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HEADQUARTERS NEW ZEALAND DEFENCE FORCE

Directorate of Legal Services

MINUTE

2) DGDLS

3304/DLS/INTREL/AFGH

21 May 07

CDF ✓ Sent 23/5 & agreed by CDF. Minute sent to COMJFNZ

Through: DGDLS [Signature] → 21 May 07, 9 cont.

23/5

INDIVIDUAL GUIDANCE ON DETENTION OF NON-ISAF PERSONNEL

References:

- A. HQ JFNZ Minute 3130/1 dated 18 Apr 07
- B. NZFOR ISAF Individual Guidance Card dated 8 Apr 07
- C. DLS Minute 3304/DLS/INTREL/AFGH dated 19 Feb 07
- D. Military Technical Arrangements between New Zealand and Afghanistan (MTA)

1. You referred COMJFNZ's Minute (Ref A) covering the draft Individual Guidance Card (Ref B) for dealing with persons detained in the course of operations in Afghanistan for legal clearance. I advise that you approve the issue of that card with some minor amendments, and on the basis that its issue is accompanied by specific guidance and training as discussed below.

2. I return Refs A and B, and also enclose:

a. Amended forms of Ref B:

- (1) One made using track changes to make the amendments clear, and
- (2) A clean copy including the changes recommended; and

b. A draft Minute to COMJFNZ.

3. The policy in respect of the searching of female detainees as proposed at para 6.a. (*Females are only to be searched by females unless there are pressing operational reasons which make this impracticable*) is unexceptionable in most operational environments. However, in light of recently reported comments by Afghan officials regarding ISAF operations failing to take sufficient account of the Afghan peoples' rights, this approach may give rise to avoidable complications in Afghanistan.

4. I note the recommendation at Ref C that TG CRIB not undertake planned detention operations. Although they may be unlikely to arise, the circumstances in which it may be necessary for NZDF personnel to detain and then search a female in Afghanistan, without it being practicable to have the search conducted by a female, are likely to be those of a PRT patrol not containing female personnel, operating in an area remote from Bamyán. If a search of the detained female is necessary, the patrol commander is unlikely to have any option but to conduct it using the resources he has available. Any such search has the potential to raise allegations that the dignity of the searched female was outraged, allegations of indecency against the

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searcher, and claims for compensation for the person searched and her family, as well as risking the carefully established reputation of the NZ PRT.

5. To minimise those potential risks, I recommend that:

- a. Consideration be given to issuing, if they are not already issued, metal and explosive detecting devices (such as those in use at airports) to patrols so that any search of a female can be effected with the minimum intrusion on her dignity; and with that intrusion being of a similar nature to those commonly encountered internationally;
- b. All patrols be directed that:
 - (1) Searching of the person of a female by anyone except another female is only to be done when essential (for instance, when a search by a detecting device has indicated that there is concealed material of security concern);
 - (2) If searching the person of a female is essential, the search must be:
 - (a) Carried out in a location screened and out of sight of all except the search party;
 - (b) Carried out with a witness present, who is to observe the conduct of the search; and
 - (c) Reported in writing, recording in addition to the matters required under paras 4 and 6 the reason(s) why the commander considered the search essential.

6. In respect of para 9, I recall that the MTA, at clause 15, provides:

" Detained persons ... will be handed over as soon as it is judged safe to do so by the Senior National Officer to the appropriate Afghan authorities. "

The direction in para 9 requiring your and COMJFNZ's prior approval to any handover to Afghan authorities imposes a prior requirement on the SNO reaching his judgment that it is safe to hand over. I consider that the requirement for your prior approval can be read consistently with the MTA. However, you and COMJFNZ do not have an unlimited discretion to refuse approval to hand over detainees; in that the MTA directs that handover is to occur " ... as soon as it is judged safe to do so ...". Any decision not to approve a handover must therefore be made on the basis that it is not yet safe to effect that handover. The MTA does not allow for a decision that handover to the Afghan authorities of that detainee is never to occur.

7. In respect of para 12, it is recommended that guidance be issued to ensure that where detainees are moved over a lengthy period of time that the breaks taken include those required for cultural and religious purposes (notably Islamic prayers) as well as for physical needs.

8. In respect of para 13, it is recommended that guidance be issued to ensure that the provision is not misconstrued, so that a detainee who has been restrained by

plasticuffs or handcuffs and is transported in a vehicle is not to be regarded as being secured to the vehicle, which is prohibited, if he or she is secured by a seat belt fitted to the vehicle for the purpose of travel in the vehicle.

PSR(IC)3

DD Ops Law

DTelN Phone: PSR(IC)3

Enclosures:

1. HQ JFNZ Minute 3130/1 dated 18 Apr 07 (original) ✓
2. NZFOR ISAF Individual Guidance Card dated 8 Apr 07 ✓
3. NZFOR ISAF Individual Guidance for Detention card track changes ✓
amendments dated 18 May 07
4. NZFOR ISAF Individual Guidance for Detention card incorporating amendments ✓
dated 18 May 07 ✓
5. Draft minute to COMJFNZ ✓

