

Legal Backgrounder 3
New Zealand and Afghanistan (2001-2008)

Background

In 1979 the USSR invaded Afghanistan, retaining troops in the country in support of various leaders until 1988 when it withdrew. On 4 April 1996 the Taliban movement overthrew the Government, providing sanctuary to Al Qaeda which subsequently claimed responsibility for the attacks against the US embassies in Africa (1998), the bombing of the USS Cole in Aden (200), and the plane hijackings and crashes in New York, Washington, DC, and Pennsylvania (2001).

Action undertaken by the UN Security Council in Afghanistan in the post-Cold War era falls into four categories:

1. To find and prosecute suspects of international terrorism (criminal prosecution);
2. To search and destroy or degrade terrorist groups (counter-terrorism);
3. To replace the Taliban with a new Government, and provide security (peace-making);
4. To assist in the reconstruction of the country (peace-building).

For the international community, action with respect to Afghanistan has essentially been concerned with the question of how best to deal with international terrorism. A fundamental distinction exists between treating terrorism as a matter of international criminality or a matter of international security. While these are closely inter-related, they are not identical. The former involves the application of criminal justice; the latter involves inter-state conflict and, potentially, the law of armed conflict or humanitarian law. The choice by governments between them thus has far-reaching legal and political ramifications.

UN Action

On 31 January 1992 the Security Council met for the first time at summit level. In its ensuing statement (S/23500), the Council expressed concern over acts of international terrorism, emphasising the need for the international community to deal effectively with 'all such criminal acts'. Through the 1990s, the UN Security Council's decisions reflected a perception of terrorism as a criminal matter. After September 2001, however, the perception changed to treating it as an international security issue, reflecting the US policy of a 'global war on terror'.

On 28 September 2001 the Council, acting under Chapter VII, decided (SCR 1373), to introduce a comprehensive range of measures against international terrorism. All States must prevent and suppress the financing of terrorist acts; refrain from providing any support to terrorists; and intensify the exchange of operational information. It established a monitoring committee to ensure implementation of all such measures – known as the Counter-Terrorism Committee (CTC). Although these measures were prompted by the September 2001 hijackings, SCR 1373 is generic in nature and not specific to Afghanistan (or Taliban/Al Qaeda).

The NZ Government has tended to follow the US lead of treating international terrorism as an issue of international security rather than criminal justice. This has had potential implications for the integrity of New Zealand's legal situation.

The legal and operational relationships between the four categories identified above are complex. Analysis of the legal authorisations given by the Security Council is given in section A, and of the operational structure in section B.

A. Legal Authorisation

1. Criminal Prosecution

- On 13 August 1998, following the bombings of US embassies in Africa, the Security Council (SCR 1189) condemned the 'indiscriminate and outrageous acts of international terrorism' and

expressed its conviction that the suppression of such acts was essential for the maintenance of international peace and security. It called upon all States to cooperate with a view to apprehending the perpetrators of the acts and bringing them swiftly to justice. It also called upon them to adopt effective measures for 'security cooperation for the prevention of such acts of terrorism', and for the 'prosecution and punishment of their perpetrators'.

