


AFC/NZ/2/3

From: PSR(IC)3 (ISED)   
 Sent: Friday, 16 April 2010 4:39 p.m.  
 To: PSR(IC)3 (MEA); PSR(IC)3 (MEA); PSR(IC)3 (LGL)  
 Cc: PSR(IC)3 (ISED); PSR(IC)3 (DSP4); PSR(IC)3 (ISED)  
 Subject: RE: Afghanistan: Arrest of Suspected Terrorists  
 Attachments: 2352211-v1-Note\_for\_Minister\_\_Detainees\_\_Options.doc

[CONFIDENTIAL]

Thanks everyone for the quick turnaround - attached is the final note for your files

From: PSR(IC)3 (ISED)  
 Sent: Friday, 16 April 2010 3:41 p.m.  
 To: PSR(IC)3 (MEA); PSR(IC)3 (MEA); PSR(IC)3 (LGL)  
 Cc: PSR(IC)3 (ISED); PSR(IC)3 (DSP4); PSR(IC)3 (ISED)  
 Subject: RE: Afghanistan: Arrest of Suspected Terrorists  
 Importance: High

[CONFIDENTIAL]  
 MFA PIS

Further to email below, attached is the draft note. It pulls together all the various information/advice, and clearly recommends that if anything, diplomatic enquiries would be the best option. Grateful any comments asap.

From: MFA PIS (MIN) [mailto:MFA PIS@parliament.govt.nz]  
 Sent: Friday, 16 April 2010 2:14 p.m.  
 To: PSR(IC)3 (ISED)  
 Cc: PSR(IC)3 (ISED); PSR(IC)3 (MEA); PSR(IC)3 (DSP4); PSR(IC)3 (LGL)  
 Subject: RE: Afghanistan: Arrest of Suspected Terrorists

Thanks PSR(IC)3

ISED

As discussed with I think what we need is a note for the Minister setting out the options for responding to his concern. His basic starting point is that in order to be able to respond to any questions from journalists or in the house about the five individuals, he needs to know what happened to them - he actually says in response is a different issue. Could we therefore get a note that sets out the different possible options (both MFAT and NZDF) for finding out. This should include the risks involved with each option. You could then provide a recommendation on a preferred course of action, which may of course be not to take any action. Based on this information the Minister can then make a decision taking into account where he sees the political risk.

This doesn't need to be a formal submission.

If the note is ready today I'll put in the reading pile for Sunday evening otherwise we'll need it by 3pm Monday.

Cheers

19/04/2010

MFAT1.001.000003

From: PSR(IC)3 (ISED) [mailto:PSR(IC)3@mfat.govt.nz]  
 Sent: Friday, 16 April 2010 11:54 am.  
 To: MFA PIS  
 Cc: PSR(IC)3 (ISED); PSR(IC)3 (MEA); PSR(IC)3 (DSP4); PSR(IC)3 (LGL)  
 Subject: Afghanistan: Arrest of Suspected Terrorists

~~[SEEMAIL] [RESTRICTED]~~

## MFA PIS

I've had a couple of discussions with Defence about options for following up on the Afghan nationals that were arrested last week by Afghan Security Forces on terrorism charges. There may be physical options for making enquiries in Kabul via Defence channels. However, Defence have suggested that we consider the following:

Once we assume any responsibility, whether legal, practical or moral, for people arrested by the Afghans, we start down a series of inevitable decision points. How often would we follow-up and for how long? In particular, what will we do with any information we obtain? At the end of that process, however, we will be in a situation we have no ability to influence, apart from encouraging the Afghan Govt to treat these people in accordance with Afghan law and in accordance with Afghanistan's human rights obligations.

This step might also raise obligations in terms of all the other people who have already been arrested by the Afghans in situations where NZ has had some connection.

Such a step could also leave us with long term obligations. There is also a risk that it will set an unhelpful precedent. PSR(R)1, PSR(IC)4

Defence also have a legal concern about judicial independence should any of their people make enquiries about the actions (direct or indirect) of the unit to which they are attached.

I understand that, for these reasons, Defence have advised their Minister against making any enquiries. I am not sure of Dr Mapp's response. (You could check with Dr Mapp's office). However, if Dr Mapp has accepted that advice, we (MFAT) could not separately ask Defence to do something counter to that.

The Minister may wish to discuss this with Dr Mapp.

If, however, he wants to take some action, but not potentially commit us to long term widespread involvement in the welfare of suspected terrorists in Afghanistan, we could convey our concerns to the Afghans in the following way:

- this operation represents a major success for the Crisis Response Unit and NZ's cooperation;
- there is accordingly a close level of interest in NZ in the outcomes of the operation and the situation of those arrested;
- we expect that these individuals will be treated by Afghanistan in accordance with Afghan law, including Afghanistan's human rights obligations under the International Covenant on Civil and Political Rights (ICCPR) and Convention Against Torture;
- this provides an opportunity to demonstrate Afghanistan's commitment to those principles and reinforce NZ's confidence;
- we look forward to continuing to be informed of the situation and the development of the case.

This could either be done when the Minister meets PSR(R)1 on Thursday, or we could ask PSR(R)1 to follow this up directly (or both).

