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Received:

18 JUL 1986

Ref: Northern Ireland Office

D Hill Esq  
Law and Order Branch  
Northern Ireland Office  
Stormont House  
BELFAST

Your reference

Our reference

Date 17 July 1986

Dear Mr Hill

I write further to our telephone conversation of the 16th July.

... I enclose a copy of the draft to chapter 5 of the Manual of Military Law Part II which deals with the employment of troops in peacetime. As you will see it deals primarily with England and Wales but there is room for a few comments on Northern Ireland (you will see how Scotland has been dealt with). I would be most grateful if you could read through the chapter and make any comments as you see fit. In particular I am looking for any differences between the English law and Northern Ireland law. Please feel free to mark the copy. A second copy is enclosed for your own use.

I am under some pressure to return the draft as soon as possible and your prompt attention will therefore be much appreciated.

Yours sincerely

- 1. Mr Breasley
- 2. Mr Casey jr

*C Adams Major*

Not read...  
Any comments?

for P D McEVROY ADD.  
Major  
SO2 Legal

*[Signature]*  
18/7.

## CHAPTER 5

### LEGAL BACKGROUND TO THE EMPLOYMENT OF TROOPS IN SITUATIONS FALLING SHORT OF ARMED CONFLICT

#### Introduction

Categories of employment 5.001. Troops may be employed on operations which fall short of international armed conflict in many different ways. Among these are the following:

- a. protecting military installations;
- b. assisting the police in dealing with riots or other civil disturbances;
- c. assisting the police in dealing with armed terrorists;
- d. guarding Key Points.
- e. helping to maintain essential supplies and services;
- f. bringing relief in natural disasters;
- g. assistance with community projects.

Deployment of troops outside the U.K. may also involve employment in one or more of these roles.

Background of law

5.002. In whatever capacity troops are employed they must always operate within the law. If the conflict is international the international law of armed conflict must be observed<sup>1</sup>. If the operation falls short of international armed conflict, then the domestic (*i.e.* internal) law of the state in which the operation occurs, together with any provisions of international law by which the parties to that operation within that state are bound must be followed. International law applying to such operations is to be found in international treaties aimed at protecting basic human rights<sup>2</sup> and in Article 3 common to the four Geneva Conventions of 1949 (Common Article 3).<sup>3</sup> Protocol II to the Geneva Conventions of 1949, adopted in 1977 and signed on behalf of the U.K. Government but not yet ratified<sup>4</sup> is also intended to apply to internal armed conflicts, but its application is specifically excluded in "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature"<sup>5</sup>. The full range of operations in which troops could be involved within the U.K. and the law which governs such operations is illustrated in the following diagram:

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1. The international Law of War On Land is dealt with in M.M.L., Part III. That volume is to be replaced by a new tri-Service Manual, "Law of Armed Conflict", presently (Jan 1986) in the course of preparation.

2. *E.g.*, within the U.K. and other European States, certain Provisions of the European Convention on Human Rights 1950 (E.C.H.R.).

3. See M.M.L. Part III, Ch. 1, para. 8. State practice, however, has clearly demonstrated that Common Article 3 has no application to civil disturbances amounting to no more than riots or sporadic outbreaks of violence or terrorism. During the period 1969 to date ( 1986) the Government of the U.K. has not recognized the application of this Article to operations in Northern Ireland.

4. As at 1986.

5. Prot. II, Art. 1(2).

		Counter Revolutionary Warfare				
					Internal Armed Conflict	International Armed Conflict
Protection of Military Installations in time of peace	Civil Disturbance, Riots, sporadic Acts of Violence	Terrorist Actions	International Tension. Home Defence Guarding Key Points	Civil War	War Between States	
		<u>Domestic Law of the State</u>				
		<u>International Law Relating to Human Rights</u> - - - - - 1				
				<u>Common Art. 3 Geneva Conventions 1949<sup>3</sup></u>	<u>International Law of Armed Conflict</u>	

Use of Force.

