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2 May 2006

LGL/SEC/PEACE/AFG

Minister of Foreign Affairs

For action by 5 May 2006

NEW ZEALAND MILITARY TECHNICAL ARRANGEMENT (MTA) WITH AFGHANISTAN: PROPOSED AMENDMENTS

Submission: Issues

Purpose: To seek approval to negotiate minor amendments to the Military Technical Arrangement (MTA) with the Afghan Government to formalise their commitment that Afghan authorities will not apply the death penalty to any detainee transferred to them by New Zealand personnel and to extend the MTA to cover other NZDF personnel currently deployed in Kabul and Bagram.

Comments: The New Zealand Ambassador to Afghanistan cross-accredited from Tehran will have the opportunity to pursue this when he visits Kabul in mid May.

Recommended Referrals

Prime Minister
Minister of Defence
Minister of Police

For concurrence by 5 May 2006
For concurrence by 5 May 2006
For information by 5 May 2006

Contacts

PSR(IC)3 Deputy Director, Legal Division PSR(IC)3 (wk)
PSR(IC)3 Legal Adviser, Legal Division PSR(IC)3 (wk)

Minister's Office Comments

Signed / Noted / Referred / Agreed / Approved

Date: __/__/__

New Zealand Military Technical Arrangement (MTA) with Afghanistan: Proposed Amendments

Key Points

- At the Afghanistan conference in London, in late January, PSR(C)1 gave an assurance to the Minister of Defence that the death penalty would not be applied to any detainee transferred to Afghan authorities by New Zealand personnel in Afghanistan.
- Officials recommend that this death penalty assurance could best be recorded through a minor addition to the Military Technical Arrangements (MTA) in place between New Zealand and Afghanistan, which was signed in 2004.
- In addition to seeking inclusion of the death penalty assurance in the MTA, we recommend also taking this opportunity to place other New Zealand personnel in Afghanistan on the same legal footing as those covered by the MTA through amendment to the MTA.
- Other proposed amendments would expand and update the MTA and would aim to provide cover to all current and future NZDF and other New Zealand deployments in Afghanistan.
- The New Zealand Ambassador cross-accredited from Tehran will visit Kabul in mid May and could propose these amendments on his visit.
- We expect that, given the favourable attitude towards New Zealand's contributions in Afghanistan, Afghan officials will accommodate our proposals although this is not guaranteed.

Recommendations

It is recommended that you:

- 1 agree that officials negotiate and conclude amendments to the Military Technical Arrangements (MTA) in place between New Zealand and Afghanistan which would formalise the death penalty assurance provided by PSR(C)1 in London in late January; Yes / No
- 2 agree that officials negotiate and conclude other amendments to the MTA that will: expand the scope of the MTA to cover other New Zealand personnel not covered by the MTA; update the MTA to reflect events that have occurred since it was signed in 2004; and incorporate into the text changes implemented by the exchange of letters of May 2005 concerning the deployment of New Zealand Police. Yes / No

PSR(IC)3

for Secretary of Foreign Affairs and Trade

New Zealand Military Technical Arrangement (MTA) with Afghanistan: Proposed Amendments

Report

Ministers agreed in January 2006 that, at the Afghanistan conference in London at the end of January, the Minister of Defence should seek an assurance from Afghan authorities that the death penalty would not be applied to any detainee transferred to them by New Zealand personnel. At that conference the PSR(C)1¹, undertook that Afghanistan would not apply the death penalty in such cases. He was also agreeable to recording this in a memorandum of understanding.

2 Officials recommend that PSR(C)1 death penalty undertaking could best be recorded through a minor addition to the Military Technical Arrangements (MTA) in place between New Zealand and Afghanistan. The MTA provides the basis for the protections, privileges and immunities of the New Zealand personnel deployed in Afghanistan. It is a political instrument rather than a treaty binding at international law. PSR(IC)4 officials consider it better to retain the current form of the instrument, PSR(IC)4

3 The MTA was signed in Kabul in 2004 by New Zealand and the Afghan Transitional Authority (and amended by an exchange of letters in May 2005) and applies to NZDF's Provincial Reconstruction Team (PRT) in Bamyán, including the New Zealand Police trainers, as well as New Zealand military and civilian personnel elsewhere in Afghanistan who are providing "humanitarian or reconstruction assistance". The NZDF personnel deployed in Afghanistan under International Stabilisation Assistance Force (ISAF) or United Nations Assistance Mission in Afghanistan (UNAMA) mandates are covered by the separate arrangements and protections in place for those missions.

