

Module two: Detention

Introduction

1. This briefing provides an overview of New Zealand's engagement with the Government of the Islamic Republic of Afghanistan and international partners on the detention of suspected insurgents and the transfer of these suspected insurgents to Afghan Government detention facilities during the period 2009 – 2012.
2. New Zealand was one of a number of countries which sought assurances from the Afghan Government that people handed over to Afghan detention facilities would be treated in a humane manner, in accordance with international conventions including the relevant Geneva Conventions, the Convention against Torture, the International Covenant on Civil and Political Rights (ICCPR), and the Second Optional Protocol to the ICCPR on the abolition of the death penalty.
3. This briefing will demonstrate that a key feature of New Zealand's detention policy in Afghanistan was on ensuring compliance with our international obligations. To that end, MFAT and NZDF committed substantial resources to this task.
4. While this briefing focuses primarily on the issues specifically of interest to the Inquiry, it also includes some additional information which, while outside the scope of the Inquiry's Terms of Reference, may help provide some useful further context.

Detention in Afghanistan: the political and military context

5. New Zealand was present in Afghanistan pursuant to a determination by the United Nations Security Council that the situation in Afghanistan constituted a threat to international peace and security.
6. Throughout New Zealand's ongoing involvement in Afghanistan the security situation has been highly volatile. New Zealand's efforts have been directed at promoting peace and security in the country. This has included a contribution to security, governance and development efforts in Bamyan province; and through the building of capacity of the broader Afghan National Security Forces (ANSF), particularly through mentoring of the Afghan Crisis Response Unit (CRU) in Kabul.

7. UN Security Council Resolution 1386 (2001) authorised States contributing troops to the International Security Assistance Force (ISAF) to use "all necessary measures" to fulfil the ISAF mandate. The detention of members of opposing armed groups for imperative reasons of security was contemplated within that authorisation and anticipated as potentially necessary as part of New Zealand's military deployments.

8. Throughout the period of the Inquiry's interest, New Zealand was conscious that Afghanistan's detention system was deficient: in the mid-2000s there was a series of UN and NGO-published reports raising serious concerns about prison conditions in Afghanistan, and alleging widespread torture of detainees. In light of these reports, when the UNSC renewed ISAF's mandate in late 2007 (UNSCR 1776), it added reconstruction and reform of the prison sector to improve respect for human rights and the rule of law as a key part of the mandate. This gave rise to two parallel demands: first, a need to build capacity and skills within the Afghan law enforcement and prison system to improve respect for human rights and the rule of law; and secondly, in the interim, to ensure that any detainees for whom New Zealand was responsible were treated in accordance with New Zealand's international obligations.

9. To meet the first demand, there was a sustained effort from the International Community operating in Afghanistan to support the development and upskilling of Police and Corrections forces across Afghanistan's various departments operating in this space. New Zealand developed a mentoring and training relationship with a unit of the Afghan National Police called the Crisis Response Unit (CRU) and, as part of this, emphasised human rights and rule of law obligations. In addition, New Zealand delivered development assistance, including significant contributions and practical support for projects including policing capability and capacity and human rights. That support is ongoing today, including by training officers at the Afghan National Army Officer Academy and providing US\$2 million each year to a UNDP-managed Law and Order Trust Fund for Afghanistan to support the capacity building of Afghan security and law enforcement forces.

10. To meet the second demand, New Zealand engaged with the Afghan Government and other international partners to ensure that persons apprehended by New Zealand and transferred to Afghan custody were treated in a humane manner, in accordance with international conventions including – where applicable – the relevant Geneva Conventions, the Convention against Torture, the International Covenant on Civil and Political Rights (ICCPR), the Second Optional Protocol to the ICCPR on the abolition of the death penalty.

11. New Zealand also considered carefully its obligations in relation to partnered operations where arrests and detentions were carried out by Afghan authorities, with NZDF members in support roles. In that context, New Zealand had no authority over the sovereign acts of the Afghan Government in administering its own law enforcement and justice system, but nonetheless New Zealand ensured it was not complicit in any mistreatment of detainees.

