

## **Module 2 Day 2 - Detention in the Afghanistan theatre**

### **Introduction**

1. For those who were not here yesterday, my name is Brigadier Lisa Ferris and I am the Director of Defence Legal Services. I was commissioned into the Army Legal Service in 2003 and I have operational experience including deployments to Afghanistan. In 2016 I assumed the role of Acting Director of Defence Legal Services and in January 2018 I was promoted to my current rank of Brigadier. I also hold the statutorily independent role of Director of Military Prosecutions.
2. In order to assist the Inquiry I have been asked to speak about detention in the Afghanistan theatre and NZ's policies on detention in Afghanistan, including standard operating procedures, how the NZDF operated, and whether practices changed over time. Again I would like to draw attention to the significant amount of public material that is available online via the Inquiry's website on the topic of detention as it relates to Afghanistan.
3. This briefing will necessarily cover detention operations conducted by NZ forces and detention operations that were conducted by elements of the Afghan National Security Forces, which were supported by NZ forces; what have been described as 'partnered operations'. To assist understanding I will take each category of detention operations in turn.

### **Detention operations conducted by NZ forces**

4. Examining detention operations conducted by the NZ force, at the outset, I would note that the primary mission of Operation WĀTEA, the NZSAS deployment to Afghanistan was not to conduct detention operations. The Chief of Defence Force described the mission as follows, "The NZ Defence Force is to provide a Special Operations Task Force to the International Security Assistance Force Afghanistan...in order to maintain stability, defeat the insurgency, mentor the Crisis Response Unit and enhance the reputation of the New Zealand Defence Force and the Government of New Zealand". I acknowledge that any deployment of the Armed Forces raises the possibility of detaining an individual and, as I will describe below, any detention was the subject of detailed procedures and processes.

5. NZ forces operating as part of International Security Assistance Force (ISAF) were required to comply with ISAF Standard Operating Procedure 362 (SOP 362) *Detention of non-ISAF Personnel*. This was the primary policy governing detention of non-ISAF personnel in Afghanistan. In order to give this SOP legal effect, in March 2007, the Chief of Defence Force directed that NZ forces under the operational control of Commander ISAF comply with it.
6. SOP 362 emphasised the obligations incumbent on the armed forces regarding transfer of detainees.<sup>1</sup> However, the maintenance of law and order was the responsibility of the Government of Afghanistan.
7. On 11 June 2007 the Chief of Defence Force issued the Individual Guidance for the Detention of non-ISAF Personnel which was to be read and implemented in conjunction with SOP 362. This Guidance is available publically on the Inquiry website. The Guidance was issued to all members deploying on operations to Afghanistan to carry with them.
8. The Individual Guidance for the Detention of non-ISAF personnel was incorporated into the OP WĀTEA rules of engagement and was promulgated to all NZSAS personnel deploying on OP WĀTEA. These rules are also available publically on the Inquiry website. I note that the provision at paragraph VICTOR of the OP WĀTEA rules of engagement in relation to detention outlines the requirement to comply with the Guidance.
9. The Individual Guidance authorised NZ forces to detain non-ISAF personnel in certain circumstances, namely:
  - a. where necessary for the defence of any personnel or property they were authorised to protect; and
  - b. for mission accomplishment.

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<sup>1</sup> See Dieter Fleck (Ed) *The Handbook of The Law of Visiting Forces* (Oxford University Press, Oxford, 2018) 666 et seq.

10. A detained person must either be released when no further threat is posed to the mission or, with prior approval of Commander Joint Forces New Zealand and/or the Chief of Defence Force, handed over to an appropriate Afghan authority. This provision was specifically inserted into the Individual Guidance document in order to ensure that non-ISAF personnel, detained by NZ forces, were not transferred or handed over in circumstances where their lives and safety were likely to be at serious risk. It ensured transparency of action within the command chain and demanded a high level of scrutiny with respect to the determination of any decision to transfer or handover any detainee. In addition, it enabled the possibility of making arrangements for another ISAF troop contributing nation to receive an individual if necessary.<sup>2</sup>
11. The Individual Guidance provided direction with regard to immediate action at the scene of detention including:
- a. the documentation that was to be completed in order to meet obligations taken from the Geneva Conventions;
  - b. acceptable levels of force that could be used in certain circumstances; and
  - c. the approach to be adopted towards search including consideration for gender and age.
12. Operation WĀTEA rules of engagement, issued in 2009, provided further limitations on the authority to detain individuals, namely that detention was only permitted if:
- a. No member of the CRU or Afghan National Security Forces was present to detain the person; **and**
  - b. The person has demonstrated hostile intent, is committing a hostile act, or is interfering with mission accomplishment.
13. In respect of detentions undertaken by New Zealand Forces in Afghanistan, I note that since 2009 only two individuals were directly detained by New Zealand Force Elements. One individual was detained by the NZSAS in 2011 and the other was detained in 2012 by members of the New Zealand Provincial Reconstruction Team. New Zealand complied with its international obligations in respect of those detainees,

