

584

PJHQ-J1-OPS-ME-SO3-S

From: LA2-S
Sent: 17 May 2004 12:04
To: PJHQ-J9-LA-S; Hd of MoDLA-S
Cc: PJHQ-J1/J4-ACOS-S; PJHQ-J3/ACOS-S
Subject: RE: Hooding

Importance: High

Thanks Ari,

I would not be in favour of asking the AG at this point.

I understand that the practice has now finally been stopped in Iraq at least so the answer to the question is presumably academic for the period from now on. We do not know where the current public debate about it will end – and we do not want to push the AG into taking a position in the abstract that we and he may then regret in the light of some later claim or allegation.

If we were to seek his advice we would have to be sure that we could provide information about the history of the 1971 advice, what we have been doing in other theatres (AFG, Kosovo etc) and all the circumstances in which we have used hooding in Iraq. I do not think we can devote the resources needed for what would be a substantial exercise at the moment -- we are working flat out on related matters and we are also pressing the AG for answers on some operationally vital things which have been outstanding with him for months. The chances of getting an answer out the AG in anything quicker than months is nil in my view.

We would also need to be clear what we would do in practical and policy terms if the AG gave clear advice that it was illegal but the US and other coalition partners disagreed and wanted to continue using it in some circumstances.

We may have to go down this path if the AG presses us but I do not want to initiate anything from this end.

Vivien

-----Original Message-----

From: PJHQ-J9-LA-S
Sent: 13 May 2004 13:13
To: Hd of MoDLA-S; LA2-S
Cc: PJHQ-J1/J4-ACOS-S; PJHQ-J3/ACOS-S
Subject: Hooding

Martin/Vivien,

RE: HOODING

As you are aware this issue has caused some concern over the last day or so and I am writing to seek your guidance on whether the AG should be engaged to provide a clear legal guidance on the following points as the issue causes us some difficulty at an operational level:

1. is hooding unlawful per se; or
2. is it permissible in limited circumstances

What concerns me is that hooding has been used in various theatres for as a practical method and for a limited purpose namely,

- a temporary measure whilst the person was in transit
- for force protection and protect the route to the facility etc
- for his own security
- to protect a HUMINT, where that was applicable.

I have sought clarification and await a response on the question of whether or not hooding was used for the purposes of disorientating a prisoner, in which case it clearly violates ECHR jurisprudence and would therefore amount to "inhuman and degrading treatment".

525

Given that there is no Convention or UK domestic law that authorises or prohibits hooding, my view is as follows:

LEGAL POSITION

The short answer is that there is no statutory provision that specifically deals with hooding as it is a practice adopted by the forces. Generally speaking a practice will not be codified (except for PACE which governs the conduct of investigations etc under UK law - this statute arose because of widespread concern about the practices of the civilian police.)

The issue that then arises is how is a determination to be made about such a practice - this would necessarily flow from the various international Conventions and jurisprudence.

International Conventions

Essentially there are a number of conventions that regulate the conduct of officials (this includes the military) anywhere:

- the four Geneva Conventions - the relevant conventions for our purpose in this case are GC III (Treatment of prisoners of war) and GC IV (dealing with internees & detainees). All 4 GCs contain a provision called 'grave breaches' - what this means is that any acts committed against the 'protected persons' would amount to an offence. The 'protected persons' for the purposes of GC III are PWs and for the purposes of GCIV are civilians, detainees & internees. The acts are listed in the relevant provision and for the present instance it would be 'torture or inhuman treatment'. The 'grave breaches' engage individual criminal responsibility and are codified under English law (Geneva Conventions Act 1957);
- Additional Protocol 1 - this is a declaration of customary international law and largely adopts the same stance as the 4 GCs and codified under English law
- Torture Convention 1984 - given effect under English law and applies in war time as well. This Convention engages individual criminal responsibility
- International Criminal Court [ICC] - which defines war crimes and as one of the elements includes "torture or inhuman treatment" and part of English law

Jurisprudence

The reason I refer to "torture/inhuman treatment" is because there is a large amount of case law from the European Court of Human Rights [leading case is Ireland v UK, 1976 in the wake of the problems with Irish terrorism]. The Court in particular consider the techniques adopted, one of which was hooding. The Court found that hooding amounted to "inhuman & degrading treatment". This view has been reaffirmed in subsequent cases. Presently the Courts are also looking at blindfolding as a technique.

Thus, there is no doubt that hooding would amount to inhuman & degrading treatment and such a practice would be in violation of ECHR law and the various international conventions referred to above.

However, the court was looking at hooding being used as a technique to disorientate the person and not as a practical operational measure on a very short & temporary basis. In such circumstances a distinction can be drawn between the practice condemned by the ECHR and that adopted in Iraq/other theatres.

When we spoke yesterday I had mentioned an advice dated sometime in the early 1970s. Whilst I have not seen that document (I understand Humphrey has a copy and I may impose on him to fax it to us) I understand it is restricted to the Irish issue and no view was taken that hooding was unlawful *per se*.

In the circumstances I wonder whether it is time to revisit this issue and seek clear guidance so that troops deployed, now or in the future know exactly what the position is and equally it allows us to give a clear steer as legal advisers. In the meantime guidance will be issued by the appropriate bodies to the forces to the effect that no hooding is permissible until we receive clear guidance on it.

I would welcome your thoughts on this as soon as possible.

Thanks

Ari