- On 28 August, the Council reiterated (SCR 1193) that the Afghan crisis could be settled only by peaceful means, through direct negotiation between the Afghan factions under UN auspices. It stressed that territorial gains through military operations would neither lead to a durable peace in Afghanistan nor contribute to a comprehensive settlement of the conflict. Outside interference in the internal affairs of Afghanistan had to cease immediately. The Council called upon all States to prohibit their military personnel from participating in military operations in Afghanistan. It reaffirmed that parties to the conflict were bound to comply with their obligations under international humanitarian law (particularly the 1949 Geneva Conventions). Persons who committed or ordered grave breaches of such laws were individually responsible.
- On 8 December, the Council (SCR 1214) demanded that the Taliban and other factions including the United Front cease fighting and resume negotiations for a broad-based and fully-representative government that would protect the rights of all Afghans. The Council condemned in particular the Taliban for its suppression of women, its sanctuary for terrorists and its violations of humanitarian law including the abduction of UN personnel.
- On 15 October 1999, the UN Security Council (SCR 1267), determined that the failure of the Taliban to respond to its demands in SCR 1214 constituted a 'threat to international peace and security'. Acting under binding powers of Chapter VII of the UN Charter, the Council, deploring the fact that the Taliban continued to provide safe haven to Usama bin Laden and allowed terrorist training camps to remain in Afghanistan, insisted that it cease such activities, hand over bin Laden to appropriate authorities in a country where he had been indicted or other appropriate country. The Council applied aviation and financial sanctions against the Taliban, and established a sanctions monitoring committee (the '1267 Committee').
- On 19 December 2000, the Council (SCR 1333) demanded that the Taliban swiftly close all terrorist camps. It called for confirmation of this by the UN through, *inter alia*, information made available by Member States and 'such other means as are necessary' to assure compliance. The Council extended the sanctions against the Taliban, and established a Committee of Experts to assist in the monitoring.
- On 13 July 2001, the Council (SCR 1363) decided that the monitoring mechanism should be comprised of an expert Monitoring Group in New York and a Sanctions Support Team.

2. Counter-terrorism ('Operation Enduring Freedom'—OEF)

- On 12 September, the Council (SCR 1368) condemned in the strongest terms the 'horrifying terrorist attacks' in the US the previous day, recalled the right under the UN Charter of individual and collective self-defence, and called on all States to work together urgently to bring to justice the perpetrators, organisers and sponsors of the attacks. It stressed that those responsible would be held accountable. It expressed its readiness to 'take all necessary steps' to respond to the attacks.
- On 6 December, the UN Secretary-General reported to the Security Council (S/2001/1157) that the 'US-led coalition' had committed military operations in Afghanistan and that, as the Taliban had continued to refuse to hand over bin Laden, "the coalition war aims were articulated as including their removal from power".
- No specific authorisation has been given by the Security Council for the presence of Operation Enduring Freedom (OEF) beyond the Council's recollection of the right of self-defence in SCR 1368. No specific reference to OEF in terms of mission mandate has been made by the Council.

No reference to OEF whatever was made by the Council until October 2003. As noted below in the ISAF peace-making section, the Council has since then made oblique reference to the need for consultation between ISAF and OEF (SCR 1510, 1563, 1623, 1659, 1707, and 1746), the operational synergy between ISAF and OEF (SCR 1659) and the 'respective designated responsibilities' of ISAF and OEF (SCR 1589, and 1746).

3. Peace-making: (International Security Assistance Force – ISAF)

- On 14 November, following the military ouster of the Taliban by the US-supported Afghan Northern Alliance, the Council (SCR 1378) expressed its strong support for the efforts of the Afghan people to establish a new and transitional administration leading to the formation of a broad-based, multi-ethnic and fully representative government. It called on UN Member States to provide support for such an administration and government. It also encouraged Member States to support efforts to ensure the safety and security of areas of Afghanistan no longer under Taliban control.
- On 6 December, the Council (SCR 1383) endorsed the Bonn Agreement of 5 December on provisional arrangements in Afghanistan pending the re-establishment of permanent government institutions.
- On 20 December, following the Bonn Conference, the Security Council (SCR 1386) authorised, pursuant to the Bonn Agreement, the establishment of an International Security Force (ISAF) to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas. It called upon UN Member States to contribute military resources to ISAF and authorised them to take all necessary means to fulfil its mandate. It requested the leadership of ISAF to provide periodic reports on progress towards implementation of its mandate. ISAF's mandate was subsequently extended (SCR 1413, 1444, 1510, 1563).
- On 13 October 2003, the Council (SCR 1510) extended the ISAF mandate to cover all areas of Afghanistan in support of the Afghan Transitional Authority (ATA), and called upon ISAF to continue to work in close consultation with the ATA, the UN's Special Representative (SRSG) and the 'Operation Enduring Freedom Coalition' in the implementation of the force mandate.
- On 17 September 2004, the Council (SCR 1563) recognised the need to strengthen ISAF and called upon Member States to contribute. It reiterated its call for ISAF to work in close consultation with the ATA, the SRSG and the OEF Coalition.
- On 24 March 2005, the Council (SCR 1589) called upon the Afghan Government, with the assistance of the international community including ISAF and the OEF coalition 'in accordance with their respective designated responsibilities as they evolve', to continue to address the threat to the security and stability of Afghanistan posed by the Al Qaeda operatives, the Taliban, and other extremist groups, factional violence among militia forces and criminal activities.
- That call was reiterated in SCR 1623 of 13 September 2005. The Council also welcomed the role played by ISAF and the OEF Coalition 'in assisting in securing the conduct of national elections'.
- On 15 February 2006, the Council (SCR 1659) endorsed the Afghanistan Compact as the framework for the partnership between Afghanistan and the international community. It acknowledged the 'continuing commitment' of NATO to lead ISAF, welcoming the adoption by NATO of a revised Operational Plan allowing, *inter alia* (i) the continued expansion of ISAF across Afghanistan, and (ii) 'closer operational synergy' with the OEF.
- That call was reiterated in SCR 1707 of 12 September 2006.
- On 23 March 2007 the Council (SCR 1746) called upon the Afghan Government, with the assistance of ISAF and OEF Coalition 'in accordance with their respective designated