5.003. Not all the possible roles in which troops may be employed involve the use of force, although many do. Whether force may be used and the degree of force depend upon circumstances and the law which must be applied. A soldier trying to prevent a demonstrator from entering a military installation as a trespasser is obviously in a very different position from a soldier who is part of a team attempting to rescue a hostage from death at the hands of armed terrorists. A soldier guarding a Key Point threatened with attack by armed saboteurs may be able to react to the full extent of the powers which he has under the domestic law of the state, resorting in appropriate circumstances to the use of lethal force.<sup>2</sup> Yet he does so lawfully only because the domestic law (in England and Wales) allows him to do so. In international armed conflict the rules are different. Under the Laws of Armed Conflict he may

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1. The application of Human Rights Law is shown with an interrupted line to indicate that in time of "War or other public emergency threatening the life of the nation" a State may derogate from its obligations, see E.C.H.R., Art.15.  
 2. As to the use of force in these circumstances, see para.  
 3. Prot. II is not included because it has not been ratified by the U.K. Government ( 1986).

lawfully engage with lethal weapons any legitimate military target, including any enemy combatant who is not hors de combat, whether this is permitted under the ordinary domestic law of the state or not.<sup>1</sup> The same soldier, therefore, guarding a Key Point threatened with attack in time of invasion by enemy troops may, without considering the circumstances further and without considering the provisions of domestic law, always resort to the use of lethal force against the attacking enemy.

Rules of  
Engagement.

5.004. It is, therefore, vital to know what law applies in a given set of circumstances and what it is that triggers a change in the law to be applied. When must Common Article 3 of the Geneva Conventions 1949 be applied? When do the restrictions on the use of lethal force contained in the domestic law of the State cease to apply? When may the international law relating to Human Rights be disapplied? When does the international Law of Armed Conflict begin to apply? Upon the answers to these questions depend the rules issued by the Ministry of Defence governing the conduct of troops in any operation in which force may have to be used. These rules have come to be known as "Rules of Engagement" (R.O.E.). Upon these R.O.E., in turn, will depend the nature and contents of orders, standard operating procedures (S.O.P.'s) and drills and the material for training and instruction at lower levels. The answers to these questions are not within the scope of this chapter.<sup>2</sup>

#### Legal Powers of Troops Deployed within the State

The legal  
position of  
soldiers.

5.005. Soldiers in no way differ in the eyes of the law when acting within the State (other than in time of international armed conflict) from other citizens. The common law imposes an obligation on every citizen, soldier and civilian alike to come to the aid of the civil power when the civil power requires his assistance to enforce law and order. This obligation applies to everyone in every type of disturbance. The soldier has, however, no more power to act than any other citizen. When he does act, he must, like any other citizen, act within the law. To these general rules there are two exceptions. The first is that although there is no legal difference between soldiers and other citizens in respect of the duty to respond to the call of the civil power, Q.R.(1975) lay on a military commander a duty to act on his own responsibility without a request by the civil power where, in very exceptional circumstances, a grave and sudden emergency has arisen which in the opinion of the commander demands his immediate intervention to protect life or property<sup>3</sup>. The second exception may arise in a prolonged period of civil disturbance in which it becomes necessary, in order that troops may have the additional powers they need to carry out their duties in supporting the enforcement of law and order, for Parliament to legislate to provide special powers which other citizens do not possess<sup>4</sup>. Soldiers also possess certain other powers in limited circumstances which are not shared with other citizens. These are covered in paras. 5.008 - 5.011.

1. It is by virtue of Common Law and the Queen's Prerogative right to deploy the armed forces of the Crown that armed force may be met with armed force beyond that which would ordinarily be allowed by law against those who "levy war against the Queen".

2. See, however, M.M.L., Part III, Ch. 1, para. 8, note 1. (at p.6).

3. Q.R.(1975) J.11.002.

4. E.g., the Northern Ireland (Emergency Provisions) Act 1978.

Police  
Primacy.

5.006. In almost every situation in which troops are deployed within the State, they are required to act in support of the police. They take action only as a last resort and when the police are no longer able to contain the situation with the resources at their disposal. The commander of the troops must act in the closest co-operation with the senior police officer responsible while retaining exclusive tactical command of the troops. Where troops exercise legal powers, e.g., to arrest offenders, they must be careful to act only within the limits of these powers. A power of arrest does not include the power to detain indefinitely<sup>1</sup>. Nor do the military decide what further action, if any, is to be taken against the alleged offender. Persons arrested must, therefore, be handed over to the police as quickly as possible or set free.

Power to  
deal with  
Trespassers.

