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PSR(IIG)3

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From: PSR(IC)3 (ISED)
Sent: Monday, 18 October 2010 5:20 p.m.
To: PSR(IC)3 (LGL); PSR(IC)3 (DS MLG); PSR(IC)3 (LGL/TLU)
Cc: PSR(IC)3 (ISED); PSR(IC)3 (ISED); PSR(IC)3 (LGL); PSR(IC)3 (MEA); PSR(IC)3 (MEA); PSR(IC)3 (LGL)
Subject: RE: Afghan detainees: NZDF and Crown Law opinions

[RESTRICTED]

Thanks PSR(IC)3

ISED agrees this is a helpful piece of work, including the distinction it draws between 'monitoring' and 'investigation/information-gathering'. In responding to Crown Law, we suggest it might be useful to point out or expand on some of the foreign policy and resource considerations (more for reflection rather than incorporation into the review). These centre largely on the implications of deciding to go down the monitoring path.

- The perceived loss of face or disregard for the sovereignty of the Afghan Government, if we decided to go ahead with monitoring all prisoners transferred with NZDF assistance - when we have no legal obligation or ability to 'ensure' their appropriate treatment, and in particular no legal right to require specific death penalty assurances for these cases.
- The extent to which this would set a precedent for or undermine the practice/policy of our ISAF partners.
- The timeframe - what would be the frequency and duration of our monitoring? The suggestion for monitoring detainees is that this needs to be "thorough, frequent and sustainable over time" - would we apply the same policy for non-detainees? When would we finish such monitoring - when the prisoner went to court? when they transferred to another facility? when New Zealand exited ISAF/Afghanistan? or when/if they are released from Afghan custody?
- The resource implications of establishing an "appropriate expert inspector" for monitoring. Keith notes Riordan's opinion that MFAT and not NZDF should assume this task. Would this entail strengthening New Zealand's diplomatic presence in Kabul, given our current limited capacity? And how long would this be required - beyond our participation in ISAF? What resources would be required at the Wellington end, e.g. for assisting with any problems the Embassy encountered such as lack of access or mistreatment of prisoners? Could more active monitoring undermine the useful relationships that New Zealand agencies have developed with their counterparts in Kabul?
- We would also need to consider the resource implications of signing up to "concerted and responsive information-gathering" - what would be the expectations on our Kabul Embassy? (In that regard, if PSR(R)1

, but would be counter to Defence's interest in distancing themselves from the monitoring role.)

- The broader implications if New Zealand decided to monitor all prisoners transferred with NZDF assistance in Afghanistan, for example if New Zealand decides to participate in counter-piracy operations in the Gulf of Aden.

Cheers
PSR(IC)3

From: PSR(IC)3 (LGL)
Sent: Monday, 18 October 2010 10:53 a.m.
To: PSR(IC)3 (DS MLG); PSR(IC)3 (LGL/TLU)

[RESTRICTED]

Hi PSR(IC)3 and PSR(IC)3

Please find attached Ben Keith's draft opinion, received this morning, which reviews Brigadier Riordan's opinion about New Zealand's arrangements concerning detainees in Afghanistan. I have attached Brigadier Riordan's earlier opinion for ease of reference.

Summary

The NZDF opinion stated that New Zealand was under a moral duty (and, arguably, a legal duty) to monitor the wellbeing of prisoners detained directly by Afghan authorities, with the assistance of NZDF personnel. The NZDF opinion asserted that New Zealand should enter into a new arrangement with the Afghan government, that would guarantee rights of access.

The Crown Law opinion emphasises the different obligations on the New Zealand government if NZDF personnel:

- detain people directly, or
- assist the Afghan authorities detain people.

If New Zealand forces detain directly, then New Zealand becomes subject to extensive obligations to ensure that there is not a real risk of torture. This includes the ongoing monitoring of detainees. Where NZDF merely assists with detentions, New Zealand's obligations are in the nature of "investigation" - which is described as "concerted and responsive-information gathering". Crown Law concludes that the approach proposed by NZDF (ie that New Zealand monitor people detained with NZDF assistance) involves greater legal risk than the status quo.

Crown Law has asked for our comments on the draft opinion. Subject to your views, I would propose to respond by saying that we agree with the reasoning and conclusions contained in Ben's opinion. He has asked for such comments by tomorrow afternoon.

Background - the *Evans* case

As you'll recall, NZDF's opinion concerned New Zealand's legal obligations in respect of detainees taken in Afghanistan, in light of a recent English High Court decision (*Evans v Secretary of State for Defence*). The *Evans* case considered the UK's policy and practice in detainee handling in Afghanistan, and referred to 'disturbing' evidence about mistreatment of prisoners by the Afghan National Directorate of Security. The High Court upheld the current UK practice of continuing to transfer detainees to two NDS facilities, but not to the NDS in Kabul.

NZDF opinion

The NZDF opinion noted that the New Zealand SAS supports an Afghan Police unit - the Crisis Response Unit. The CRU transfers a small number of the people it arrests to the NDS in Kabul. The NZDF opinion considers whether the NZSAS's involvement with the operations of the CRU gives rise to:

- the issue of complicity in torture on the part of the New Zealand government (through the principle of state responsibility), and/or
- individual criminal responsibility of members of the NZDF.