4 In addition to seeking inclusion of the death penalty assurance, we would also take this opportunity to place other personnel in Afghanistan on the same legal footing as the PRT. The recent Cabinet paper on options for Operation Enduring Freedom (OEF) (decided upon by Cabinet on 7 April) noted that the legal basis for OEF operations in Afghanistan has evolved since late 2001. In 2001, the right of self-defence in response to the September 11 attacks was recognised by the UN Security Council as a basis for the use of force in Afghanistan. However, with the passage of time and establishment of a functioning Afghan Government, the authority for the OEF operations is not just dependent on the relevant UN Security Council resolutions, but also on the consent of the Afghan Government.

5 The Cabinet OEF options paper noted that there are two NZDF personnel currently deployed in Afghanistan not covered by the MTA or other formal arrangements – one staff officer at Combined Force Command in Kabul, and one staff officer at Coalition HQ in Bagram. Given the nature of their work and location, the legal risks for these two personnel are low. Future NZDF deployments outside of Bamyán would also not be covered by the MTA (e.g. NZSAS) as it is currently drafted. The Cabinet OEF options paper therefore noted "that officials will provide Ministers with options on formalising the status of the two NZDF personnel who are not covered by current bilateral arrangements and any other future deployments." The two main options for progressing this include:

- To negotiate a **new instrument** covering the two NZDF OEF personnel as well as future NZDF deployments; or
- To negotiate **amendments to the MTA** which would cover the two NZDF OEF personnel as well as future NZDF deployments.

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6 We recommend the second option of seeking to amend the MTA to extend its scope. The difficulties PSR(IC)4

by proposing amendments to the MTA rather than negotiating a new instrument. PSR(IC)4

Although the MTA was drafted primarily to cover the PRT, relatively minor changes could be made to ensure the MTA's coverage was extended to the two NZDF personnel and other future NZDF deployments outside of Bamyān.

7 Amending the MTA would also permit consolidation into the text of the changes concerning the New Zealand Police deployment agreed upon by New Zealand and Afghanistan by exchange of letters in May 2005. It would make more explicit that the MTA is an arrangement between the Government of New Zealand and the Government of Afghanistan, rather than with the Afghan Transitional Authority which no longer exists (an issue that has been raised by local Afghan officials).

8 The updating and expansion of the scope of the MTA would be a significant achievement for New Zealand. It would aim to provide cover to all current and future NZDF and other New Zealand deployments in Afghanistan. Subject to Ministers' approval we recommend proposing to the Afghan Government the amendments which are set out in the proposed revision of the MTA attached to this submission (Annex 1). The purpose of the proposed changes would be to:

- Formalise the undertaking that Afghan authorities will not apply the death penalty to any detainee transferred to them by New Zealand personnel, and will treat any detainees transferred in accordance with applicable international humanitarian law and human rights law;
- Expand the scope of the MTA to cover the two NZDF personnel, as well as future NZDF deployments outside Bamyān, not covered by the MTA (e.g. NZSAS);
- Update the MTA to reflect events that have occurred since it was signed in 2004 (such as inauguration of the Government of Afghanistan in September 2005, a reference to the 2006 London Compact).
- Incorporate into the MTA text the changes concerning deployment of NZ Police implemented by New Zealand and Afghanistan in an exchange of letters in May 2005;
- Clarify some other parts of the MTA in light of the above changes.

9 The New Zealand Ambassador cross-accredited from Tehran will be visiting Kabul in mid May and could propose these amendments on his visit. Such visits are not regular and it is unclear when he will next be able to visit and engage Afghan officials.

10 We expect that, given the favourable attitude towards New Zealand's contributions in Afghanistan, Afghan officials will accommodate our proposals although this is not guaranteed. PSR(C)1

**New Zealand Military Technical Arrangement (MTA) with Afghanistan:
Proposed Amendments**

PSR(C)1 If there are any significant difficulties, we will report to Ministers and provide options and seek advice on future action.

Consultation MFAT/NZAID

This submission represents the views of MFAT, NZDF and the Ministry of Defence, and NZAID was consulted.