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Chief of the Defence Force
MINUTE

CDF 843/02
ADHQ 2001/31884

Minister for Defence

For Action: Recommend early consideration – 6 Sep 02

OPERATION SLIPPER – TREATMENT OF CAPTURED TALIBAN AND AL
QA'EDA PERSONNEL

RECOMMENDATION

- That you:
 - note that I have continued the preparatory steps necessary to allow the ADF operating in Afghanistan to lawfully maintain custody of captives for whom Australia is legally responsible, should this need arise.
 - note that should captives be taken, further Government policy guidance will be required for their processing.
 - note that a number of complex legal issues require resolution and that the preparation of a SCNS/NSC briefing package has been delayed pending resolution of these issues with appropriate Departments.

OVERVIEW

s. 33(1)(a) ii

s. 42-7

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- The Attorney General's Department previously advised that there are persons in Afghanistan who are likely to qualify for prisoner of war status if captured.

S 33(1)(a) ii

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e An additional complication in this matter is the detention of Mr Hicks and Mr Habib by the US at Guantanamo Bay. The media may seek to link the two captive's circumstances with Australia's own detainee policies in Afghanistan. Of particular interest may be any transfer of captives to the US or another Coalition partner or the continued detention of any civilians held by the ADF in Afghanistan without charge.

e You have previously directed that Defence should determine the rules for dealing with captives and that this should be endorsed by the NSC. The initial intention was that this brief should enclose a draft SCNS/NSC package. However, while drafting this brief, it became clear that there are still significant legal issues that need to be addressed before SCNS/NSC could be provided with advice and recommendations concerning the way ahead. The advice previously received from the Attorney General's Department only covers

Section 42.

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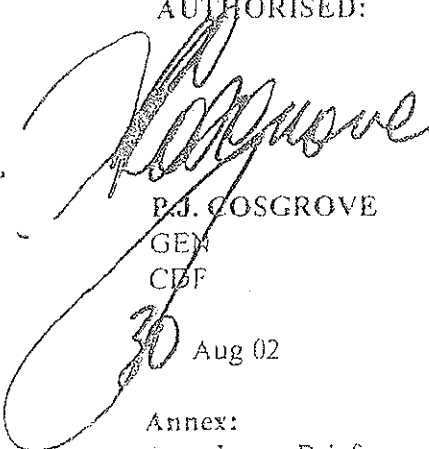
The intent of the remainder of this brief is to provide you with a detailed summary of where this matter is currently situated, and what issues remain to be addressed.

Sensitivity. Yes. Australia's position regarding the treatment of captives remains of considerable interest to its coalition partners (particularly the US), the United Nations, International Committee of the Red Cross, NGOs concerned with human rights, political and legal commentators and to the media.

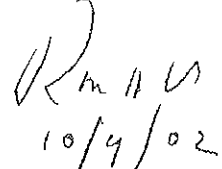
Consultation. SIP

AUTHORISED:

NOTED


P.J. COSGROVE
GEN
CDF
30 Aug 02

I know the issues are complex but this really has taken too long. We need to draw some conclusions to get the appropriate endorsement.


10/4/02

Annex:
A. Issues Brief

CONTACT: WGCDR SA Strategic Command, (02) 626 50057
Copies: Secretary, VCDF, DEPSEC SP, CN, CAF, CA, HSC, DEPSEC I+S, FASSIP, HPGA, COMAST, HPACC, DGTDLs.

"I know the issues are complex but this really has taken too long. We need to draw some conclusions and get the appropriate endorsement."

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Annex A to
CDF /02
Dated 30 Aug 02

ISSUES BRIEF

BACKGROUND

Previous Briefing

- A brief to the Minister dated 2 Jun 02 dealt with the Australia's options for the treatment of captured Taliban and al Qa'eda personnel in Afghanistan. A copy of that brief is attached (Enclosure 1). The brief provides background to this issue from the start of Operation SLIPPER. Relevant to this present brief, the previous brief advised the following:

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S 33(1)(a) ii

Subsequent Planning

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S 33(1)(a) ii

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S 33 (1)(b) ii

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- **Laws of Armed Conflict.** Legal advice from Defence, DFAT and the Attorney General's Department is that there is still an international armed conflict occurring in Afghanistan. Consequently, the laws of armed conflict, including the Geneva Conventions (and Additional Protocols thereto) apply. All interactions with captives, including questioning/interrogation will be in accordance with the laws of armed conflict. This will include during such time as any assistance is obtained from US interrogators or other personnel.