5.007. Usually trespass to land is not a criminal offence. The common notice, "Trespassers will be prosecuted" is a misconception and often referred to as "the Wooden Lie". Even in those cases where particular forms of trespass have been made offences<sup>2</sup>, they are not arrestable offences<sup>3</sup> and citizens (including troops) do not share the powers of arrest which have been particularly conferred on police officers. Troops protecting military installations do, however, as servants or agents of the Crown in whom ownership of the land is vested, have the right of any owner to prevent unauthorised persons from entering the land they are under a duty to protect, to remove unauthorised persons who have entered<sup>4</sup> and to restrain such persons from taking or destroying anything on that land<sup>5</sup>. If the trespasser has used no force, he must first be asked to leave and given the opportunity to do so peacefully before any degree of force may be used to compel him. If he refuses or ignores the request it is lawful to use reasonable force to expel him<sup>6</sup>.

Military  
Lands Act  
1982.

5.008. The Secretary of State<sup>7</sup> is empowered under section 14 of the Military Lands Act 1892 to make byelaws prohibiting intrusion on land used for any military purpose and any obstruction of that use. Such byelaws have been made. They are local in their application and military commanders should familiarise themselves with

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1. See M.M.L. Part I, Ch. VI, para. 13(d)(iii).
  2. E.g., trespass with a weapon of offence, C.L.A. 1967, s.8(1); entry with violence, ibid., s.6(1).
  3. Arrestable Offences, see para.
  4. 2 Rolle Abr., 548, l.25.
  5. Ibid., 549, l.7.
  6. R. v. Hussey.
  7. For Defence.

the provisions of any which may apply to land occupied by units under command. They may create offences for infringement and confer on troops the power to arrest<sup>1</sup> and remove the trespassers and to hand them over to the police for subsequent prosecution.

The Explosives Act 1875

5.009. Under the Explosives Act 1875<sup>2</sup> trespassers on some military properties marked with the appropriate warning signs may be arrested by troops, removed and handed over to the police for subsequent prosecution.

The Manoeuvres Act 1958

5.010. H.M. may, by Order in Council, authorise defence manoeuvres within a "manoeuvres area" during a "manoeuvres period" lasting not more than three months. The Order is referred to as "the Manoeuvres Order"<sup>3</sup>. The Act creates a number of offences relating to interference with manoeuvres. In particular, it is an offence within a manoeuvres area and during a manoeuvres period for any person:

(a) wilfully and unlawfully to obstruct or interfere with the execution of the manoeuvres; or

(b) without due authority to enter or remain in any camp<sup>4</sup>.

Such persons may lawfully be removed, together with any vehicle or property under his charge by, or by order of, any commissioned officer of the authorised forces<sup>5</sup>.

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1. A person arrested must be told he is under arrest and, in sufficiently precise terms, the reason for the arrest.
  2. As supplemented by the Explosives Act 1923.
  3. Manoeuvres Act 1958, s.1.
  4. Ibid., s.8(1).
  5. Authorised forces, i.e., any person taking part, with H.M.'s authority in the manoeuvres authorised by the Manoeuvres Order, ibid., s.2(1).

Prohibited  
Places.

5.011. The Official Secrets Acts 1911 to 1939<sup>1</sup> create a number of offences, in particular, "for any purpose prejudicial to the safety or interests of the State", approaching, inspecting, passing over or being in the neighbourhood of or entering<sup>2</sup> a prohibited place<sup>3</sup>. It is also an offence<sup>4</sup> for a person in the vicinity of<sup>5</sup> any prohibited place<sup>3</sup> to obstruct, knowingly mislead or otherwise interfere with or impede any member of H.M. forces engaged on guard, sentry, patrol or other similar duty in relation to the prohibited place<sup>3</sup>. Anyone found committing, reasonably suspected of having committed, having attempted or being about to commit one of these latter offences of interfering with members of H.M. forces may be arrested<sup>6</sup> by any citizen, soldier or civilian and handed over to the police. The same is true in respect of the former offences relating to persons approaching etc. a prohibited place<sup>3</sup>. However the person to be arrested must not only be approaching, in the neighbourhood or actually in the prohibited place. He must be reasonably suspected of being there for "a purpose prejudicial to the safety or interests of the State." What amounts to such a purpose is a complex question<sup>7</sup>. For this reason, certainly in time of peace, orders to troops engaged in the protection of military installations are normally framed without taking account of this special power of arrest.