Negotiation of a New Zealand-specific detention arrangement with Afghanistan

12. To address concerns about prison conditions in Afghanistan, including risks of lack of due process, torture and the use of capital punishment, some ISAF troop contributing nations looked to put in place additional measures to safeguard against these risks, by negotiating bilateral agreements with the Afghan Government in addition to the ISAF policy on detention.

13. Likewise, while NZDF personnel in Afghanistan were bound by ISAF policies on detainees, New Zealand also pursued its own bilateral arrangements with Afghanistan on the detention and transfer of detainees by New Zealand forces.

14. The issue of mistreatment and the non-application of the death penalty required careful negotiation.¹ The issue of capital punishment was a particular area of concern because capital punishment remains permissible under the Afghan criminal code. In practice, however, it has been rarely used since the fall of the Taliban. Alongside assurances on the humane treatment of detainees transferred to Afghan custody, New Zealand, in common with a number of ISAF partners who had also ratified the Second Optional Protocol to the ICCPR, sought assurances that provided for non-application of the death penalty.

15. In 2006, New Zealand obtained verbal assurances from a range of Afghan senior officials regarding humane treatment in accordance with international humanitarian and human rights law, and assurances on the non-application of the death penalty against detainees transferred to Afghanistan by NZDF personnel. Subsequently, New Zealand sought to formalise these assurances in writing via a bilateral arrangement.

¹ The negotiation of assurances on detention took place alongside negotiations on an updated Military Technical Arrangement with the Government of the Islamic Republic of Afghanistan. Both these documents are publicly available at <https://www.operationburnham.inquiry.govt.nz/information/decclassified-documents/documents-relating-to-detention/>.

16. Following some negotiation New Zealand signed an arrangement with the Government of Afghanistan on 12 August 2009. This covered the transfer of any persons from New Zealand forces to Afghan authorities.² Key elements included that:

- NZDF was responsible for maintaining and safeguarding persons apprehended by it and would treat those persons in accordance with applicable domestic and international law;
- Afghan authorities were responsible for maintaining and safeguarding all persons [transferred to them by the NZDF] in accordance with applicable domestic and international law;
- NZDF was required to notify the International Committee of the Red Cross (ICRC) and the Afghan Independent Human Rights Commission (AIHRC) of a detainee transfer;
- Afghan authorities guaranteed access to the NZDF, the ICRC and the Afghan Independent Human Rights Commission to visit and monitor the welfare of transferred prisoners; and
- Afghan authorities were required to inform NZDF prior to any legal proceedings being initiated, any transfer of the detainee to a third party, or the release of any detainee.

17. On the issue of the death penalty, Afghan sensitivities precluded express reference to the prohibition of the death penalty. However, the arrangement recorded that "persons transferred from the NZDF to the Afghan authorities will be treated in accordance with the international obligations of *both* Participants..." (emphasis added). This included New Zealand's obligations under the Second Optional Protocol to the ICCPR.³

ISAF Partners' experiences with Detainee Transfers

18. When considering how to ensure our international legal obligations were met on any arrangement on detainees, New Zealand held regular discussions with a range of NATO-ISAF partners. In 2007, Denmark had commenced the Copenhagen Process aimed at consolidating and agreeing principles on the handling of detainees. New Zealand was an active participant in this process which, eventually, led to the negotiation of the Copenhagen Process Principles and Guidelines on the Handling of Detainees in International Military Operations

² *Arrangement Between the Ministry of Foreign Affairs of the Islamic Republic of Afghanistan and the New Zealand Defence Force concerning the Transfer of Persons between the New Zealand Defence Force and the Afghan Authorities* (August 2009) ("Arrangement on Transfer of Detainees") available at <https://www.operationburnham.inquiry.govt.nz/information/declassified-documents/documents-relating-to-detention/>.

³ See preambular paragraph 4 and paragraph 7 of the *Arrangement on Transfer of Detainees*.

