoA authorities which were neither sought by NZDF, nor over which the NZDF has any ability to exercise authority or influence.

The role of the International Committee of the Red Cross

50. **PSR(IC)4, PSR(R)1**

The ICRC has a pre-eminent role in the protection of the human rights of persons detained in connection with armed conflict – but it does so on a strictly bilateral basis. It does not make its findings known other than to the government concerned.²¹ We

²⁰ Report into Allegations of UK Complicity in Torture. Twenty-third Report of Session 2008–09., HL Paper 152, HC 230 Published on 4 August 2009

²¹ Employees and former employees of the ICRC do not even give evidence in the subsequent trials of those accused of war crimes: see *Prosecutor v Blagoje Simic et al. (Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness)*, IT-95-9-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 27 July 1999 The ICTY ruled that customary

cannot, therefore, shape any response to this issue which has as one of its elements the proposition that the ICRC is responsible for ensuring the welfare of detainees (they are not), or that they will tell NZDF if any person arrested by the CRU is mistreated (they will not).

51. PSR(IC)4, PSR(R)1

52. PSR(IC)4, PSR(R)1

a. PSR(IC)4, PSR(R)1

b. PSR(IC)4, PSR(R)1

c. PSR(IC)4, PSR(R)1

d. PSR(IC)4, PSR(R)1

53. PSR(R)1, PSR(IC)4

I recommended that the ICRC in Afghanistan (or, if necessary, Geneva) be asked to provide, in writing, a simple explanation of what it is that they want us to do in this regard, and we will, in response, then tell them what it is that we are able to do.

international law provides the ICRC with an absolute right to non-disclosure of information relating to the work of the ICRC in the possession of an ICRC employee.

The situation relating to the NDS facility now

54. ~~PSR(IC)4, PSR(R)1~~

Reports from our current and previous LSO in theatre are that the Kabul NDS facility is regarded as the one ~~PSR(R)1, PSR(IC)4~~ and which has the best record-keeping.

55. Ref A sets out a detailed report arising out of the visit to Afghanistan conducted by you and the Minister. It identifies that the structure, polices and procedures regarding the treatment of detainees have undergone rapid overhaul over recent years. The standards of NDS, including those of Department 17, have improved substantially. Furthermore, this improvement is still ongoing, with considerable support from the international community.

56. Clearly this is major risk reduction factor in terms of NZDF operations and provides comfort that if NDS have used torture in the past, we are not forced to the conclusion that they will continue to do so. Indeed if advancements in the rule of law projects being pursued by ISAF continue, the risk identified by the UK High Court may subside to the point that the part of the judgment relating to the NDS facility in Kabul becomes moot.

Next steps

57. Ref A identifies a moral (and arguably legal) duty to take reasonable steps to ascertain that the human rights of persons detained in partnered activities are respected. We need to consider how we are to do this.

58. The most robust and legally justifiable measure would, of course, be to conduct inspections and monitoring of such people. In my view such steps, if taken, cannot be a hollow gesture. Inspection and monitoring must be predicated on a sustainable legal basis. It must be genuine, thorough and frequent and may need to carry on for some time, including beyond the return of NZDF force elements. Logically it would not be simply confined to the NDS facility, but rather to all places in which persons arrested by CRU were detained.

59. Such inspections should be carried out by a person with access to expertise in international human rights law and international standards for detention. The person should not be a member of the NZDF force element concerned so as to avoid any perceived lack of objectivity. In my view the appropriate person would come from MFAT rather than NZDF – for example the Embassy staff.

60. If, in the course of such an inspection, credible evidence of torture were to be uncovered NZDF must be in a position to act decisively in response. A failure to do

²² ~~PSR(IC)4, PSR(R)1~~

so could be interpreted as tacit approval and a much more complete indication of complicity than our current situation. The same may be true if access to the facility is refused at any time. Unlike the UK Forces, NZDF does not have the option of handing the person over to another facility or force, nor of simply releasing the person. This may mean that NZDF only has the option of declining to provide further assistance to the CRU for a period or indefinitely. This may have consequences for the viability of the deployment.