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1. (a) These Acts have been extended to Northern Ireland by the Official Secrets Act 1939, s.2(2).  
(b) See Ch. 10 of this Volume.
2. Official Secrets Acts 1911, s.1(1)(a).
3. Prohibited place, see definition in Official Secrets Act 1911, s.3 (post, para. 10.005). This is wide enough to cover all military installations in the U.K.
4. Under Official Secrets Act 1920, s.3.
5. See note 1 to ibid., s.3, para. 10.015.
6. Official Secrets Act 1911, s.6. See para. 10.006. See also para. 5.007 note 1.
7. See Chandler and others v. D.P.P.

Breach of  
the Peace

5.012. Troops share with other citizens the right at common law to arrest for breach of the peace. This power is dealt with in M.M.L. Part I, Ch. VI, para. 13. Briefly, a soldier may arrest<sup>1</sup> a person who in the soldier's presence:

- a. assaults or is clearly about to assault any person  
or
- b. damages or is clearly about to damage any property  
in circumstances occasioning "public alarm and excitement"  
or
- c. obstructs a public officer in the execution of his  
duty or
- d. runs away and continues to try to escape immediately  
following the commission of the acts set out in a., b., and  
c. above.

Abusive language alone does not usually amount to a breach of the peace.

A.A.1955,  
s.193

5.013. A.A.1955, s.193 makes it an offence for any person in the U.K. wilfully to obstruct or otherwise interfere with any officer, warrant officer, non-commissioned officer or soldier of the regular forces<sup>2</sup> acting in the execution of his duty. This is not, however, an arrestable offence<sup>3</sup> and troops have no power of arrest if the obstruction or interference falls short of a breach of the peace<sup>4</sup>.

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1. See para. 5.007, note 1.

2. Regular forces, see A.A.1955, s.225(1) and note to that s. in M.M.L. Part I.

3. See para. 5.014.

4. See para. 5.012.

Police and Criminal Evidence Act 1984, s.24 "Arrestable Offences".

5.014.<sup>1</sup> Any person (including a soldier) may arrest<sup>2</sup> anyone who is, or who is with reasonable cause suspected of being, in the act of committing an arrestable offence or, where an arrestable offence has been committed, anyone who is, or who is with reasonable cause suspected of being guilty of the offence<sup>3</sup>. An arrestable offence is defined as an offence for which the sentence is fixed by law or for which a person (not previously convicted) may under or by virtue of any enactment be sentenced to imprisonment for a term of five years, attempts to commit any such offence and offences under the Official Secrets Acts<sup>4</sup>. Arrestable offences include murder, manslaughter, riot, unlawful assembly, arson, assault occasioning actual bodily harm, causing grievous bodily harm or wounding with intent, criminal damage and threats to destroy or damage property.

Criminal Law Act 1967, s.3.

5.015. Any person (including a soldier) may use such force as is reasonable in the circumstances in the prevention of crime, or for effecting or assisting in the lawful arrest of offenders or suspected offenders or persons unlawfully at large<sup>5</sup>.

Self-Defence.

5.016. Any person (including a soldier) who is attacked by another may, if necessary, use such force to defend himself against his attacker as is reasonable in the circumstances. The degree of force used in defence must not be disproportionate to the necessity of the situation<sup>6</sup>. Since an assault is a crime, under the Criminal Law Act 1967, s.3<sup>7</sup>, anyone may use such force as is reasonable in the circumstances in the prevention of that crime. This means that a soldier may act within the limits of this provision in the defence of others.

"Reasonable in the circumstances".

5.017. What force is reasonable in the circumstances depends on the answers to two questions of fact:

- a. What circumstances may be considered and
- b. What, on the basis of those circumstances is reasonable?

