

From: Mr. A.P. Hockaday, CMG,  
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Your reference: 191

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CONFIDENTIAL

*Dear David*

You wrote to Chris Johnson on 1 March about the responsibilities of the Westminster and Stormont Parliaments and Governments in respect of control of the Army. I am sorry it has taken so long to get you a reply, but a number of branches, and also the Treasury Solicitor's Department, have had to be consulted.

2. The formal dichotomy to which the Home Secretary referred, in the passage quoted in your para 1, has its origins in the Government of Ireland Act, 1920. This empowered the Northern Ireland Parliament to make laws for the peace, order and good government of Northern Ireland, but specifically excluded the power to legislate about the Armed Forces and defence matters generally. These remained the responsibility of Westminster. The current situation, in which the Army is engaged in peace keeping activities in support of the civil power, inevitably raises the question of the formal spheres of interest of the respective Parliaments, particularly as regards the scope and latitude of debate in the two Houses, where there may indeed be some overlap. I think, however, that the question of ministerial responsibility is fairly clear, and the practical arrangements between the Executive of Northern Ireland and the representatives of the Executive of the UK, as described by the Home Secretary, require little further comment or explanation.

3. It is desirable to distinguish between the following:-

(a) Legal Responsibility

The soldier's responsibility for his actions under the civil law, whether Common Law or statute (e.g. the Special Powers Acts), is to the Courts of Northern Ireland.

(b) Executive Responsibility

The soldier acts under higher military authority up the chain of command as far as the Defence Council and ultimately Her Majesty. The Secretary of State is the Minister responsible to Her Majesty for everything connected with the performance of their military duties by the Armed Forces of the Crown.

/ (c)

D.J. West, Esq.,  
Civil Adviser to GOC Northern Ireland.

(c) Parliamentary Responsibility

The Secretary of State is responsible to the Westminster Parliament for all matters relating to the Armed Forces of the Crown as at (b) above.

The soldier has no responsibility to the Stormont Government, nor has the Stormont Government any responsibility for his actions. This is not affected by the fact that the Northern Ireland Government is the civil power (responsible for the peace, order, and good government of Northern Ireland) which may call upon the Armed Forces for assistance or that certain of the actions which the Armed Forces may be entitled to take are authorised by Northern Ireland statutes (e.g. the Special Powers Acts). Against this background I propose, at the risk of some repetition, to follow closely the arguments in your letter (particularly your paras 3 and 4) and to deal with your points in the order in which they arise.

4. I agree that the employment of troops in aid of the civil power is, in general, based upon the fulfilment of a Common Law obligation. This is, however, in no way incompatible with the authority of S of S, who is responsible to Her Majesty and the Westminster Parliament not only on such matters as organisation, equipment etc, but, as I have said above, for everything connected with the performance of their military duties. It is perhaps misleading to talk of the responsibility of the troops to S of S in this context. They are "responsible" for the performance of their military duties to higher military authority up the chain of command as far as the Defence Council and ultimately to Her Majesty. (This, incidentally, further illustrates the fact that the Northern Ireland Government has no direct standing in questions of command or control of the Armed Forces).

5. The "responsibility" of soldiers as members of the Armed Forces to higher military authority in no way affects their responsibility as citizens for their actions at law. The reverse is also true. These responsibilities can run concurrently, and there is no specific field in which the one is operative while the other is not. The case of Marine Bek may serve to illustrate this point. As you know, Bek was tried in the civil courts on a charge of malicious wounding (ie it was alleged that he used unreasonable force). But he might equally well have been tried under the Army Act, either on that charge or, more significantly on a charge of disobedience to standing orders, (ie failing in his responsibilities to his military superiors). Thus both responsibilities were directly relevant to his single action.

6. The fact that soldiers are responsible for their actions at law, in this case the law which applies in Northern Ireland, in no way makes Stormont ministers answerable for them. Soldiers have the same liabilities under the law as any other private individual; and it would be absurd to suggest that ministers had any responsibility for the actions of private individuals on this account. S of S, of course, is responsible to the Westminster Parliament for the activities of troops as such but this derives from their status as members of the Armed Forces of the Crown and not from their legal liability as citizens. It follows that, while discussion both at

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Stormont and at Westminster may range very widely on internal security matters, questions relating to the direction and activities of the Armed Forces can only properly be answered at Westminster.

7. The passage in Manual of Military Law, Part II, Section V which instructs a military commander to place himself under the direction of a magistrate should not be applied too literally in the Northern Ireland situation. The underlying message of this passage is that forces going to the aid of the civil power should liaise with the civil authorities as closely as possible and give their views all due weight, particularly on such matters as when their intervention has achieved its objective; but the wishes of the civil authority in no way bind the commander on the spot to a particular course of action or relieve him of his legal responsibility.

Your Para 4

8. The current actions of the troops in Northern Ireland can fairly be defined as "in aid of the civil power", whether their authority is rooted in the Common Law or a regulation made under the Special Powers Acts. It is a mistake, however, to think that when the authority for a certain action is the Special Powers Act, the principles of the Common Law cease to apply. For example, the soldier who carries out an arrest under Regulation 11 may be acting under the power conferred by that regulation but the Common Law principle of minimum force is still applicable and he is liable to answer for his action on that count. The Special Powers Acts and the associated regulations modify the Common Law in certain specific respects insofar as they give powers to the civil authorities and servicemen on duty which they would not otherwise possess, but they do not thereby supersede it in its entirety.

9. The fact that a soldier may be operating under the Special Powers Acts Regulations does not make him responsible to the Minister for Home Affairs or any other authority in the Northern Ireland Parliament or executive. The Northern Ireland Parliament, as I have explained in para 2 above, is empowered to pass laws relating to peace and good order in Northern Ireland, and it is clear that if it is necessary for soldiers to exercise exceptional powers in a peacekeeping role in an internally self-governing province, it is for the legislature of that province to provide the legal authority for their actions. However, the existence of such authority only entitles the soldier to exercise the powers in question; it does not oblige him to do so and indeed could not without violating the Government of Ireland Act. The decision whether or not soldiers should exercise these powers is the responsibility of higher authority in the chain of command up to the Defence Council and is thus the ultimate responsibility of S of S and Her Majesty's Government at Westminster. As I have explained in para 3 above, there is no question of responsibility to the Stormont Government involved in this process.

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10. I agree that the position of the Northern Ireland Minister of Home Affairs seems anomalous in that he is required to pay compensation for damage done by persons for whom he has no responsibility and over whom he exercises no control. It can, however, be defended on the argument that as the Stormont authorities are responsible for law and order, they should expect to pay for the consequences of maintaining it.

Your Para 5

11. It is conceivable, though, I hope, highly unlikely, that the Army in Northern Ireland might at some future time be acting in a capacity other than in support of the civil power. An invasion of Northern Ireland would, no doubt, require the employment of troops on a different footing. In such an event the question would become one of the defence of the realm with legislation appropriate to that situation. In such a case the necessary action would be taken by the Westminster Parliament.

Your Para 6

12. Regarding the suggestion that Stormont ministers might explain and defend the Army's actions under some convenient formula which disclaimed formal responsibility, we and the Home Office are generally content with the present practice (followed also in Westminster when matters affecting the RUC are raised) of prefacing replies with the "I understand that" wording. This I think is working reasonably well but does depend on adequate consultation by both the Northern Ireland and Whitehall/HQ Northern Ireland authorities.

*Yours ever*

*Arthur Hockaday*