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<sup>2</sup> Similar provisions appear in New Zealand's Manual of Armed Force Law (2ed) Volume 4, s 11, ch 12. This 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 – see para 25 of Detainee Arrangements – 10 September 2010.

including regular monitoring. Both of the detainees were initially transferred to US custody before being brought before Afghan judicial authorities.

### **Detention operations conducted by elements of the Afghan National Security Forces (ANSF)**

14. Turning now to detention operations conducted by elements of the Afghan National Security Forces. The Individual Guidance for the Detention of non-ISAF Personnel and the Operation WĀTEA rules of engagement distinguish between non-ISAF personnel detained by New Zealand forces and those arrested or detained by Afghan National Security Force personnel. Specifically, the documents emphasise that it is the Afghanistan National Security Forces that are the primary arresting or detaining authority.
15. New Zealand forces, similar to other ISAF troop contributing nations, 'partnered' with particular units of the Afghan National Security Forces. New Zealand forces, based in Kabul, operated in a partnering and mentoring relationship with a unit of the Afghan National Police called the Crisis Response Unit or CRU. NZ forces provided professional development and mentoring to the CRU. The CRU, as their title suggests, were typically involved in rapid action responses to crisis situations. They were authorised to apprehend people believed to be involved in actual or imminent attacks on the population and the Government of the Islamic Republic of Afghanistan.<sup>3</sup>
16. In the majority of cases where NZ forces were involved in supporting operations conducted with elements of the Afghan National Security Forces, they operated alongside the CRU. The CRU was able to detain people for short periods of time but under Afghan law the CRU was obliged to either transfer the detainees to a prosecution authority or release them within 72 hours. Accordingly, if detainees were not released they were typically transferred to other agencies within the Ministry of Interior or to the National Directorate of Security.

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<sup>3</sup> Detainee Arrangements – 10 September 2010 at [12].

17. The majority of the operations that the NZSAS conducted were with the CRU. On occasions, for example if the CRU were unavailable due to the time-sensitive nature of an operation, the NZSAS operated with other elements of the Afghan National Security apparatus, including the National Directorate of Security or NDS.
18. In order to better understand how various units such as the CRU and the NDS operated within the all of government model of the Islamic Republic of Afghanistan I would refer to the slide [SLIDE].
19. As you can see, similar to NZ, the Afghan armed forces, which include the Army and Air Force (there is no Navy as Afghanistan is land-locked) come under the control of the Ministry of Defence. The Afghan National Police including the CRU and the Afghan local police come under the control of the Ministry of Interior. The National Directorate of Security, the primary domestic and foreign intelligence agency of the Islamic Republic of Afghanistan, reports directly to the office of the President. Each of the Afghan National Army, the Afghan National Police, the CRU and NDS, amongst other agencies are collectively described as the Afghan National Security Forces.
20. Most of the individuals detained by the Afghan National Security Forces were arrested pursuant to an arrest warrant issued by the Attorney-General of Afghanistan. As a result such people entered the Afghan criminal justice system from the outset. Where an arrest of a person subject to the jurisdiction of the Islamic Republic of Afghanistan was effected it was conducted by members of the Afghan National Security Forces, in one guise or another. Such arrests were not conducted by New Zealand forces. Due to the fact that arrest warrants were issued to the Afghan authorities, New Zealand forces had no *legal power* to conduct an arrest pursuant to the warrants.
21. It is important to understand the distinction between arrest by the Afghan authorities, acting in a law enforcement context under Afghan domestic law; and detention; conduct that could be effected by New Zealand forces in certain specified circumstances. I would reiterate that New Zealand forces had no authority to interfere with the conduct of any criminal investigation or judicial process in Afghanistan.

22. It is also worth noting that unlike some other Five Eyes partners such as the United States, United Kingdom and Canada, New Zealand had no detention facilities in Afghanistan.<sup>4</sup>

23. To better illustrate the role of the Afghanistan National Security Forces and the role of NZ forces with regard to arrest and detention I would like to set out two simple scenarios:

### **Scenario 1. Checkpoint**

24. NZ forces, operating in isolation or alongside elements of the Afghan National Security Forces, might have reason to establish a checkpoint. A typical example would be a security checkpoint close to or at the point of entry to a base. At the checkpoint, every vehicle and every non-ISAF pedestrian is stopped and subjected to a form of inspection or search to ensure that they did not pose a security risk. During the conduct of a security inspection an individual may be temporarily held by NZ force elements for a short period. Although in the majority of situations, check point stops are likely to be extremely transitory, any individuals held are still entitled to humane treatment.

