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Sender: SFHQ (UK) J1-S01-LEGAL-S" E-Mail Link
To: SFHQ (UK) J35-CAMPAIGNS-S01-S" E-Mail Link
Subject: FW: 20110407-Initial Legal Thoughts-LIMDIS-S
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S01 Legal

Contact Details

From: SFHQ (UK) J1-S01-LEGAL-S
Sent: 07 April 2011 17:53
To: SFHQ (UK) COMD-ACOS-OPS-S
Subject: 20110407-Initial Legal Thoughts-LIMDIS-S

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We have spoken about when there is an obligation on a CO to report matters to the Service Police to investigate allegations. These are some of my rough thoughts which I can finesse over the next couple of days. They are more initial musings.

The Law. Armed Forces Act 2006 (AFA 06) sets out the legal duties upon a commanding officer where there is a possibility that a serious offence has been committed. If a CO becomes aware of certain allegations or circumstances he must ensure that the service police are aware of them. He must do so as soon as reasonably practicable. The duty applies to allegations or circumstances which would suggest to a reasonable person that someone (whether or not identified) within the CO's command may have committed any service offence listed within Schedule 2 of AFA 06. The service offences listed in Schedule 2 are all inherently serious and the schedule includes offences such as murder, manslaughter, etc.

There is no definition of what an 'allegation' is, ie there is nothing stipulating that there must be a complainant or a first hand witness to the commission of such an offence. All that is stated is that the allegation is one or the circumstances are such as would suggest to a reasonable person that a service offence may have been committed. Arguably this is a pretty low bar and it is possible that second hand accounts from other persons or written records which would suggest to a reasonable person that an offence may have been committed.

Assessment. In these case it is arguable that, taken in isolation, each operation does not meet the statutory criteria for notifying the service police.

Indeed it is notable that SIRs, an internal exercise which is partly used as an aid to the CO to determine whether a service offence may have been committed, have been carried out in a couple of the cases (Obj [REDACTED] 3, Obj [REDACTED] 1). In both, following legal advice being given to Comd [SFHQ(A)] it was assessed that the matters did not require reporting to the Service Police. However it is arguable that when all these cases are taken together and there is an identification of similar trends and suspicion developing over the credibility of the accounts given in the OPSUMs then the circumstances are such that a reasonable person would consider that service offences may have been committed.

My assessment based on the OPSUMs and the SIRs prepared to date indicate that there is at the very least a requirement to look very carefully at the current TTP of sending males back into compounds to remove weapons / threats. Without explicitly clear direction (the role of the 'terp' / APU / ISAF linguist but the responsibility of the [SU]) as to the safe course of action the 'searching male' should follow (or amendment of the TTP in some other way to negate a potential threat being created) there is the likelihood that any deviation from that directed COA by the male (be it by confusion / hostile intent or indeed misdirection) will result in him being engaged and killed. The number of similar incidents may indicate the TTP is a systemic failing. [If the TTP was being employed deliberately to generate a certain outcome to justify an engagement under the ROE then this would suggest service offences may have been committed.]

Caution. I have not spoken to ex-CO [UKSF3] nor been made aware of the accounts that he has been made party to. However I do understand that, in the main, this consists of 'bar chat'. It would be wrong of me to make an assessment without seeing this extra information. Further it should also be remembered that the OPSUMs themselves cannot be relied upon with any real confidence as the 'definitive account' of what occurred. Whilst signed off by the [SU] Comd, I am told that the detail is often gleaned by Ops Room staff from radio logs, etc. As such it is not an accurate and first hand account of what occurred on the ground (there may be a tendency to paraphrase and 'cut and paste' on reporting, compounded by the failure by the relevant OC to fully check the OPSUM.

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