

OP WAATEA 03130/LLEGAL

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SNO

ROERREQ 001/2009: CONSISTENCY BETWEEN NZROE AND ISAF ROE

References:

- A. **PSR(S)1**
- B. ROE IMPLEMENTATION for JFC BRUNSSUM OPLAN 30302 REVISION 1, DTG:031335Z MAY 06
- C. NZDF 03130/DSC/2 CDF Operational Directive 21/2009 dated 24 August 2009
- D. 081013-NSI-Quick Reference Guide to Insurgency in AFG

BACKGROUND

1. After a review of NZ ROE and ISAF ROE it is apparent that there are some inconsistencies between the two documents that in my opinion requires a ROERREQ or at least amplification and guidance in respect of the ROE to ensure consistency with ISAF and TF81 mission. This paper specifically examines ROE **H** compared with ISAF ROE

NZ ROE **H AND ISAF ROE**

2. NZ ROE provides:

H Attack on **PSR(S)3** is permitted, as they have been declared hostile.

3. The **PSR(S)1** ROE for ISAF provides:

PSR(S)1

4. **PSR(S)1**

INCONSISTENCY BETWEEN NZ AND ISAF ROE

5. Insurgent groups in Afghanistan consist of more than just **PSR(S)3** and indeed the Taleban (TB) is the largest insurgent group in Afghanistan. Other groups, including **PSR(S)3** (illustrated in Ref C) also present a threat to the legitimate government. The mission for TF81 is to provide a SOTF to ISAF in Afghanistan from September 2009 for up to 18 months in order to maintain stability, defeat the insurgency, assist the Crisis Response Unit (CRU) and enhance the reputation of the NZDF and GONZ. Para 14 b. of Ref C also states that one of the 'be prepared to' tasks includes Direct Action tasks against insurgent networks in support of ISAF and GIRoA.
6. The Joint Prioritized Effects List (JPEL) which must be approved by COMISAF also contains a list of those targets that have been identified as directly participating in hostilities in Afghanistan. Some of those targets do not fall under **PSR(S)3**
7. Accordingly, on current reading of the NZ ROE, if a planned Direct Action operation were to target insurgent individuals or groups that were not part of **PSR(S)3** then TF81 could only use force against those individuals or groups displaying either hostile intent or hostile act and could not undertake direct action pursuant to ISAF ROE unless the targets were **PSR(S)3**. The only mechanism that TF81 could utilise to be consistent with **PSR(S)1** outside of **PSR(S)3** is through the hostile act / hostile intent provisions of the NZ ROE, however, in my opinion this is not a satisfactory solution, particularly noting the mission of TF81.

DIRECT PARTICIPATION IN HOSTILITIES

8. Under the Law of Armed Conflict (LOAC) for non-international armed conflicts civilian status is presumed unless and until individuals take a "direct part in hostilities". Direction from HQ NZDF Legal has defined direct participation in hostilities in terms of three categories:
 - (1) Hostile acts which are likely to cause actual harm to the personnel and equipment of coalition forces
 - (2) "The revolving door": Those attempting to be "farmers by day and fighters by night" lose protection from attack even in the periods between hostile acts.
 - (3) Individual who is a member of an organised armed group that collectively takes a direct part in hostilities is also DPH for the time that the individual is a member. E.g., a member of **PSR(S)3**
9. The **apparent** consequence of ROE **H** has been to limit attack under LOAC to ^{**PSR(S)3**} who have been declared hostile, **PSR(S)3**. If this was not the intent of ROE **H**, then in my opinion amplification and guidance is required in respect of the ROE to ensure consistency with the overarching TF81 mission described in Ref C.

10. It should be emphasised that the approval authority for any Direct Action is held at the highest level and that all planned operations are subject to a rigorous screening process to ensure that the CONOPS is lawful. This includes a full targeting procedure incorporating ROE approval from HQ ISAF LEGAD and including an analysis of KARZAI's 12, with sign-off through HQ ISAF or, in some limited situations, by an ^{PSR(S)1}

RECOMMENDATION

11. It is recommended that you request CDF through COMJFNZ to amend ROE H incorporate Direct Action against identified hostile forces. A suggested amendment is as follows:

H Attack on individuals, forces or groups directly participating in hostilities in Afghanistan against the legitimate Afghan government, is permitted.

AMPL/1/Subject to **PSR(S)3** approval authority.

12. In my opinion, the intent of the ROE was to not limit Direct Action operations in respect of JPEL targets and other individuals, forces or groups that take a direct part in hostilities. Should this be the case, it is recommended that national amplification and guidance is provided in respect of the current ROE to clarify in what circumstances TF81 can conduct Direct Action in respect of insurgents identified on the JPEL, in support of ANSF/CRU, or as otherwise directed through HQ ISAF. This will also ensure that the ROE is consistent with the overall intent of Ref C.

PSR(IC)4, PSR(sen)1

TF81 LSO