(2012).⁴ During the same period, ISAF held annual conferences for ISAF members to share respective approaches on monitoring regimes and to discuss current challenges and work under way to address them.

19. ISAF contributing partners, including Canada, Denmark, the Netherlands, Norway, and the UK, all negotiated Memorandums of Understanding or Transfer Arrangements with the Afghan Government.

20. New Zealand consulted most, if not all, of the above countries in order to ascertain the best approach to securing written assurances that the death penalty would not be applied to any detainee transferred to Afghan custody, and that obligations around detainee treatment would be met. There was no one-size-fits-all solution to this issue and despite close cooperation through the ISAF mission, each country had to negotiate separately with Afghanistan. New Zealand's detainee arrangement contained similar elements to those negotiated by others.

21. Common elements from other partner agreements provide that:

- Afghan authorities will accept the transfer of detainees from detaining country forces, and Afghan authorities will keep records of transferred detainees;
- The participants will treat detainees in accordance with international law including human rights and humanitarian law;
- Representatives of the respective ISAF state, the ICRC and the AIHRC will have access to the detainees after they have been handed over;
- The ISAF state will be notified prior to the initiation of legal proceeding against, release or transfer to a third country of the detainee; and
- No person transferred will be subject to the death penalty.

Impact of the 2010 Evans judgment and the 2011 UNAMA report

22. In June 2010 the UK High Court released its judgment for the case *R (Evans) v the Secretary of State for Defence* [2010] (hereafter *Evans*) on transferring detainees in Afghanistan to Afghan detention facilities. The judgment noted serious concerns in relation to a specific National Directorate of Security (NDS) facility in Kabul. While the NZDF had not directly transferred any prisoners to Afghan detention facilities, it had provided support to operations

⁴ The Copenhagen Process Principles was led by Denmark and at least 24 states including New Zealand participated in this process. The sixteen principles cover issues relating to humane treatment of detainees, conditions of detention, transfer of detainees to third parties, and rules for reviewing a detention. Recognising the shift in the early 2000s to more complex state building operations, the principles are intended to be applicable to all international military operations.

during which Afghan authorities made arrests and transferred those detainees to Afghan detention facilities.

23. Following the release of the *Evans* judgment, NZDF sought legal advice regarding the consequences of the *Evans* decision for NZDF operations. These matters were also considered by Cabinet. Advice from NZDF Defence Legal Services and Crown Law both concluded that there was a clear distinction between the obligations arising where i) New Zealand was the detaining authority, and ii) those arising where New Zealand was engaged in a partnering operation where the Afghan authorities carried out the arrest and detention.

24. In particular, the legal advice made it clear that the *non-refoulement* obligations under international law would apply in full in respect of any person detained by the NZDF; but that prisoners taken by Afghan forces in New Zealand partnered operations were not within the scope of that obligation.

25. The priority given by New Zealand to detention policies and treatment of detainees, irrespective of legal obligations, was emphasised also at a political level. Senior visitors to Afghanistan - such as by Defence Minister Dr Wayne Mapp - raised New Zealand's concerns with historic abuses committed by Afghan authorities (specifically the NDS) and sought assurances of the humane treatment of detainees apprehended by the Afghan National Security Forces (ANSF), especially when operating with the support of the NZSAS.

26. During a visit to Afghanistan in August 2010, Dr Mapp reiterated New Zealand's concerns on the treatment of detainees and sought updates on the progress of improved surveillance of NDS facilities. He was briefed on improvements within Afghan prisons, particularly where international assistance had helped the NDS improve its investigative, forensic and evidence based methodology and support to modernise detention facilities in Kabul.

27. As part of our diplomatic efforts, New Zealand also joined with a number of international partners in a detainee working group to assist the Afghan Government to upgrade detainee facilities, systems and practices, including within the NDS. Membership of this working group gave New Zealand a stronger voice for raising concerns around detainee treatment and conditions with the Afghan Government. Participation also enabled New Zealand to better understand the issues facing the NDS and consider how its detention facilities could be further supported. This work contributed to efforts to improve the standards, policies and procedures of Afghan facilities and administering authorities.

