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**From:** [PSR(IC)3] <[PSR(IC)3]@nzdf.mil.nz>  
**Sent:** Friday, 21 October 2011 3:35 p.m.  
**To:** [PSR(IC)3]  
[PSR(IC)3] (NYK); [PSR(IC)3] (KLU); [PSR(IC)3] (OTT); [PSR(IC)3]  
[PSR(IC)3] (BMY); [PSR(IC)3] (RIY); [PSR(IC)3] (BKK);  
[PSR(IC)3] (BEI); [PSR(IC)3] (JAK); [PSR(IC)3] (SEL); [PSR(IC)3]  
[PSR(IC)3] (BY); [PSR(IC)3]  
[PSR(IC)3]  
**Subject:** FW: Message from CDF: NZDF operations in Afghanistan meet UN and international standards for the transfer of detainees  
**Attachments:** CDF - Detainee Treatment 20Oct2011.pdf; CDF- NZDF Operations 31August2011.pdf

Good Morning to yo uall

The attached is forwarded for your information

Regards

[PSR(IC)3]

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**From:** [PSR(IC)3] On Behalf Of Office of Chief of Defence Force  
**Sent:** Friday, 21 October 2011 3:15 p.m.  
**To:** Office of Chief of Defence Force  
**Subject:** Message from CDF: NZDF operations in Afghanistan meet UN and international standards for the transfer of detainees

To all at NZDF

This afternoon the Minister of Defence, Hon Dr Wayne Mapp, has released my report to him on NZDF operations in Afghanistan relating to the transfer of detainees to Afghan authorities.

This follows the release last week of a report by the United Nations Assistance Mission in Afghanistan (UNAMA) on the treatment of conflict-related detainees in Afghan custody. While it found significant incidences of torture and mistreatment in Afghan law-enforcement agencies, the abuses are not institutionalised at all facilities.

The report concluded that troop-contributing nations must continue to partner and train Afghan organisations in order to raise them to internationally accepted standards of behaviour. And this is what we do - as New Zealanders, and as members of the New Zealand Defence Force.

NZDF personnel operating in Afghanistan do a vital job in a difficult and dangerous environment, often at risk to their own lives. They have brought security and improved conditions to many people in Afghanistan. I regard it as my duty to ensure that members of the NZDF are not

exposed to the risk of being implicated in any breach of the law simply through carrying out the mission set for them. I take this duty seriously and I know my predecessors have done so too.

In summary, I can assure you that the NZDF fully meets the United Nation's intent as well as international standards of human rights.

In response to the UNAMA report, the International Stabilisation Force in Afghanistan (ISAF), whose activities are mandated by the UN Security Council, have announced a six-phase plan to improve detention operations and establish safeguards to prevent future mistreatment. The NZDF legal officer posted to ISAF headquarters in Kabul is part of the ISAF legal team working on that plan.

I have given careful consideration to the recommendations made by UNAMA to troop contributing nations. Since the return of the NZSAS to Afghanistan in 2009, the NZDF has taken only one detainee. His well-being is regularly monitored. Nevertheless we need procedures to safeguard our people against allegations of wrongdoing. I have therefore put the following in place:

- No person detained by the NZDF in Afghanistan is to be handed over to any other authority without specific permission from me;
- I will not allow the transfer of any person to a facility that is listed in the UNAMA report, or where credible allegations or reports of torture and ill-treatment exist;
- I will not allow any transfer of a person from the NZDF to facilities run by the National Directorate of Security (NDS) while credible evidence of mistreatment in NDS facilities exists;
- I have reviewed NZDF policies on transferring detainees and am satisfied they are robust and appropriate and deal with the concerns raised in the UNAMA report. We will use our partnering position with the CRU to train members of that unit to conduct detention and arrest in a humane, professional and lawful way. There are no allegations that members of the CRU have ever mistreated any person they have detained or arrested.

While the UNAMA report is a cause for concern, the report clearly endorses the view that involvement in mentoring and training is a vital step in reducing mistreatment. I remain confident that our activities in Afghanistan continue to play an important part in this process.