The position of the soldier who is being trained to undertake particular duties within the state in which he may be called upon to use force, perhaps lethal force, is a difficult one. He cannot always be sure of the answers to these questions before the event. Clearly soldiers deployed to rescue hostages under immediate threat of death from the clutches of armed terrorists who have already killed may use lethal force. But what of the soldier in the course of an attack upon the terrorist stronghold who is

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1. See also M.M.L. Part I, Ch. VI, para. 13(e)(vi).  
 2. See para. 5.006, note 1.  
 3. P.C.E.A. 1984, s.24(4) and (5).  
 4. Ibid., s.24(1) and (3).  
 5. C.L.A. 1967, s.3(1).  
 6. Palmer v. R.  
 7. See para. 5.015.

confronted by a terrorist who is attempting to surrender? Until neutralised, he must still be regarded as a potential threat because of the possibility of concealed weapons or a pocket electronic device which may be activated to set off an explosion. No such cases have been before the courts and the only answer which can be given is that the soldier must judge what is reasonable in the circumstances.

Reference under s.48A of the Criminal Appeal (Northern Ireland) Act 1968 (No 1 of 1975).

5.018. A soldier serving in Northern Ireland was a member of a patrol searching for terrorists. During the patrol an unarmed man was challenged and ran away. The accused soldier shot and killed him as he fled. The area in which the incident occurred was one in which troops had been attacked and killed by the Provisional Irish Republican Army; it was an area in which soldiers faced a real threat to their lives and where the element of surprise attack by the Provisional I.R.A. was a real threat. The patrol had been briefed to expect attack and to be wary of being led into an ambush. They had also been briefed that the nearby farm buildings (where the deceased lived) were places where terrorists might be hiding. When the deceased ran off, the accused was 70 yards from the other members of the patrol. Individual pursuit by the accused was inhibited by knowledge of the possibility of ambush. The accused stated in evidence that he honestly and reasonably believed that he was dealing with a member of the Provisional I.R.A. The accused was charged with murder, duly tried and acquitted. The Attorney General referred the case to the Court of Criminal Appeal in Northern Ireland. Following their opinion that there were no grounds in law for interfering with the acquittal, the case was further referred to the House of Lords. In the course of his opinion, Lord Diplock stated:

"... an honest and reasonable belief by the accused in the existence of facts which, if true, would have rendered his act lawful is a defence to any charge based on the shooting so ... one must ignore the fact that the deceased was an entirely innocent person and deal with [it] as if he were a member of the Provisional I.R.A. and a potentially dangerous terrorist, as the accused honestly and reasonably believed him to be<sup>1</sup>. ... if the act of the accused was lawful it must have been on the ground that it was done in the performance of his duty to prevent crime<sup>2</sup>. ... it may not be inaccurate to describe the legal rights and duties of a soldier as being no more than those of an ordinary citizen in uniform. But such a description is in my view misleading in the circumstances in which the army is currently employed in aid of the civil power in Northern Ireland. In some parts of the province there has existed for some years now a state of armed and clandestinely organised insurrection against the lawful government of Her Majesty by persons seeking to gain political ends by violent means, that is by committing murder and other crimes of violence against persons and property. Due to the efforts of the army and police to suppress it the insurrection has been sporadic in its manifestations but, as

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1. These remarks are a reference to the defence of mistake of fact, as to which see M.M.L. Part I, Ch. VI, para. 8.  
2. I.e., under the Criminal Law (Northern Ireland) Act 1967, s.3. which is in identical terms to the English Statute, see para. 5.015.

events have repeatedly shown, if vigilance is relaxed the violence erupts again. In theory it may be the duty of every citizen when an arrestable offence is about to be committed in his presence to take whatever reasonable measures are available to him to prevent the commission of the crime; but the duty is one of imperfect obligation and does not place him under any obligation to do anything by which he would expose himself to risk of personal injury, nor is he under any duty to search for criminals or seek out crime. In contrast to this a soldier who is employed in aid of the civil power in Northern Ireland is under a duty, enforceable under military law, to search for criminals if so ordered by his superior officer and to risk his own life should this be necessary in preventing terrorist acts. For the performance of this duty he is armed with a firearm, a self-loading rifle, from which a bullet, if it hits the human body, is almost certain to cause serious injury if not death.

What amount of force is 'reasonable in the circumstances' for the purpose of preventing crime is, in my view, always a question for the jury in a jury trial, never a 'point of law' for the judge.

The form in which the jury would have to ask themselves the question in a trial for an offence against the person in which this defence was raised by the accused, would be: are we satisfied that no reasonable man (a) with knowledge of such facts as were known to the accused or reasonably believed by him to exist (b) in the circumstance and time available to him for reflection (c) could be of opinion that the prevention of the risk of harm to which others might be exposed if the suspect were allowed to escape, justified exposing the suspect to the risk of harm to him that might result from the kind of force that the accused contemplated using?.