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**AFGHAN NATIONALS IN AFGHAN CUSTODY:  
OPTIONS FOR FOLLOW-UP BY NEW ZEALAND**

**Situation**

On 8/9 April 2010 New Zealand SAS were involved in providing technical support for the Afghan Crisis Response Unit's apprehension and arrest of five suspected suicide bombers in Kabul. The Afghan nationals were discovered with suicide vests and cellphones attempting to enter the city. After following-up on intelligence, the CRU, with support from British and New Zealand SAS, found huge amounts of explosives in several locations around Kabul city. The five individuals are now in Afghan custody.

2 The events have been reported in the international media, including the Associated Press and Stars and Stripes, although there has been no reference to the New Zealand involvement. **PSR(C)1**

**Process**

3 New Zealand's legal obligations are clear in this case, given the Afghan National Security Forces captured and arrested the five Afghan nationals, who are now in Afghan custody. The individuals were not detained by New Zealand forces, and New Zealand consequently does not have any jurisdiction or legal assurances in this case. Our Memorandum of Understanding with the Afghan Government relates only to the transfer of New Zealand detainees and is not applicable in this case.

4 From a human rights perspective, we have sought information from UK Government contacts in London on the likely status, treatment and legal process of the five individuals. **Based on the UK's experience, their expectations are as follows.**

**SR(C)1, PSR(IC)4**

# PSR(C)1, PSR(IC)4

## Options

10 The extent of New Zealand's political and legal options in this case is to seek information about their cases and convey to the Afghan Government our expectation that these persons will be treated in accordance with international and Afghan law.

11 New Zealand does not have legal grounds to require specific death penalty assurances in this case; and if we sought them, Afghanistan would be under no obligation to give them, and would be unlikely to do so for political/sovereignty reasons.

12 There would be further risks to seeking formal assurances:

- **PSR(C)1**

The arrest by Afghan forces is the ideal scenario for mitigating detainee issues.

- There may also be some risk to the existing assurance New Zealand has received on the transfer of detainees if this issue becomes publicised, particularly given the sensitivities.

Maintaining the viability of the arrangement on detainees is essential for the continued deployment of the SAS.

13 We assess below the options available for New Zealand to follow up with Afghan authorities on the status of the Afghan nationals.



Defence channels

14 There may be physical options for making enquiries in Kabul via Defence channels. This could include the New Zealand Defence officer deployed in ISAF HQ and the New Zealand Defence legal officer attached to the SAS unit. However, Defence have noted the need to consider the following issues.

15 Once the New Zealand Government assumes any responsibility, whether legal, practical or moral, for people arrested by the Afghan authorities, we start down a series of inevitable decision points. How often would we follow-up and for how long? In particular, what will we do with any information we obtain? At the end of that process, however, we will be in a situation we have no ability to influence, apart from encouraging the Afghan Government to treat these people in accordance with Afghan law and in accordance with Afghanistan's human rights obligations.

16 This step might also raise obligations in terms of all the other people who have already been arrested by the Afghans in situations where New Zealand has had some connection.

17 Such a step could also leave New Zealand with long-term obligations.  
PSR(C)1

18 Defence also have a legal concern about judicial independence should any Defence personnel in Kabul make enquiries about the actions (direct or indirect) of the unit to which they are attached.

19 Based on the above considerations, we understand that Defence have advised Minister Mapp against making any enquiries.

Consular enquiries

20 The New Zealand Embassy in Tehran could be tasked to make "consular enquiries" about these arrested Afghans. PSR(C)1

This approach would raise many of the same issues identified in paragraphs 15 to 17 above in relation to enquiries by defence personnel. It would also raise broader issues about whether New Zealand can or should assume consular responsibility for foreign nationals arrested by national authorities in their country of nationality.

21 The Ministry's assessment is that the consular enquiries route is therefore not the right one to take. This option stretches "moral responsibility"

too far and is in effect assumption of full responsibility for these persons' welfare by the New Zealand Government.

#### Diplomatic channels

22 Enquiries could either be made when the Minister meets with **PSR(C)1** Thursday 24 April, or the Embassy in Tehran could be tasked to follow this up directly with Afghan contacts (or both options could be pursued). This option would not commit New Zealand to long-term widespread involvement in the welfare of the suspected terrorists. Our concerns could be conveyed to the Afghan Government in the following way:

- This operation represents a major success for the Crisis Response Unit and New Zealand's cooperation;
- There is accordingly a close level of interest in New Zealand in the outcomes of the operation and the situation of those arrested;
- We expect that these individuals will be treated by Afghanistan in accordance with Afghan law, including Afghanistan's human rights obligations under the International Covenant on Civil and Political Rights (ICCPR) and Convention Against Torture;
- This provides an opportunity to demonstrate Afghanistan's commitment to those principles and reinforce New Zealand's confidence;
- We look forward to continuing to be informed of the situation and the development of the case.

#### **Recommendations**

23 We understand Defence's advice to Minister Mapp is not to make any enquiries. Given Minister McCully's request for more information on what has happened to the five individuals, our recommendation is that the best option available is to make diplomatic enquiries. This could be done during the bilateral meeting **PSR(C)1** and/or by tasking the Embassy in Tehran.

*International Security & Disarmament, Legal, Middle East & Africa Divisions,  
Ministry of Foreign Affairs and Trade  
16 April 2010*