**Lieutenant General Rhys Jones**  
Chief of Defence Force

Copies of the reports are attached and are on the NZDF intranet:

<<CDF - Detainee Treatment 20Oct2011.pdf>> <<CDF- NZDF Operations 31August2011.pdf>>

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3304 AFG

20 October 2011

Minister of Defence

### **DETAINEE TREATMENT - AFGHANISTAN**

1. As you are aware, the United Nation Assistance Mission in Afghanistan (UNAMA) has released a comprehensive report on the treatment of conflict-related detainees in Afghan custody. We have been expecting this report for some time and the International Stabilisation Force in Afghanistan (ISAF) has already taken measures in anticipation of its contents. As the UNAMA Report impinges upon many of the matters covered in my report to you concerning Detainee Arrangements in Afghanistan, it is necessary to assess its content and recommendations in order to provide you with the greatest degree of surety relating to our operations in that country.
2. In summary, although the UNAMA Report concludes that torture and mistreatment in Afghan law-enforcement agencies is not institutionalised in all facilities, it demonstrates a significant incidence of such abuses.
3. The Report concludes that troop-contributing nations must continue to partner and train Afghan organisations in order to lift them up to internationally accepted standards of behaviour.
4. In this respect the UNAMA Report reinforces my previous advice to you that the New Zealand Government and the public can be assured that the NZDF is acting in full alignment with the intent of the United Nations and in accordance with international standards of human rights.

#### **The UNAMA Report**

5. The UNAMA Report is well-researched and is accepted as credible by ISAF. It details torture and abuse in some facilities run by the National Directorate of Security (NDS), Afghan National Police (ANP) and Ministry of Justice. These findings are of considerable concern.
6. I note, however, that the Report states that torture does not appear to have been officially authorised in the NDS facilities UNAMA observed. In some facilities UNAMA observed, more investigation is required to determine whether torture is used systematically in the facility. The Report states:

UNAMA concludes on the basis of the findings of this observation programme that the use of torture is not a *de facto* institutional policy directed or ordered by

the highest levels of NDS leadership or the Government. This together with the fact that NDS cooperated with UNAMA's detention observation programme suggests that reform is both possible and desired by elements within the NDS. <sup>1</sup>

7. As previously advised, during partnered operations with the Crisis Response Unit (CRU) individuals may be arrested under warrant by Afghan authorities and subsequently prosecuted in accordance with Afghan Law. The NDS is one such prosecuting authority.

#### **NZDF reaction to the Report**

8. Since becoming aware of the likely content of the UNAMA Report in early September NZDF forces in Kabul have ensured that they know where persons who are arrested during CRU operations are taken after arrest. CRU take the people they have detained to the holding cells at the Ministry of Interior where they are held until they are either released or their case comes up before a judge. To the best of our knowledge no one who has been arrested during CRU operations since the completion of the UNAMA Report has been taken to any of the prohibited facilities. Other facilities such as NDS 17 (now called NDS 40) in Kabul have not been prohibited by ISAF, but remain subject to further examination. We will continue to monitor this examination carefully.

#### **The ISAF response**

9. We have been working closely with ISAF as it has developed initiatives to implement appropriate programs to improve detention operations and establish safeguards to prevent future mistreatment. ISAF have announced a six-phase plan in response to the UNAMA report which includes:

- facility inspection,
- remediation training in human rights and detainee treatment,
- formal certification of facilities by the Commander ISAF,
- provision of support to accountability actions being taken by the Afghan Government,
- monitoring detainees in the long-term, and
- facilitating transparency and communication among ISAF and Afghan Government detention operations.

10. Given the size and nature of the force deployed, it is not within the NZDF's capability to unilaterally assume a comprehensive monitoring role. Our activities fit within a larger scheme of ISAF involvement. Other elements of ISAF and civil society are responsible for partnering and mentoring the other parts of the Afghan legal system and we are confident that they have the willingness and capability to effect the recommendations of the UNAMA Report in that regard. Within our resource constraints we will ensure that we continue to play an active part in ISAF measures to extend its overview of detention activities by Afghan forces. Our legal adviser in ISAF Headquarters is involved in the further development of the ISAF plan

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<sup>1</sup> UNAMA Report p11.

and we are taking a proactive approach from within ISAF HQ to respond to this report.