responsibilities as they evolve', to continue to address the threat to the security and stability of Afghanistan posed by the Taliban, Al Qaeda, other extremist groups and criminal activities. It welcomed the completion of ISAF's expansion throughout Afghanistan, and called on all parties to uphold international humanitarian and human rights law.

- On 19 September 2007, the Council (SCR 1776) recognised the 'multifaceted and interconnected nature' of the challenges in Afghanistan and that the responsibility for security and stability resided with the Afghan Authorities. It noted the 'synergies in the objectives' of UNAMA and ISAF, and reiterated its support for the continuing endeavours by the Afghan Government, 'with the assistance of the international community including ISAF and the OEF Coalition' to improve the security situation. It welcomed the completion of ISAF's expansion throughout Afghanistan, the continued coordination between ISAF and the OEF coalition, and the cooperation established between ISAF and the EU presence, particularly its police presence (EUPOL). It expressed its appreciation for NATO's leadership and for the contributions of many nations to ISAF and the OEF coalition, including its maritime interdiction component. It called upon ISAF to continue to work in close consultation with the Afghan Govt., the SRSG and the OEF coalition in the implementation of its mandate.

4. Peace-building: (UN Assistance Mission in Afghanistan – UNAMA)

- On 20 March 2002, the UN Security Council (SCR 1401) established UNAMA, the UN-authorized peace-building mission. Its mandate (SCR 1662, SCR 1746), pursuant to the Bonn Agreement, is to:
 - (i) provide political and strategic advice, and good offices, in support of the peace process;
 - (ii) help implement the Afghan Compact, and development and drug control strategies;
 - (iii) promote human rights;
 - (iv) provide technical assistance; and
 - (v) coordinate the humanitarian relief, recovery and reconstruction activities.
- On 26 June 2002, the Council (SCR 1419) welcomed the successful conclusion of the Emergency Loya Jirga and the establishment of the Afghan Transitional Authority.
- The Council extended UNAMA's mandate in (SCR 1589) and subsequent resolutions.
- On 20 March 2008, the Council (SCR 1806), in extending UNAMA's mandate, called upon the Afghan Government, with the assistance of the international community including ISAF and the OEF coalition 'in accordance with their respective designated responsibilities as they evolve', to continue to address the threat to the security and stability of Afghanistan posed by the Taliban, Al Qaeda, illegally armed groups, criminals and those involved in the narcotics trade.
- On 11 June, the Council (SCR 1817) expressed utmost concern at the high level of opium cultivation and trafficking in Afghanistan and called upon all Member States to increase cooperation in anti-narcotic measures.

B. Operational Structure and History

(i) OEF

- OEF does not maintain a website. According to the US, OEF is a multinational coalition military operation initiated in October 2001 to 'counter terrorism and bring security to Afghanistan in collaboration with Afghan forces'. OEF operations led to the collapse of the Taliban regime and 'helped bring a measure of security and stability to Afghanistan for the first time in a generation'.
 - OEF involves troops from over 20 nations, including about 19,000 US forces and about 3,100 non-US troops.
 - US and Coalition forces continue to engage Taliban remnants and other extremists and coordinate with the Pakistani military to bolster security along the Afghan-Pakistan border.