28. Given the significant international efforts to support the modernisation and compliance with international standards of the Afghan prison and policing sector, the October 2011 UNAMA report on Afghan detention facilities revealed the scale of the ongoing challenge.⁵ This report highlighted widespread mistreatment of detainees, use of torture, and a lack of access to legal representation in Afghan prisons. It had an immediate impact on the detention facilities used by ISAF partners in Afghanistan, including New Zealand. In early September 2011, in response to the findings in the forthcoming UNAMA report, ISAF stopped transferring detainees to 16 NDS and ANP facilities.⁶ In October 2011, New Zealand's CDF confirmed to the Minister of Defence that he would also not allow the transfer of any person to a facility that was listed in the UNAMA Report, or in respect of which credible allegations or reports of torture and ill-treatment existed.

29. However, notwithstanding criticisms of the treatment of detainees, the UNAMA report highlighted the importance of continuing partnering with Afghan authorities. It recommended in particular ongoing mentoring relating to international human rights obligations for detainees and support to upskilling NDS and Afghan National Police in lawful investigative measures. This was a key element of New Zealand's mentoring of the Afghan Crisis Response Unit.

Case study: New Zealand's detention policy in practice

30. In practice, New Zealand's arrangement with the Afghanistan authorities was never engaged as NZDF did not detain and transfer any individuals directly to the Afghan authorities. During Operation Wātea, the NZSAS only detained one person - Musa Khan - who was subsequently transferred to US custody. However, to illustrate how New Zealand's detention policy was implemented in practice, I will briefly outline how New Zealand dealt with this individual.

31. As the individual detained was to be transferred to US custody, New Zealand sought assurances from the US Government to ensure compliance with New Zealand's international obligations. The US offered its standard conditions of transfer which were considered to be broadly compliant with New Zealand's obligations. However, the New Zealand Government also confirmed with the US New Zealand's understanding that the US commitment to treat the detainee in accordance with international law would include respect for New Zealand's obligations under the Second Optional Protocol of the ICCPR.

⁵ See https://unama.unmissions.org/sites/default/files/october10_2011_unama_detention_full-report_eng.pdf.

⁶ These 16 facilities included the NDS national Counter-Terrorism Department 90/124 in Kabul; NDS provincial facilities in Herat, Kandahar, Kapisa, Khost, Laghman and Takhar; and Kandahar District 2 NDS office; ANP district facilities in Kandahar including Daman, Arghandab, District 9 and Zhari; ANP headquarters in Khost, Kunduz and Uruzgan; and the ANP district facility in Dasht-e-Archi, Kunduz.

32. Upon transfer to US custody, NZDF immediately informed the ICRC and AIHRC of the detention and New Zealand Government monitoring of the detainee's well-being commenced.

33. New Zealand diplomatic and NZDF personnel regularly visited the individual to ensure his detention met our international and domestic legal obligations. These visits were conducted by NZDF personnel based in Kabul and with diplomatic personnel from the New Zealand Embassy in Kabul. Joint visits by military and diplomatic personnel followed best practice established by likeminded countries in Afghanistan including the UK, Canada and Australia. The New Zealand Government continued to monitor the detainee until he was brought before a judicial authority of the Afghan Government.

Afghanistan's slowly improving criminal detention system

34. Strengthening the rule of law and ensuring detention facilities in Afghanistan remains a high priority for NATO and the international community, and while there is further work to be done, partnering and mentoring remains a key pillar of support to Afghanistan. A 2019 UNAMA report welcomed the steps taken by the Government of Afghanistan to prevent and address torture and ill-treatment of conflict-related detainees. However, the Report noted that the continuing use of torture and ill-treatment remains significant. Accordingly UNAMA continues to recommend capacity building across the justice sector to support investigative techniques and prosecution in full compliance with international human rights standards, as well as continued upskilling to identify and report any allegations of torture of detainees.