### **Detention by NZDF**

11. The lessons of the UNAMA Report apply equally to persons actually captured by ISAF Forces and those arrested by Afghan authorities. The one person who was detained by the NZDF and who has been transferred to a joint US / Afghan facility is still being routinely monitored and has not been transferred to any of the facilities named in the report.

### **Recommendations to troop contributing nations**

12. I have given careful consideration to the recommendations made by UNAMA to troop contributing nations and concerned states. All four clearly anticipate that interaction with Afghan authorities will continue. None of them suggest in any way that members of ISAF should stop cooperating with or partnering Afghan forces or institutions or that by partnering with Afghan authorities, ISAF forces are in any way complicit in the incidents of abuse.

13. Three of the four recommendations encourage States to increase their level of training and mentoring of Afghan forces and institutions in order to combat such abuse.

14. I address each of the recommendations as follows:

- **Suspend transfer of detainees to those NDS and ANP units and facilities where credible allegations or reports of torture and ill-treatment have been made pending a full assessment.**

15. NZDF Orders for Detainee Handling require that no person detained by the NZDF in Afghanistan is to be handed over to any other authority without specific permission from me. I will not allow the transfer of any person to a facility that is listed in the UNAMA Report, or in respect of which credible allegations or reports of torture and ill-treatment exist. Having reviewed our procedures in this regard I consider this to be the best safeguard possible. A list of the named facilities will be sent to the NZDF force elements in Afghanistan (NZSAS and NZ Provincial Reconstruction Team) to ensure that no transfers to the listed facilities are made.

- **Review monitoring practices at each NDS facility where detainees are transferred and revise as necessary to ensure no detainees are transferred to a risk of torture.**

16. There is no person who has been captured or detained by the NZDF who is in the custody of the NDS. I will not allow any such transfer from the NZDF to the NDS to occur while credible evidence of mistreatment in NDS facilities exists. Monitoring practices in respect of any other facility which may, in the future, need to be used will be under constant review. Monitoring currently takes place in respect of the detainee held in the Joint US / Afghan facility.

- **Review policies on transferring detainees to ANP and NDS custody to ensure adequate safeguards and use participation in joint operations, funding arrangements, the transition process, intelligence liaison relationships and other means to stop the use of torture and promote reforms by NDS and ANP.**

17. NZDF policies on transferring detainees have been reviewed and are considered to be robust and appropriate to deal with the concerns raised by the UNAMA Report. NZDF uses its partnering position with the CRU of the ANP to train members of that unit to conduct arrest and detention in a humane, professional and lawful way. There is no allegation that members of the CRU have ever mistreated a person arrested or detained by them.

- **Build the capacity of NDS and ANP facilities and personnel including through mentoring and training on the legal and human rights of detainees and detention practices in line with international human rights standards.**

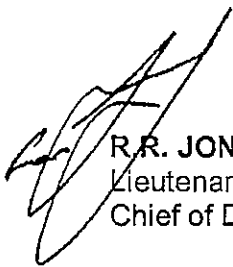
18. NZDF does not mentor or train members of the NDS. NZDF does however, train the CRU in the professional and humane conduct of their duties. NZDF is also providing support to Rule of Law initiatives in Afghanistan.<sup>2</sup> In the light of the UNAMA Report we are examining further opportunities to develop training in this regard.

- **Increase efforts to support training to all NDS and ANP interrogators and their supervisors in lawful and effective interrogation methods, and alternative investigative approaches (such as forensics).**

19. NZDF does not currently train or mentor NDS or ANP interrogators or supervisors. Due to the small size of the NZDF force, we concentrate on training and mentoring the CRU.