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S 33 (1) (a) ii

- **Planning Results.** The planning undertaken should ensure that Government and ADF decisions on the processing of captives are not driven solely by an inability on the part of the ADF to hold captives even in the short term. This planning should also address a basic concern that individual ADF commanders, or other Government officials, do not become criminally liable for actions regarding their treatment of captives because proper preparations were not undertaken.

Current ADF Assumptions and Parameters

- Without the need for further direction from Government, the ADF will operate within the following parameters and assumptions:
 - There continues to be an international armed conflict in Afghanistan and members of the Taliban and al Qa'eda armed forces are capable of being PWs in accordance with Geneva Convention III and Additional Protocol I.

- | The ADF will comply with the international and domestic law identified to it by Australian Government lawyers.

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S 33 (i)(ii)

ISSUES

PW Issues

- * Should it be determined that a captive has the status as a PW, then their subsequent treatment remains subject to the regime laid down in Geneva Convention III and Additional Protocol I for dealing with PWs. A summary of the pertinent issues relating to the transfer, release, repatriation and potential prosecution of PWs is attached at Appendix A.

Civilian Detainee Issues

- * Any captive who is not PW is entitled to be treated as a civilian. Persons who find themselves in ADF custody as civilians rather than as PWs, may include:

S 33 (i)(ii)

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§ 33(1)(a) ii

Government Issues

- Attached C is list of matters which might be expected to require Government input and/or decisions should any captives be taken by ADF forces.

Unresolved Legal Issues

- During the preparation of this brief, it has become apparent that there are a number of legal issues that require resolution (Appendix A, B and C refer). Through my military lawyers I will now consult with the Attorney General's Department on the following issues:

§ 33(1)(a) ii

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SCNS/NSC Brief

A draft SCNS/NSC briefing package will be prepared once the unresolved legal issues have been addressed. However, at this stage I envisage that the basic parameters of the briefing package noted in previous submissions to you, will remain the same. That is, the briefing package will ask that SCNS/NSC:

- approve the continuation of the policy that in combined operations with the US in AFG, the US will take control over all captured personnel.
- note that in the event captives are taken during sole AS operations in AFG, the subsequent handling of those captives will require government-level decisions.

Appendices:

- A. Prisoners of War - Summary of matters affecting Transfer, Release, Repatriation and Prosecution
- B. Civilian Captives - Legal Basis for Custody and Management
- C. Detainees - Potential Matters for Government Consideration

Enclosures:

1. CDF 454/02 of 2 Jun 02
2. Article 5 Tribunal Plan
3. Article 75 of Additional Protocol I

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APPENDIX A TO
CDF /02
DATED 10 AUG 02

OP SLIPPER - PRISONERS OF WAR
SUMMARY OF MATTERS AFFECTING TRANSFER, RELEASE, REPATRIATION
AND PROSECUTION

Introduction

- Should it be determined that a captive has the status as a prisoner of war (PW), then their subsequent treatment remains subject to the regime for dealing with PWs laid down in Geneva Convention III and Additional Protocol I.

Transfer

- There are strict controls upon the subsequent transfer of a PW into the custody of another nation.
 - The recipient country must be a party to Geneva Convention III. Moreover, the country transferring a PW must have satisfied itself of the willingness and ability of the recipient country to apply Geneva Convention III. If following transfer the recipient country later fails to carry out the provisions of Geneva Convention III, the transferring nation must take effective measures to correct the situation or shall request the return of the prisoner. This request must be complied with.
 - Examples of conduct by a recipient state that would require the transferring state to seek corrective action or return of the PW include torture or inhuman treatment (including wilfully causing suffering or serious injury to body or health), wilfully depriving a PW of the right to a fair and regular trial prescribed by Geneva Convention III, and unjustifiable delay in repatriation.