- US and Coalition forces operate 14 of 23 provincial reconstruction teams (PRTs) in Afghanistan. The PRTs support the Afghan government through reconstruction and good governance initiatives, including projects that help Afghans rebuild damaged roads, community buildings, and wells.
- During the 2004 presidential election and the 2005 National Assembly and Provincial Council elections, US and Coalition forces partnered with Afghan security forces and other international troops to provide security. [US State Dept. Fact Sheet (January 31, 2006)]

No operational control of OEF is conducted within the UN. Such control is conducted exclusively by the US.

(ii) ISAF

On 19 December 2001, pursuant to the Bonn Agreement of 5 December 2001, the UK advised the UN Security Council (S/2001/1217) that it was willing to be the lead nation for ISAF under the terms of the Agreement's Annex I. While responsibility for security and national law and order resided with the Afghan authorities, ISAF would assist the Interim Afghan Administration in the maintenance of security. It would have a particular mission different from Operation Enduring Freedom (OEF). It would be a multinational force operating 'with the support of the US'. For 'reasons of effectiveness', OEF would operate under the authority of US Central Command so that activities of the two factions would not conflict and to ensure the successful completion of OEF. A joint coordinating body would be established comprising US Central Command, the Afghan Interim Administration and ISAF.

Also on 19 December, the Security Council received a letter from Dr. Abdullah Abdullah conveying the readiness of the 'Afghan authorities' to welcome the deployment of a UN-authorized international security force (S/2001/1223).

On this basis, the Council authorised ISAF in SCR 1386 of 20 December 2001. The original mission objective of ISAF was to 'assist ... in the maintenance of security in Kabul and its surrounding areas'. For two years (December 2001 – October 2003), ISAF activities were confined only to Kabul. On 13 October 2003 the Security Council resolved (SCR 1510) to extend its activities to the surrounding areas. The extension of ISAF's activities has proceeded in four stages:

1. From Dec. '01 : to secure Kabul and area North
2. From May '05 to secure area West
3. From July '06 to secure area South
4. From Oct. '06: to secure area East

ISAF is comprised of an HQ Command in Kabul, with 5 Regional Command Centres (Kabul, North, West, South, East) within which some 25 PRTs (Provincial Reconstruction Teams) operate. ISAF leadership has been exercised on a rotation basis by different countries or organizations, as follows:

UK; Turkey; Germany/Netherlands; NATO; Canada; Euro-corps; Turkey; Italy; UK; US.

On 5 October 2006, NATO took military operational control of international forces in Afghanistan. NATO forces themselves operate as a separate unit (NATO-ISAF).

(iii) UNAMA

UNAMA is a UN political mission under the control of the UN's Dept. Peacekeeping Operations (DPKO). It is led by a SG Special Representative and has about 1,000 staff (20% are expatriates), with an HQ in Kabul and 13 sub-regional offices throughout the country. About twenty UN programmes and FAO work in coordination under UNAMA. It is a UN civilian operation, with no national involvement.

NZ Action

The Government states that New Zealand's wide-ranging participation is based upon the international community's acknowledgement that Afghanistan's stability is important to global stability. "Our long-standing commitment to collective security underlies New Zealand's interest in seeing the international

community's high-profile commitment to Afghanistan succeed in establishing a viable government and economy." In line with this, NZ operations in Afghanistan have been as follows.

Counter-terrorism

New Zealand has been engaged in CT operations on land, sea and air, as follows.

Land: NZSAS in OEF

New Zealand's SAS conducted operations in Afghanistan, involving 20 to 65 personnel, over a four-year period – from December 2001 to November 2005. The troops worked alongside other special forces as part of the US-led Combined Joint Special Operations Task Force. Its tasks included:

- (i) special reconnaissance;
- (ii) direct combat action;
- (iii) close personnel protection;
- (iv) specialist searches;
- (v) special operations force missions.