### **Conclusion**

20. In summary, although the incidents referred to in the UNAMA report are a cause for concern, the ultimate conclusion of the report is consistent with my previous advice to you. The UNAMA Report clearly endorses the view that involvement in mentoring and training Afghan Authorities in the professional and humane conduct of their duties is viewed by the United Nations as a vital step in reducing mistreatment. I am confident that our activities in Afghanistan play an important part in this process.



**R.R. JONES**  
Lieutenant General  
Chief of Defence Force

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<sup>2</sup> An NZDF legal adviser is currently posted to the Kharward District and is working with the GIRoA officials to increase competence and respect for rule of law.

1455/DLS/Comd

31 August 2011

Minister of Defence

## **NZDF OPERATIONS – AFGHANISTAN**

1. You have sought a report on NZSAS operations in Afghanistan with respect to the transfer of detainees by partnered forces to other Afghan authorities and whether such partnering operations potentially render members of the NZDF complicit in torture. In providing advice to you on this matter I have considered reports from the members of the NZSAS, taken legal advice and read the reports of the meetings that you have had with Ministers of other nations, top-level officials and commanders.

2. The issue is an important one. Members of the NZDF operating in Afghanistan do a vital job in a difficult and dangerous environment, often at risk to their own lives. They have brought security and improved conditions of life to many people in Afghanistan. Allegations of that by so-doing they may be complicit in one of the most serious international crimes are potentially damaging to the morale and mana of the members of the NZDF operating in this demanding theatre if not adequately addressed.

3. The importance of this issue goes far beyond the current operations in Afghanistan. Peace-support and armed conflict operations seldom require forces to operate in liberal democracies. The bulk of our future operations, as in the past, will require NZDF force elements to operate collaboratively with the authorities of States in which respect for the rule of law is not strong. The issue has long-term and wide-ranging implications for the future of NZDF operations.

### **The decision to return to Afghanistan**

4. The current NZSAS deployment arose from an invitation from the International Security Assistance Force (ISAF) whose activities in Afghanistan are mandated by the United Nations Security Council.<sup>1</sup> Overall respect for the rule of law in Afghanistan was well-known to be weak. The choice for states was to engage with Afghan forces in the hope of strengthening their professionalism and respect for the

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<sup>1</sup> The current mandate UNSCR 1943 (2010) calls on States to further strengthen the force to meet all its operational requirements in the areas of personnel, equipment and other resources and encouraged ISAF and other partners to sustain their efforts to accelerate progress towards the goal of self-sufficient, professional, accountable and ethnically balanced Afghan forces.

rule of law, or to avoid such engagement and leave them to develop, or not, on their own. We have been careful to ensure that NZDF participation in Afghan security cannot be taken as tacit acceptance of human rights abuses. It is not possible, however, for the NZDF to mentor foreign forces in how to conduct their roles professionally and humanely if we are unable to interact with them.

### **NZSAS Operations in Afghanistan**

5. Given the size of the NZ force, their duty to mentor, guide and train members of the Crisis Response Unit (CRU) cannot imply a responsibility to bring about changes throughout the whole of the Afghan legal system or society. Members of the NZSAS have no role in partnering or mentoring the National Directorate of Security (NDS). That responsibility falls upon other elements of ISAF who are performing their duties as diligently as we do ours.

6. Although assigned under the operational control of ISAF, members of the NZDF remain under my command and must comply with the standards that I set for their behaviour. I require all members of the NZDF to respect international and domestic law and the standards of decency that New Zealanders would expect of them. I regard it as my duty to ensure that members of the NZDF are not exposed to the risk of being implicated in any breach of the law simply through carrying out the mission set for them. I take this duty seriously, and I know that my predecessors have done so too.