To answer this the jury would have first to decide what were the facts that did exist and were known to the accused to do so and what were mistakenly believed by the accused to be facts. In respect of the latter the jury would have had to decide whether any reasonable man on the material available to the accused could have shared that belief.

The jury would have also to consider how the circumstances in which the accused had to make his decision whether or not to use force, and the shortness of the time available to him on reflection might affect the judgment of a reasonable man. In the facts that are to be assumed for the purposes of the reference there is material on which a jury might take the view that the accused had reasonable grounds for apprehension of imminent danger to himself and other members of the patrol if the deceased were allowed to get away and join armed fellow members of the Provisional I.R.A. who might be lurking in the neighbourhood, and that the time available to the accused to make up his mind what to do was so short that even a reasonable man could only act intuitively. This being so, the jury in approaching the final part of the question should remind themselves that the postulated balancing of risk against risk, harm against harm, by the reasonable man is not undertaken in the calm analytical atmosphere of the court room after counsel with the benefit of hindsight have

expounded at length the reasons for and against the kind and degree of force that was used by the accused; but in the brief second or two which the accused had to decide whether to shoot or not and under all the stresses to which he was exposed.

In many cases where force is used in the prevention of crime or in effecting an arrest there is a choice as to the degree of force to use. On the facts that are to be assumed for the purposes of the reference the only options open to the accused were either to let the deceased escape or to shoot at him with a service rifle. A reasonable man would know that a bullet from a self-loading rifle if it hit a human being, at any rate at the range at which the accused fired, would be likely to kill him or to injure him seriously. So in one scale of the balance the harm to which the deceased would be exposed if the accused aimed to hit him was predictable and grave and the risk of its occurrence high. In the other scale of the balance it would be open to the jury to take the view that it would not be unreasonable to assess the kind of harm to be averted by preventing the deceased's escape was even graver - the killing or wounding of members of the patrol by terrorists in ambush, and the effect of this success by members of the Provisional I.R.A. in encouraging the continuance of the armed insurrection and all the misery and destruction of life and property that terrorist activity in Northern Ireland has entailed. The jury would have to consider too what was the highest degree at which a reasonable man could have assessed the likelihood that such consequences might follow the escape of the deceased if the facts had been as the accused knew or believed them reasonably to be."

It appears from Lord Diplock's remarks that the circumstances which may be considered are very wide and include not only the immediate circumstances in which the accused finds himself, but also the circumstances of the background against which the incident arises. It also appears that if a soldier believes honestly that it is his duty to act in a particular way, provided that concept of duty is not 'manifestly illegal', his honest belief will weigh heavily in his favour. It follows that those responsible for training soldiers for operations in which difficult decisions as to the use of force may have to be taken must do their best to foresee the circumstances which may arise and ensure that their standard operating procedures, drills and orders are, as far as possible, exhaustive and appropriate. They should be aimed at ensuring the soldier knows how he is expected to react by those in authority in any anticipated circumstances. The soldier then has the protection of knowing that if he has faithfully carried out those procedures, drills and orders, he can claim an honest belief that he has done no more than his duty. This is not the whole answer, however, because no one can correctly anticipate every turn of events during a projected operation. It must, nevertheless, be the aim. Ultimately it remains the responsibility of the soldier who has to pull the trigger to ensure he has made the right decision.

Farrell v.  
Secretary of  
State for  
Defence.