The mission involved three stages of operations:

- *Deployment 1 (Dec. '01 – Dec. '02)*
Helicopter-inserted foot patrols; long-range vehicle-mounted special reconnaissance patrols
- *Deployment 2 (May – Sept. '04)*
Long-range vehicle-mounted special reconnaissance patrols: direct combat action.
- *Deployment 3 (June-Nov. '05)*
Same as Deployment 2.

The force operated under the command of a NZ Senior National Officer responsible to the NZ Chief of Defence Force (NZ-CDF).

Sea: HMNZS Frigates in OEF-MIO Action

From December 2002 to June 2003, the deployment of NZ frigates (*Te Kaha* and *Te Mana*) as part of OEF Maritime Interdiction Operations. Core maritime interdiction tasks were the investigation of vessels not responding to 'radio hails' and visits of other identified vessels, in order to detect or deter suspected Al Qaeda and Taliban movements. Many such operations have been conducted, including vessel-boarding.

Air: RNZAF Surveillance supporting OEF-MIO

In December 2003, deployment by an RNZAF P-3 Orion surveillance aircraft, monitoring three vessels, which resulted in the seizure of illicit drugs.

Peacemaking

NZ Provincial Reconstruction Teams (PRTs) in ISAF

Some 20 to 25 Provincial Reconstruction Teams operate in Afghanistan, designed to assist reconstruction efforts and conduct civil-military operations at a regional level. PRTs are often multinational, inter-agency teams that include military and civilian personnel.

On 23 September 2003, New Zealand took command of the PRT in Bamyan Province, central Afghanistan to the northwest of Kabul. About 1,000 NZ personnel have served in the Reconstruction Team.

Activities by the NZPRT include the following:

- security and liaison patrols (deploying for up to 4 weeks at a time in remote forward operating bases in each administrative region);
- participation in the Afghan Government's security and reconstruction meetings;

- counselling adversaries and refereeing disputes;
- facilitating, overseeing and advising on aid and reconstruction (e.g. in preparation of the Bamyán Province Strategic Development Plan) – including some NZ\$10 m. of NZ aid;
- mentoring and assisting the national police, e.g; 2005 and 2007 parliamentary/municipal elections.
- support security sector reforms, including NZ NCOs as part of a British Army unit training the Afghan Army..

Prior to October 2006 NZPRT operated under US military operational control; and since then it has operated under NATO control. New formal agreements between New Zealand and NATO have been concluded, covering all NZ deployed elements.

Conclusion on the Legal Merits of NZ Govt. Action

Two legal issues arise pertaining to New Zealand's military and civilian presence in Afghanistan:

- A. Whether NZ is acting under a legitimate UN mandate authorising its presence and whether its actions remain within the mission objective; and
- B. Whether, in its mission operations, NZ is acting consistently with international law.

A. Mandate

Since September 2001 New Zealand has had the following operations underway in Afghanistan:

1. NZSAS Operation in OEF

Little information is given publicly by the NZ Government of SAS activities. It has been a long-standing governmental policy not to provide details of the operational activities of NZ special forces. The Minister of Defence observed in February, 2007 that "Successive governments have rightly judged that protecting the lives of NZSAS members and their families outweighed the 'right to know' and have refused to comment in detail on special forces activities".

The nature of the NZSAS role in Afghanistan, in fact, has been described most explicitly by the United States. The NZ Force was awarded a US Presidential Citation on 7 December 2004, with the following statement:

".... Task Force K-BAR successfully executed its primary mission to conduct special operations in support of the US efforts to destroy, degrade, and neutralize the Taliban and Al Qaeda leadership and military."

There is no UN Security Council resolution that explicitly accords such a mandate to OEF, which was established as a self-defence operation against an attack in the US.

2. NZ-PRT Activities in ISAF

The NZDF contingent operates as one PRT within ISAF, which is authorised by the UN Security Council under SCR 1386 in December 2001, with extensions since then. This is a sound legal basis for New Zealand's involvement in UN peacemaking in Afghanistan.

B. Conduct

As a Party to the ICC Statute (which entered into force on 1 July 2002), NZ nationals, including its political leaders and defence personnel, are subject to individual criminal liability for any acts of genocide, war crimes and crimes against humanity.