### **Partnering operations with the CRU**

7. As I have previously reported, recent media comments about NZSAS activities in Afghanistan are mistaken in a number of material respects. In partnering operations with the CRU the actual arrest of a person subject to Afghan jurisdiction is conducted by a member of the CRU. This is viewed as essential for cultural, operational and developmental reasons, as well as legal ones. Members of the NZSAS have been with the CRU on 58 occasions when persons have been arrested by the CRU. Most were arrested pursuant to a warrant issued by Afghan Attorney-General<sup>2</sup> and entered the criminal justice system from the outset. A prosecutor from the Attorney-General's office must be present. NZSAS may provide certain technical capabilities and assistance. Members of the NZSAS may need to become engaged or act in self-defence where a person poses an immediate threat to which the CRU cannot respond. Unlike the UK, Australian and other forces, the NZDF has no detention facilities in Afghanistan and does not have the resources or the mandate to operate such facilities.

8. The CRU is not a prosecution authority. It detains persons for short periods of time, but must either hand them over to a prosecution authority (e.g. the Ministry of Interior) or release them within 72 hours. A small number of the persons detained by CRU are transferred to the NDS in Kabul. The NZDF plays no part in this decision and does not have the legal ability or mandate to maintain oversight of the detainees once they leave the custody of CRU. There is no evidence, or even a suggestion, that any member of the CRU has tortured or ordered the torture of any person. All evidence at our disposal suggests the CRU have acted appropriately in respect of

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<sup>2</sup> On occasions military aged men who are in the company of the suspect have been detained by the CRU in order to ascertain their identity.



persons that they have arrested. The CRU is now regarded by ISAF as the leading unit of its kind.

### **Transfers of Detainees**

9. International law prohibits the transfer of any person to another State or authority in circumstances where the person is at risk of torture, cruel, inhuman or degrading treatment or arbitrary deprivation of life. NZDF personnel have been ordered to comply with *ISAF Standard Operating Procedures for Detention of Non-ISAF Personnel* (SOP 362). Annex D states in part:

The Islamic Republic of Afghanistan has overall responsibility for the maintenance of law and order within IRoA and, when transferring a detainee to the control of the Host Nation, ISAF cannot seek to constrain the freedom of action of the Afghan authorities. However, bilateral agreements may be concluded between [troop contributing nations] and the Host Nation, according to national requirements.

...Consistent with international law, persons should not be transferred under any circumstances in which there is a risk that they will be subjected to torture or other forms of ill-treatment.

10. The NZDF has an arrangement with the Afghan Ministry of Foreign Affairs concerning the transfer of persons between the NZDF and the Afghan Authorities (called the ATD). The arrangement is classified and has not been released out of respect for the wishes of the Government of Afghanistan. It requires that persons transferred from the NZDF to the Afghan authorities will be treated in accordance with the international obligations of both participants. The NZDF will notify transfers to the ICRC and the Afghan Independent Human Rights Commission (AIHRC) who will have full access to such persons and to the facilities where they are held. Representatives of the NZDF will also have full access to the detainees.

11. NZDF Guidance on Detention of Non-ISAF personnel paragraph 9 states:

Personnel detained by NZFOR ISAF personnel are not to be transferred or handed over to ANSF [Afghan National Security Forces] or other ISAF coalition forces without the prior approval of COMJFNZ [Commander Joint Forces New Zealand] and CDF.

12. This provision enables me to "veto" any handover and to make arrangements for another coalition partner to hold the individual in circumstances where his or her life or safety is likely to be at serious risk. If arrangements guaranteeing safety cannot be made, the person will have to be released.

13. The ATD, however, relates only to detainees transferred by the NZDF. When the person is arrested by the authorities of the host State, however, there is no "transfer". A visiting force cannot forcibly remove the individual from the authorities or deny the jurisdiction of the host State. To assert a right to do so would amount to an infringement of the sovereignty of the host State. There is no obligation or power under the ATD for members of the NZDF to visit or inspect detainees transferred by other forces. In other respects the members of the NZDF have no standing in Afghanistan to carry out such inspections.

## **NZDF detentions in Afghanistan**

14. Since 2009 NZSAS has taken one person into detention in Afghanistan; a mid-level Taliban commander. This operation was at the direction of ISAF and was not conducted in partnership with the CRU. The NZDF has subsequently transferred that person to joint US / GIRoA custody. The ICRC and AIHRC have been informed of the detention. Monitoring of his well-being in accordance with the NZDF detention policy has commenced and will continue until he is released or brought before an Afghan court.

