

**YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14,
2011
CORRESPONDENTS' REPORTS**

NEW ZEALAND¹

Contents

Legislation and Treaty Action — Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel 1994.....	1
Legislation and Treaty Action — Red Crystal Emblem	1
Government Statements — Children in Armed Conflict	1
Government Reports — Detainees in Afghanistan.....	2

Legislation and Treaty Action — Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel 1994

- *International Protected Persons, United Nations and Associated Personnel, and Hostages Act 1980*
- *Ratification of the Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel 1994*

New Zealand was one of the original States Parties to the *Convention on the Safety of United Nations and Associated Personnel 1994* and supported the extension of the treaty by means of the Optional Protocol to include humanitarian, development and other non-peacekeeping operations under its protection. In June 2010, New Zealand amended its domestic legislation to reflect the extension, which involved a simple amendment of s 2(1) of the *International Protected Persons, United Nations and Associated Personnel, and Hostages Act 1980* to broaden the definition of ‘UN operation’. Following this minor amendment, on 20 September 2011, New Zealand ratified the Protocol, which had entered into force on 19 August 2010.²

Legislation and Treaty Action — Red Crystal Emblem

- *Geneva Conventions (Third Protocol-Red Crystal Emblem) Amendment Bill 2010*

On 24 August 2010, the Geneva Conventions Amendment Bill was introduced to Parliament. The Bill amends the *Geneva Conventions Act 1958*, introducing the new Red Crystal Emblem as a protected emblem in New Zealand. The Bill also increases the maximum penalty for a breach of the Act from the existing modest NZ\$1,000.00 to NZ\$10,000.00. Once the Bill has been enacted, New Zealand will be able to ratify the Protocol.

Government Statements — Children in Armed Conflict

- *Statement to the Security Council Debate on Children in Armed Conflict*
- *Endorsement of the Paris Commitments and Paris Principles on Children Associated with Armed Forces or Armed Groups*

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² Opened for signature 8 December 2005, 25 ILM 558 (entered into force 19 August 2010).

**YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14,
2011
CORRESPONDENTS' REPORTS**

In June 2010, New Zealand spoke during the Security Council debate on Children in Armed Conflict.³ In the course of that statement, the Council was urged to take a more active role in bringing an end to violations of international law involving children and armed conflict, in particular, the recruitment and use of child soldiers and attacks on teachers, students and educational facilities. New Zealand encouraged the Council to refer persistent violators to relevant sanctions committees. On 27 September 2010, New Zealand endorsed the Paris Commitments and the Paris Principles on Children Associated with Armed Forces or Armed Groups.⁴ The endorsement signaled New Zealand's acceptance that a more proactive approach is required to protect and support children effectively who are or have been associated with armed groups than what existing treaty law provides. In September 2011, New Zealand participated in the Interactive Dialogue on Children in Armed Conflict hosted by the Special Representative of the Secretary-General on Children and Armed Conflict.

Government Reports — Detainees in Afghanistan

- Memorandum from R. R. Jones, Chief of Defence Force to Minister of Defence, 'NZDF Operations — Afghanistan' (1455/DLS/Comd, 31 August 2011) <<http://www.beehive.govt.nz/release/minister-defence-releases-detainees-report>>
- Memorandum from R. R. Jones, Chief of Defence Force to Minister of Defence, 'Detainee Treatment — Afghanistan' (3304 AFG, 20 October 2011) <<http://www.beehive.govt.nz/release/minister-defence-releases-detainees-report>>

Since December 2001, New Zealand has contributed to the international presence in Afghanistan in the form of deployment of Special Air Service personnel (NZSAS). While allegations of detainee abuse and torture in Afghan detention facilities and concerns about the role of the international forces in Afghanistan in transferring to those facilities are not new,⁵ it was not until 2010 that questions were raised in the New Zealand media as to the handling of persons captured by the NZSAS, or in the presence of NZSAS, and the subsequent detention of those persons or transfer to other Afghan, or United States authorities.⁶ In an interview in August 2010, the Minister of Defence confirmed that he had ordered an inquiry by the New Zealand Defence Force into detention and transfer practices in Afghanistan.⁷ It was another fourteen months before the results of that inquiry were made known, and only then following the

³ Statement by Jim McLay, New Zealand Permanent Representative to the United Nations Security Council, Children in Armed Conflict (16 June 2010) <www.mfat.govt.nz>.

⁴ Statement by Jim McLay, New Zealand Permanent Representative to the United Nations Security Council, Ministerial Follow-Up Forum to the Paris Commitments and Paris Principles on Children Associated with Armed Forces or Armed Groups (27 September 2011) <www.mfat.govt.nz>.