S 33(1)(a) ii + iii

Release and Repatriation

- PWs are entitled to be "released and repatriated without delay after the cessation of active hostilities."
 - Early release and repatriation is not prohibited. A key issue in this context is a determination that there has been a "cessation of active hostilities." On the evidence available, this is not yet the case.
 - A potential complication is that while hostilities may end in Afghanistan, the global nature of the "war on terror" could lead to a conclusion that the cessation of active hostilities is not merely a regional issue. If it is judged that active hostilities have not ended, then this justifies the continued retention of a PW (although as stated, early release or repatriation is not prohibited).
- The obligation to release and repatriate is subject to the requirement that PWs are not be repatriated against their will. This principle developed during the Korean War. In effect, PWs may seek a form of asylum from their captors or some other nation.
- Repatriation requires a recipient country. Usually this is the country for which the captive has fought. However, if the potential recipient state is not prepared to take them, or is threatening treatment that will breach international human rights standards, then this would also become a complication. Given the international nature of the Taliban and al Qa'eda armed forces, even identifying the correct recipient state may be difficult.

S 33 (1)(d) iii

- Repatriation can be delayed if the prisoner of war is being detained in relation to judicial prosecution or conviction.

Application of Criminal and Disciplinary Law

- The Attorney General's Department will be consulted about the potential application of Australian criminal law, including domestic war crimes legislation, to any PWs taken in Afghanistan.
- For the purposes of discipline, PWs will be subject to the provisions of the Defence Force Discipline Act 1982 (Cth), as if they were members of the ADF, during the time they are held by Australia.

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APPENDIX B TO
CDF /02
DATED 20 AUG 02

OP SLIPPER – CIVILIAN CAPTIVES LEGAL BASIS FOR CUSTODY AND MANAGEMENT

Civilian Captives

- In the event that a civilian is detained by the ADF in Afghanistan and not immediately released, Australia will require a legal basis for the ongoing detention and management of that civilian captive.
- This issue does not immediately arise with PWs, because their detention is justified under international law up to the point when legally they must be released and repatriated at the end of the conflict (or earlier in certain circumstances). The management regime for PWs during captivity is also clearly defined.
- Based on Australia's legal and cultural traditions there would be a public expectation that civilians who are detained are, within a reasonable timeframe, either charged with an offence or released. The position of detainees held by the US in Guantanamo Bay not only presents a challenge to this expectation, but also demonstrates that it may in fact be difficult to find an applicable criminal offence with which to charge a detainee.
- The matter is complicated because there is considerable difficulty in establishing exactly what law currently applies to civilians (captive or otherwise) in Afghanistan.
- The identification of a full Australian legal basis for the detention of civilians is a matter that lawyers from Defence will pursue further with the Attorney General's Department.

Application of Article 75 of Additional Protocol I

- Article 75 provides a number of basic minimum standards that will apply to any person who is not entitled to better treatment under the Geneva Conventions or Additional Protocol I. With respect to the issue of detention, article 75 provides that:
 - Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken.
 - Except in the case of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.
- Article 75 is only of limited assistance as it does not of itself provide the reasons why any arrest, detention or internment would be lawful in the first place.

Application of Geneva Convention IV

- Geneva Convention IV deals with the protection of the civilian population. At the meeting on 11 Jul 02, the ICRC stated that it believes that Geneva Convention IV applies in Afghanistan. That is, if a person is not PW (and therefore not covered by Geneva Convention III), then the person is a civilian and Geneva Convention IV will provide a framework for their treatment as a "Protected Person". The difficulty with the ICRC's view is that Geneva Convention IV was drafted with WWII scenario firmly in the background and it may be inappropriate to apply some or all of its provisions to the current situation in Afghanistan. For instance, the application of many of the important provisions of Geneva Convention IV depends upon the characterisation of the Afghanistan "Occupied Territory" and the coalition forces as an "Occupying Force."
- Geneva Convention IV provides certain coverage of the following types of issues:
 - detention without criminal charge by way of "internment" for security reasons;
 - arrest, prosecution and conviction;
 - geographical transfers;
 - custody transfers;
 - extradition; and
 - the right to leave territory.
- A limited analysis of Geneva Convention IV suggests that there may be both positives and negatives to be drawn from an application of this convention. For instance, it may appear convenient to draw upon some of the provisions that allow for the "internment" of civilians for security reasons. However, the cost of such an approach is that Australia would be obliged to apply the full internment regime, which may be quite onerous and may severely limit, if not prohibit in some circumstances, the transfer of captives out of Afghanistan or into the custody of a third party. Lawyers from Defence will now seek the views of the Attorney General's Department on the application of Geneva Convention IV.
- It is noted that the ADF has, however, previously applied parts of Geneva Convention IV at least as a matter of policy during operations in Somalia and East Timor.