NZSAS troops have been involved in actions where individuals were temporarily detained in order to capture Taliban and Al Qaeda suspects believed to be among them. On two occasions during the first

deployment, NZSAS elements were involved in operations during which they temporarily detained 50 to 70 individuals for up to five hours. According to the Foreign Minister on 27 February 2007:

“The NZDF understands that no person who has been held, even temporarily, in NZ custody is currently in the hands of the US or other nations represented in the international forces”.

This statement conveys insufficient information to constitute a clear assurance that New Zealand has abided by its ICC obligations (or its humanitarian obligations) between 1 July and 31 December 2002, the period when the ICC Statute was in force for New Zealand during the latter half of the first NZSAS deployment.

- It does not identify the dates in which such detentions occurred; and
- It does not discount the possibility of US or other forces having held such detainees at any time before February 2007, or provide information on the manner of treatment during any such detention.

The Minister’s statement also included the following observation:

“The Chief of Defence has put in place procedures for the notification of [sic] the ICRC of the fact that persons have been captured or transferred to another power, New Zealand has, from an early stage, made clear our expectation that all detainees would be treated humanely and in accordance with international law.”

This statement is essentially meaningless. Conveying an explanation does not constitute a verifiable assurance that an illegal action has not occurred or may not occur in the future. Statements of expectation of another party’s behaviour do not constitute an adequate defence in domestic criminal law; and it is unlikely that they would, any more, in international criminal law.

No statement has been advanced by the NZ Government in Parliament providing a complete assurance to the NZ public that the conduct of the NZSAS troops throughout their deployment in Afghanistan has been consistent with New Zealand’s obligations under the law of armed conflict or the ICC Statute.

Conclusion

Despite having briefly addressed the question, the NZ Government has not given a valid assurance that the NZSAS operations in Afghanistan are consistent with New Zealand’s obligations under the UN Charter and international humanitarian and criminal law.

(i) Operation Enduring Freedom (OEF)

The counter-terrorism action (Operation Enduring Freedom), which commenced in 7 October 2001 and remains ongoing to date, has never been authorised by the UN Security Council by means of a specific mandate. Nor does it have any finite mandated period that requires renewal, as is normal for UN missions (such as the six-month or twelve-month extensions for ISAF and UNAMA). And OEF is not required to report to the Security Council, nor are any reports voluntarily submitted. OEF is thus effectively operating beyond the control of the United Nations.

As is evidenced by the above analysis, OEF was initially undertaken as a collective self-defence measure, in accordance with Article 51 of the UN Charter, under SCR 1368. Article 51, however, authorises military action in self-defence ‘until the Security Council has taken measures necessary for the maintenance of international peace and security’. Such measures would seem to have been taken when the Council established ISAF with the mandate for the security and stability of Afghanistan. It would follow that the right of self-defence, individually (by Afghanistan) or collectively (by the OEF coalition) lapses from that moment (20 December 2001). Yet the Security Council simply refers to the ‘evolving mandate’ of OEF (and ISAF). The distinction is that ISAF’s mandate is explicitly authorised and controlled by the UN Security Council while OEF’s is not.

Accordingly, it would appear to be unlawful for New Zealand forces to be engaged in Operation Enduring Freedom any time subsequent to 20 December 2001. The Security Council references to Operation Enduring Freedom appear to be a case of 'legitimation by stealth'.

(ii) International Security Force (ISAF)

The mandate, and its extensions, given to the ISAF by the UN Security Council are sound and in order. New Zealand's participation in ISAF appears to have a sound legal basis.

Less satisfactory is the tepid nature of the NZG assurance pertaining to detainees who may have been originally captured by NZSAS and handed over to US, and other, forces.

Note:

Nothing in this analysis impugns the valour and skill of the NZSAS, whose reputation is deservedly high. The focus of this backgrounder is exclusively on the legal merits of the NZSAS and NZDF deployment in Afghanistan and the legal integrity of their activities there. The purpose is to assure the NZ public that all NZ troops are operating within a legally-sound mandate and undertaking legally-sound actions.

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