### **Scenario 2. 'Partnered operations'**

25. As has been described, NZ forces were 'partnered' with the CRU. Where the CRU intended to conduct an operation to arrest and detain a particular individual or individuals, NZ forces provided support with regard to the planning, intelligence gathering and application of the operation. The typical role of NZ forces in a partnered operation was to provide support.

26. In any typical operation NZ forces might provide a security cordon or perimeter around a particular building that the CRU were intending to enter to carry out an arrest warrant. The CRU would enter the building, together with a prosecutor from the Ministry of Interior (MOI), and arrest the individual named in the warrant. In the event that the

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<sup>4</sup> Detainee Arrangements – 10 September 2010 at [19].

individual evaded arrest or escaped from the building, the NZ forces would be in a position to act; they could prevent the individual from fleeing.

27. But, as with the previous scenario, any form of detention would be transitory in nature as the individual would be arrested by the CRU. Therefore, the detaining authority for the purposes of the law-enforcement operation remained the CRU.

28. As has been set out in other documents, the mentoring provided by NZ forces improved the capability of the CRU. They played a material role in developing and maturing the arrest warrant systems for the CRU and the Ministry of Interior which were utilised more broadly by ISAF. During the period NZ forces provided support to the CRU, the CRU took on more responsibility to the extent that by the time NZ forces ended their deployment, the CRU was able to conduct some of its operations without the assistance of NZ forces.

## **Safeguards**

29. An important part of detention policy and practice in respect of any deployment is the operation of safeguards. In addition to those measures described by the previous presenters, I would like to briefly discuss some of the safeguards employed at the operational level regarding detention in Afghanistan. As the conflict in Afghanistan continued and evolved, further directives and guidance concerning detention were issued by ISAF and adopted by the NZDF. One Directive from ISAF in 2010 in particular set out further guidance and intent on the conduct of detention operations with an emphasis on partnered operations. The Directive required that ISAF units involved in partnering activities report detention events conducted by the Afghan National Security Forces. The report must make it clear who is responsible for the detainee. New Zealand complied with this Directive.

30. Other safeguards undertaken by NZ force elements in the context of partnered operations were focussed on the mentoring and training of CRU personnel in best practice tactics, techniques, and procedures.

31. Safeguards in terms of individuals that the New Zealand Defence Force detained have already been described by Mr Fisher, including informing the ICRC and the Afghan

International Human Rights Committee of detentions. New Zealand government monitoring was undertaken on a regular basis by a NZ Defence Force legal officer who was posted to Headquarters ISAF.

32. As was discussed yesterday in the hearing on LOAC and rules of engagement, the obligations of our code of conduct card include an obligation to report matters through the chain of command, and this would include NZSAS personnel witnessing any alleged breaches of LOAC or other misconduct.

33. Broader ISAF Coalition safeguards included the establishment of working groups as has already been discussed by Mr Fisher, as well as the establishment of rule of law programmes and oversight mechanisms to continually monitor and improve transparency and standards of detention facilities.

34. I note that other organisations, such as EUPOL Afghanistan were part of the international community's efforts to rebuild Afghanistan with an emphasis on law enforcement capability. EUPOL Afghanistan was set up by the European Union in June 2007 to assist the Afghanistan government in reforming its police service and had a role in training and mentoring the ANP as well as supporting the harmonisation of Afghan laws with relevant universal human rights standards. They were also responsible for supporting the development of a Code of Conduct and promoting its awareness. I understand that EUPOL were also involved in the setting up of oversight and accountability mechanisms for the policing forces.

35. The NZ Defence Force, primarily through the senior national officer, and the legal adviser regularly engaged with representatives of agencies in Afghanistan, including the ICRC, EUPOL, the United Nations, and our wider Coalition partners to maintain an ongoing dialogue about a range of issues, including detention.

36. And of course, as already discussed by the other presenters, the United Nations Assistance Mission in Afghanistan (UNAMA) maintained an oversight role in respect of monitoring and reviewing detention facilities as part of its mission to strengthen the Afghan state by promoting national ownership and accountable institutions that are built on rule of law, good governance, and respect for human rights.

**AWAIT QUESTIONS FROM THE INQUIRY**