## **The situation relating to the NDS facility**

15. The UK High Court decided in 2010<sup>3</sup> that the MOD moratorium on passing detainees from British Forces to the NDS facility in Kabul should be maintained. The court concluded that there was a real risk that persons handed to the NDS might be tortured and that there were inadequate monitoring measures available to UK Forces in 2010 to address this risk. However ISAF regards the NDS facility in Kabul as the "detainee arrangement of choice" and directs troop contributing nations to make use of these facilities.<sup>4</sup>

16. Although at present the UK moratorium applies in respect of this facility, it continues to be used by other ISAF forces. It is regarded as the one to which ICRC has the best access and which has the best record-keeping.

17. In September 2010 you visited Afghanistan. As you identified, the structure, policies and procedures regarding the treatment of detainees have undergone rapid overhaul in recent years. There are substantial ongoing improvements in the standards of NDS with considerable support from the international community. An NDS Oversight Committee has recently been established to handle allegations of mistreatment, which Australia, Canada and the UK consider to be of considerable significance.

## **No complicity in Torture**

18. The prohibition against torture is an especially strong rule of international law that applies in peace and armed conflict and cannot be derogated from even in times of emergency. Regardless of their status under the law, all persons deprived of their liberty must be treated humanely.<sup>5</sup> Any member of the NZDF who tortures any person, orders a person to be tortured, or aids and abets torture is liable to be tried under the Armed Forces Discipline Act 1971. If found guilty of an offence under the Geneva Conventions Act 1958 he or she would be liable to imprisonment for life or a lesser term, under the Crimes of Torture Act 1989 to 14 years imprisonment, and under the International Crimes and International Criminal Court Act 2000 to life imprisonment or a lesser penalty. Torture, inhuman or degrading treatment of persons under the control of the NZDF is contrary to the values and ethos of the

<sup>3</sup> *R (on application of Maya Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin) (*Evans*).

<sup>4</sup> ISAF SOP 362 para 19 directs that those detainees taken by ISAF forces are, operational considerations permitting, to be handed over to the custody of the NDS office in their region.

<sup>5</sup> All such persons are entitled, at least, to the protections of Geneva Convention Common Art 3, the protections of customary international law, the Convention against Torture and the International Covenant on Civil and Political Rights.

NZDF. The prohibition against torture forms a major part of the NZDF law of armed conflict training.

19. Complicity in torture requires knowledge that torture is taking place and a contribution by way of assistance which has a substantial effect on the perpetration of the crime. The person must know of the aims of the criminal activity and intend to contribute to its commission. I am satisfied that the actions of our personnel in Afghanistan do not even approach the threshold for complicity. Clearly there has never been an intention by the NZDF that persons arrested by the CRU be tortured by the NDS or anyone else. In fact quite the opposite. The ATD is clear that New Zealand expects Afghanistan to comply with its international law obligations. Furthermore under NZDF mentorship members of the CRU have been specifically instructed on the requirement to handle detainees humanely. The NZDF will continue to review information on detention practices. If credible indications of ill-treatment by partnered forces are identified, the NZDF will respond.

20. As suggested by COMISAF an NZDF legal officer joined the staff of the Office of the Legal Advisor in HQ ISAF in April. This officer advises NZ forces in a national capacity and works with the Ambassador on detainee issues.

21. We act under a UN Mandate in concert with 48 other states that, like New Zealand, respect international law. Partnering arrangements are an increasingly important part of ISAF's work as it moves towards handing over control of detention facilities to Afghans. ISAF is instigating rule of law programmes to improve transparency. Members of the NZDF in Afghanistan continue to display the highest standards of integrity and professionalism. They are performing their mission, at great personal risk, to improve the stability, security and well-being of a deeply troubled country. There is no complicity in torture or any other international crime by New Zealand or members of the NZDF by partnering with the CRU.



**R.R. JONES**  
Lieutenant General  
Chief of Defence Force