International Human Rights Law

- As a party to Optional Protocol II to the International Covenant on Civil and Political Rights, where Australia believes that the transfer of a person entails a real risk that the person will be executed or subject to torture, cruel inhuman or degrading treatment or punishment then in the absence of assurances to the contrary, Australia is bound not to complete the transfer. Such a transfer may also be complicated if Australia is not confident that any assurances that may receive from the recipient are reliable. While this may not be an issue in the case of the US or other coalition partners, it may be a live issue if the recipient is the Afghan Interim Authority.

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Application of Criminal Law

- The Attorney General's Department will be consulted about the potential application of Australian criminal law, including domestic war crimes legislation, to civilian captives.
- If the civilian captive is suspected of committing a serious offence simply against local domestic law (such as armed robbery, murder or serious assault) rather than a war crime, then the option of handing the person over to the local civilian authorities, may be complicated by the potential treatment/punishment that may be meted out to the captive.

US Approach

- The US appears to be adopting a legal theory of preventative detention. That is, they will continue to hold certain captives without charge on the basis that they pose a risk if released. The US may argue that they are exercising a form of legitimate national self-defence.

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APPENDIX C TO
CDF /02
DATED 30 AUG 02

OP SLIPPER - DETAINEES
POTENTIAL MATTERS FOR GOVERNMENT CONSIDERATION

In the event of a captive being taken (or in anticipation of such an event) the Australian Government may need to consider some or all of the following matters:

- a. Whether or not the situation in Afghanistan remains as an international armed conflict, or has transformed into an internal armed conflict (or has even reverted to peacetime)?
 - This issue will affect the status of captives. The position taken by the lawyers for Defence, DFAT and the Attorney General's Department is that there is still an international armed conflict occurring in Afghanistan. However, the Government might choose to seek updated advice on this position should captives be taken. Should an Article 5 Tribunal be utilised, then the status of the conflict may become an issue before the tribunal or in any subsequent appellate proceedings.
- a. Whether or not an Article 5 Tribunal is necessary?
 - The Attorney General's Department has advised that [REDACTED] 542.
[REDACTED] Should a captive be taken, then the Government could determine that there was no doubt that a person is a PW because [REDACTED] 542.
[REDACTED] 542. Consequently, an Article 5 Tribunal would be unnecessary. The Government, can also determine that there is no issue of "doubt" where it is certain that a person apprehended did not participate in hostilities, and therefore no question of PW status arises.
- a. Whether or not a captive should be transferred into the custody of a third party or to another country?
 - Should the preferred Government position be that either PWs or civilian detainees are transferred into the custody of another country or authority, then the Government would need to be satisfied as to the conditions of transfer. This would involve an assessment of the legal efficacy of the transfer. It may also depend on an assessment of the risk that the recipient authority, notwithstanding their legal obligations and/or assurances, will mistreat the captive.
- a. Whether or not captives should be released and/or repatriated?
 - Release would generally pose no problems unless such action placed the captive in immediate and foreseeable danger, or another nation specifically opposed the release of the particular captive in question.

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- PWs are entitled to be "released and repatriated without delay at the end of active hostilities." The Government may be required to make an assessment as to what point active hostilities have ended. The Government may also be required to deal with requests from a PW that they not be repatriated. The Government may delay repatriation if the member is subject to criminal proceedings serving a sentence for an indictable offence.
- PWs who are not yet entitled to repatriation or release under Geneva Convention III can be retained. Civilians who are validly held pending criminal proceedings, or who have been duly convicted and are now imprisoned, could also be retained. In other cases, for there to be a valid retention in custody, the Government would need to develop some other legitimate legal basis to justify that retention.
- Whether or not there is any need to consult with Afghan Interim Authority on any matters relevant to detainees?
 - The role of the Afghan authorities has been largely ignored and this approach may not be tenable in the future. The Afghan authorities may develop views on such issues as the conduct of tribunals within the borders of Afghanistan and the transfer of persons (particularly Afghans) from their territory.