⁵ See United Nations Assistance Mission in Afghanistan, *Treatment of Conflict-Related Detainees in Afghan Custody* (October 2011) p. 2 ('UNAMA Report')

⁶ Interview with Wayne Mapp, Minister of Defence, 'New Zealand's Defence Force May Face Human Rights Legal Action' (*Morning Report*, National Radio, 16 August 2010) <www.radionz.co.nz> [*Morning Report* Interview]; Interview with Wayne Mapp, Minister of Defence (*Q+A*, TVNZ, 24 April 2011) <www.tvnz.co.nz>. See also Jon Stephenson 'Eyes Wide Shut', *Metro* (New Zealand), 1 May 2011, 38.

⁷ *Morning Report* Interview, *supra* n 6.

**YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14,
2011
CORRESPONDENTS' REPORTS**

release of a comprehensive report by the United Nations Assistance Mission in Afghanistan (UNAMA).

The Minister released two reports on 21 October 2011. The first, dated 31 August 2011, runs to 21 paragraphs, a good proportion of which is a reiteration, in general terms, of New Zealand's international obligations in Afghanistan and general statements about New Zealand's commitment to the rule of law.⁸ A strong theme in the report, as with the statements of the Minister generally, is the inability of New Zealand to influence behaviour in Afghanistan, either due to the small size of the deployment,⁹ the narrow scope of the deployment¹⁰ or the sovereignty of Afghanistan.¹¹ In interviews, the Minister has also reiterated these points saying that New Zealand is in Afghanistan to assist with capacity building and strengthening of the rule of law and that this 'cannot imply a responsibility to bring about changes throughout the whole of the Afghan legal system or society'.¹²

The second report, dated 20 October 2011, and thus finalised after the release of the UNAMA report, runs to 20 paragraphs. Again, there is an emphasis on the capacity building nature of the New Zealand involvement.¹³ Although the report acknowledges the credibility of the UNAMA report, its selective and careful references to the details reported by UNAMA downplays the impact of UNAMA's findings. For example, the NZDF report focuses on the UNAMA's conclusion that the use of torture is not a de facto institutional policy of the NDS or the Afghan government, and that in some facilities, UNAMA stated that more investigation is required to determine whether torture is used systematically.¹⁴ The NZDF report does not repeat, much less emphasise, the central finding of the UNAMA report that there was compelling evidence of torture in certain facilities, most notably in the New Zealand context, the NSD facility in Kabul.

The first NZDF report reveals that members of the NZSAS were with the Afghan Crisis Response Unit (CRU) on 58 occasions when persons have been arrested, 'most' of whom were arrested pursuant to an arrest warrant.¹⁵ The report does not specify the time-frame but presumably it is from the time of original deployment in December 2001 through to the time of finalising the report in 2011. 'A small number' of those 58 persons were 'transferred to the NDS in Kabul'.¹⁶ Presumably, although it is not stated, this refers to the NDS National Counter-Terrorism Department 90/124 in Kabul.

The confirmation of NZSAS presence or involvement with this 'small number' is important and raises serious questions, which are neither raised much less answered in either of the NZDF reports. The UNAMA report concluded that there was compelling

⁸ Memorandum from R. R. Jones, Chief of Defence Force to Minister of Defence, 'NZDF Operations — Afghanistan' (1455/DLS/Comd, 31 August 2011) paras. 2, 4, 6, 9, 18–19, 21

⁹ *Ibid.*, para. 5.

¹⁰ *Ibid.*, paras. 8, 13.

¹¹ *Ibid.*, para. 13.

¹² *Ibid.*, para. 5.

¹³ Memorandum from R. R. Jones, Chief of Defence Force to Minister of Defence, 'Detainee Treatment — Afghanistan' (3304 AFG, 20 October 2011) para. 3.

¹⁴ *Ibid.*, para. 6.

¹⁵ *Ibid.*, para. 7.

¹⁶ *Ibid.*, para. 8.

**YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14,
2011
CORRESPONDENTS' REPORTS**

evidence that officials of the Afghan National Directorate of Security had systematically tortured detainees at detention facilities in Herat, Khadabar, Khost, Laghman and Kabul.¹⁷ UNAMA interviewed 28 persons held at the Kabul facility,¹⁸ 26 of whom reported torture, being 93 per cent of those interviewed.¹⁹ UNAMA also gathered substantial information on torture in that facility by interviewing detainees at other facilities who had previously been detained in Kabul.²⁰ On the basis of those interviews, UNAMA found that NDS officials in the Kabul facility used beatings, suspensions, twisting and wrenching of genitals and electric shocks as methods of torture.²¹ Not surprisingly then, the NDS facility in Kabul is now deemed 'prohibited'.²²

The NZDF reports do not adequately address these findings. The first report (prepared prior to the release of the UNAMA report), having noted the decision of the UK High Court in *Maya Evans* that there was a real risk of torture at the Kabul facility,²³ still does not properly consider the implications of the 'small number' of detainees who were transferred there. Rather, the report says that ISAF regards the facility as the 'detainee arrangement of choice', and 'is regarded' as the one to which the ICRC has the best access and which has the best record-keeping. Even in the second report, when the UNAMA findings had been made known, there was no proper consideration of the fate of those detainees, or the consequent legal implications. It does confirm that '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.'²⁴ While it is good to know that the UNAMA report is being taken seriously, this does not help with addressing any past problems.

A second concern about the reports is the way in which New Zealand is distancing itself from the problem. There is no suggestion that New Zealanders personally have been involved in mistreatment much less torture. It seems (apart from a single detainee mentioned separately in the reports who is being monitored by the ICRC) that all of the detentions arose in the context of operations with the CRU and importantly, there are no allegations of torture or mistreatment by the CRU in UNAMA report. The real issue is what happens to the detainees once the CRU transfers them to another authority, Afghan or otherwise. While it may be correct that the transfers do not come close to the threshold required for a finding of complicity in terms of individual criminal responsibility of SAS personnel,²⁵ that conclusion does not adequately address New Zealand's responsibilities more generally under the *Convention against Torture*.²⁶ Admittedly, there are real difficulties in establishing clear lines of responsibility and accountability in Afghanistan in light of the complexity of the legal relationships involved but this should not, and does not,

¹⁷ United Nations Assistance Mission in Afghanistan, *supra* n. 5, pp. 3, 16–35.

¹⁸ *Ibid.*, p. 17.

¹⁹ *Ibid.*, p. 18.

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*, p. 52.

²³ Jones, *supra* n. 8, para.15. See *R (Evans) v Secretary of State* [2010] EWHC 1445 (Admin).

²⁴ Jones, *supra* n. 8, para.8.

²⁵ *Ibid.*, para.19.

²⁶ See generally T. Dunworth, 'International Law' [2011] *NZ Law Rev* 569, pp. 587–590.

**YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14,
2011
CORRESPONDENTS' REPORTS**

absolve New Zealand of its own commitment to the rule of law and in particular to its obligation to prevent torture.

A third criticism of the New Zealand response needs to be made, namely that the Minister of Defence has been less than enthusiastic to investigate and to release the reports. Allegations of torture and serious mistreatment in Afghanistan detention facilities are not new. While the UNAMA report is useful in terms of its credibility and authority, prior to its release there was already sufficient evidence available to raise real concerns about systematic torture in certain facilities in Afghanistan and in particular at the NDS facility in Kabul: earlier UN reports had expressed concern about allegations of torture by NDS officials;²⁷ credible international human rights groups had detailed their concerns;²⁸ and other allegations had been raised by the Afghan Independent Human Rights Commission²⁹ and in litigation in the United Kingdom³⁰ and in Canada.³¹ In light of this evidence, New Zealand, as a self-proclaimed champion of the international rule of law, should have shown better leadership and thus should not have waited so long to conduct its own inquiry. It is true that New Zealand itself cannot, and should not, be responsible for everything that happens in Afghanistan but neither should New Zealand be part of a system that seems to have been turning a blind eye to torture and mistreatment of detainees.

TREASA DUNWORTH

²⁷ In 2007, the UN High Commissioner for Human Rights stated 'On the issue of detention, including the transfer of detainees by international forces to their Afghan counterparts, I have shared my concerns regarding the treatment of detainees with the Government, ISAF and representatives of contributing states. Transfers to the National Security Directorate (NDS) are particularly problematic.' 'High Commissioner for Human Rights Concludes Visit to Afghanistan' (20 November 2007) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=4782&LangID=E>>.

²⁸ Amnesty International, *Detainees Transferred to Torture: ISAF Complicity?* (November 2007); Human Rights Watch Press Release, *Canada/Afghanistan: Investigate Canadian Responsibility for Detainee Abuse* (27 November 2009).

²⁹ Afghanistan Independent Human Rights Commission, *Torture, Transfers and Denial of Due Process: The Treatment of Conflict-Related Detainees in Afghanistan* (17 March 2012).

³⁰ *R (Evans) v Secretary of State* [2010] EWHC 1445 (Admin).

³¹ *Amnesty International Canada v Canada (Chief of the Defence Staff)* [2008] FC336.