The NZDF opinion concludes that 'partnering' with the CRU does not amount complicity (for the reasons set out at para 64). The opinion goes on to refer to a "moral imperative" under which New Zealand is to take "reasonable steps to ascertain that the human rights of persons arrested by the CRU are protected". It refers to prisoner monitoring as one way of taking such steps. The opinion recommends that such monitoring be undertaken by "appropriately qualified [New Zealand] embassy staff".

The opinion goes on to recommend that a further arrangement be concluded with the Afghan government, to guarantee rights of access by New Zealand officials to people detained by the CRU.

Crown Law opinion

18/10/2010

Crown Law's review of the NZDF opinion confirms some aspects of that opinion, and differs on other aspects. Crown Law agrees with NZDF on the following:

- New Zealand's activities in Afghanistan give rise to potential individual and/or state complicity in torture
- the extent of the non-refoulement obligation
- law of armed conflict standard may apply to New Zealand operations, which may introduce additional standards for the treatment of detainees.

Crown Law's opinion adds that:

- it is very likely that the rights affirmed in the NZ Bill of Rights Act, at least in respect of torture, apply to New Zealand operations.
- there could be a customary international law obligation on states to prevent torture.
- The Security Council mandate for the Afghanistan operation would probably not exempt NZ operations from being reviewed against human rights standards, nationally or internationally.

The Crown Law opinion differs from the NZDF opinion by emphasising the different obligations that apply if New Zealand personnel directly take prisoners into custody, as opposed to situations where New Zealand personnel merely act to assist detentions. Crown Law characterises obligations in respect to the former to be "comparatively extensive", and the latter to be "much less extensive".

Most importantly, Crown Law questions whether the same approach should be taken in both situations. Crown Law indicates that monitoring and non-refoulement obligations clearly apply where NZDF personnel directly detain prisoners. However, Crown Law goes on to state that a different approach should apply to prisoners who are detained by the CRU, albeit with NZDF assistance. In the latter case, Crown Law asserts that an approach "based on agreement, assurances and "concerted and responsive information gathering" would avoid risk.

Monitoring - investigation distinction

In essence, Crown Law's opinion highlights the different obligations on New Zealand in circumstances where NZDF personnel directly detain people, and where they assist the detention of people by the Afghan authorities. Where the NZDF detains directly, New Zealand is subject to extensive obligations to ensure that there is not a real risk of torture - this involves positive humanitarian law duties. Where NZDF merely assists with detentions, New Zealand's obligations are in the nature of "investigation" - this is in the nature of seeking assurances and obtaining information.

Crown Law concluded that for New Zealand to seek to monitor the wellbeing of prisoner detained by the Afghan authorities (with the assistance of NZDF personnel) would risk greater legal liability than not undertaking monitoring.

Comment

Having considered both opinions, my view is that Crown Law's analysis is well-reasoned and persuasive. It's primary implication for New Zealand's operations in Afghanistan would be to ensure that our current activities meet the threshold of "concerted and responsive-information gathering".

I'd be happy to discuss any of this with you.

PSR(IC)3

PSR(IC)3

Acting Deputy Director, General International Law Team | Legal Division | Ministry of Foreign Affairs and Trade - Manatu Aorere
Private Bag PSR(IC)3 Wellington, New Zealand | DD PSR(IC)3 | Fax PSR(IC)3

From: Ben Keith PSR(IC)3

Dear ^{PSR(IC)3} and ^{PSR(IC)3}; – further to my earlier emails, and with apologies for taking somewhat longer than I had hoped, I have attached a draft of a review of Brigadier Riordan's opinion. It may well contain typos and sure, other points on which I will be grateful for your comments and possible corrections. If it is at all possible, I should like to discuss between now and Wednesday, at which time I will forward it to the Solicitor-General for his review.

Yours & thanks again

Ben

Crown Counsel
Crown Law Office, Wellington, New Zealand

PO Box 2858 / DX SP20208
DDI (+64) ^{PSR(IC)3} / Direct fax (+64) ^{PSR(IC)3}

From: ^{PSR(IC)3} (ISED)
Sent: Monday, 27 September 2010 2:10 p.m.
To: ^{PSR(IC)3} (ISED); ^{PSR(IC)3} (MEA); ^{PSR(IC)3} (LGL); ^{PSR(IC)3} (LGL); ^{PSR(IC)3} (LGL)
Cc: ^{PSR(IC)3} (DS MLG); ^{PSR(IC)3} (ISED); ^{PSR(IC)3} (MEA)
Subject: Detainees: NZDF Opinion

[SEEMAIL] ~~[RESTRICTED]~~

Attached is a copy of Brig Kevin Riordan's legal opinion on New Zealand's detainee arrangements in Afghanistan (I'm awaiting a hard copy with the flags/annexes). This opinion has been drafted at MinDef's request, following the UK High Court judgment (on which we provided advice to our Minister).

Please let me know if you have any questions/comments, in which case I will coordinate a response from MFAT. Its primary purpose is to clarify the extent of NZ's legal obligations and our policy re detainees in Afghanistan. But it also points to a possible moral imperative to carrying out (or at least exploring options for) prisoner monitoring. In this regard, the opinion indicates some implications for MFAT, including recommending that the Ministry be "engaged to identify a programme a method of enhancing New Zealand's overview of the human rights position of persons arrested by the CRU in the course of partnered operations".

Cheers
^{PSR(IC)3}

18/10/2010