61. If, therefore, New Zealand seeks to enhance its ability to overview in a reliable and enforceable manner the conditions and welfare of persons other than those detained by NZDF, it will be necessary to enter immediately into negotiations with the GIRoA to establish further arrangements to provide for such access. One of the lessons from the *Evans* decision is that the arrangement will need to specifically include the NDS facilities. Since the NDS works directly to President Hamid Karsai, this will quite possibly require engagement at presidential level.²³ Given the fact that the current ATD took a number of years to bring to fruition, the potential difficulty of this task should not be underestimated.

62. If, however, such inspection and monitoring is simply not possible, then the other measures may include **PSR(R)1** and involvement with other embassies in mentoring and supporting rule of law project. Needless to say this would not engage us in assessing the human rights situation of any particular person.

63. **PSR(R)1** has suggested that a senior NZDF legal officer become involved in assessing detainment arrangements. If this invitation is acted upon it will be necessary to clearly define the role of the position so as to avoid compromising the individual and the NZDF. **PSR(R)1**

I would want to be confident that the terms of reference for such a deployment furthered the best interests of the New Zealand and the NZDF. If so, I will make an officer available.

Conclusion

Executive Summary

64. There have been public suggestions in the light of the *Evans* judgment that by supporting the CRU in its operations New Zealand and / or members of the NZDF are complicit in torture. However it is my advice that such partnering does not amount to complicity because:

- a. New Zealand does not seek or encourage the torture of any person.

²³ See *Evans* judgment paragraphs 113 -128. The fact that the UK MOU was regarded as binding only on facilities under the control of the Minister of Defence (which NDS is not) was a major impediment to routine monitoring.

- b. New Zealand advocates against the use of torture, and has recorded its expectation that Afghanistan will comply with international law in the ATD.
- c. No New Zealander has any role in the decision to transfer detainees to the NDS.
- d. NZDF has not arrested or detained anyone during this operation.
- e. NZDF currently has no legal obligation, right or physical ability to monitor the well-being of persons detained by the CRU and transferred to the NDS since the ATD does not apply to such people.
- f. NZDF has no legal capacity to interfere in the arrest or detention of any person or to release the person detained. To assert a right to do so would be an infringement of the sovereignty of Afghanistan.

65. A moral imperative has been identified under which New Zealand is to take reasonable steps to ascertain that the human rights of persons arrest by the CRU are protected. We need to explore how this is to be done. If prisoner monitoring is to be commenced it will need to be:

- a. Genuine and carried out in good faith in accordance with international standards.
- b. Thorough, robust and frequent.
- c. Backed by effective measures to force compliance.

66. Monitoring should be done by appropriately qualified Embassy staff.

67. A further arrangement will be necessary with GIRoA, possibly at Presidential level, to guarantee the rights of access of New Zealand personnel to prisoners who have been detained by the CRU.

68. In order to establish a robust and useful detainee reporting procedure NZDF needs to ascertain, **PSR(R)1**

69. **PSR(R)1** has suggested that a senior NZDF legal officer become involved in ISAF engagement over detainment arrangements. If this invitation is to be acted upon it will be necessary to clearly define the role of the position so as to avoid compromising the individual and the NZDF.

Recommendations:

70. It is my recommendation that:

- a. You advise the Minister that the partnering arrangement between NZSAS and the CRU does not amount to complicity in torture.

- b. That we shape our response to this suggestion primarily around the assurances and information that was given to you and the Minister as set out in Ref A.
- c. MFAT be engaged to identify a programme and method of enhancing New Zealand's overview of the human rights position of persons arrested by the CRU in the course of partnered operations. This may require MFAT to begin immediate negotiation with the GIRoA to extend the application of the ATD to allow access by New Zealand observers to:
 - 1. Persons who have not been apprehended, detained or transferred to Afghan authorities by NZDF personnel, but in respect of whom we have identified a legitimate moral interest;
 - 2. All facilities in which such persons may be held, including NDS facilities.
- d. The invitation of **PSR(R)1** to provide a legal officer to the ISAF Headquarters be explored.
- e. **PSR(R)1**
- f. **PSR(R)1**

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