5.019. Another useful illustration is the case of Farrell v. Secretary of State for Northern Ireland. On 23rd October 1971 the officer in command of a detachment of troops in Newry, Northern Ireland ('soldier X') received information that a bomb attack by three men was likely to take place that night on a bank in the town. He informed soldier A and instructed him to go with three other soldiers, B, C and D, and take up a position on the roof of a building opposite the bank. The four soldiers took up their position at about 10.30 p.m. While soldier B was alone on the front of the roof he saw two men walking towards the bank and go to the night safe which they appeared to be trying to open. He then saw three other men cross the road to the night safe. There was a scuffle with the two already there. Soldier B called soldier A who saw the three men close to the night safe with their backs towards him. Soldier A ordered them to halt. The men stopped what they were doing and looked up and down the street. One shouted to the others to run and all three ran off. Soldier A cocked his rifle and again ordered them to halt stating that he was ready to fire. The men did not stop. He and the other three soldiers then fired killing all three men. It turned out that none of the men was armed or carrying a bomb. They had been attempting to rob one of the other two men who was putting money in the night safe. That autumn there had been 35 bomb explosions in Newry and two days before the incident a bomb had been placed outside the bank. The widow of one of the deceased sued the Ministry of Defence for damages on the ground that the deaths had been caused by the negligence of the four soldiers. There was no claim of negligence on the part of anyone involved in the planning of the operation. At the trial, in the course of cross-examination of the soldiers, it was elicited that soldier X had only selected and instructed one soldier, that he had given no instructions about summoning help, and there was no agreed procedure for the four soldiers reporting back to their base, that only four soldiers out of 80 under soldier X's command had been selected for the operation and that they did not have a loud-hailer with them and could only stop or apprehend a terrorist or suspect terrorist who refused to stop by firing at him. The soldier's defence included the claim that each had used no more force than was reasonable in the circumstances in the prevention of crime or in effecting the lawful arrest of offenders<sup>1</sup>. The soldiers were mistaken as to the identity and character of the three civilians. Once again, however, they were entitled to plead successfully an honest belief that the the men were terrorists. The case was dealt with on that basis in view of the briefing the soldiers had been given. The jury in the original trial found that in the circumstances in which the four soldiers were placed, on the basis that they honestly believed they were witnessing a terrorist attack on the bank:

- a. it was reasonable in the circumstances, in the prevention of crime, for the soldiers to shoot to kill and
- b. it was reasonable in the circumstances, in order to effect the arrest of the three men, for the soldiers to shoot to kill.

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1. I.e., under the Criminal Law (Northern Ireland) Act 1967, s.3 which is in identical terms to the English Statute, see para. 5.015.

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It was not claimed that there had been negligence by anyone other than the four soldiers. In consequence, the Judge found for the Ministry of Defence. The Judge's action was upheld in the House of Lords when Viscount Dilhorne stated that "the question to be determined is whether the person who is accused or sued used such force as was reasonable in the circumstances in which he was placed ...".

If, however, there is negligence in the planning of an operation and in consequence death of or injury to an innocent person is caused, then the fact that the soldiers on the ground used no more force than was reasonable in the circumstances in which they were placed in the prevention of crime will afford no defence to those who planned the operation or the M.O.D. who employs them if an action for damages is brought.

Excessive  
Show of  
Force.

5.020. Although when called to the aid of the civil power soldiers in no way differ in the eyes of the law from other citizens, by reason of their organization and equipment, there is always a danger that their employment in aid of the civil power may in itself constitute the use of more force than is reasonable in the circumstances in the prevention of crime etc. The law is clear that the military must come to the assistance of the civil power when it is reasonable in the circumstances that they should do so, but not otherwise. No excess of force or even display of force by way of threat must be used and a soldier is guilty of an offence if what is done is not reasonable. This is so even if what is done is by direction of the civil authority, unless the circumstances are such that the military commander has no opportunity of judging the facts of the case for himself and is therefore compelled to accept the opinion and appraisal of the civil authority concerned<sup>1</sup>.

Call-Out  
of Troops.

5.021. The primary obligation to preserve public order and suppress disturbances rests with the civil authority<sup>2</sup>. Troops should be called out only in the last resort and when a situation has developed or is immediately apprehended which the civil authority consider is beyond the capacity of the police to control by the employment of all the resources available to them. Save in a grave and sudden emergency<sup>3</sup>, the decision to call out troops will be taken by Government Ministers. Any request to a military commander for assistance in maintaining public order from a Chief Officer of Police or from any other source must be referred to M.O.D. and the commander's immediate superior military authority<sup>4</sup>.

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1. R. v. Pinney.
  2. See also para. 5.006.
  3. See para. 5.005.
  4. Q.R.(1975) J.11.002.

Control of Troops.

5.022. Even after a decision has been taken by Government Ministers to use troops to restore order the military commander should normally commit his troops only at the request and on the advice of the Chief Officer of Police responsible<sup>1</sup>. Once troops are committed to action, however, responsibility for the operation in which they are engaged rests and remains with the military commander until they have fulfilled their mission or have been withdrawn. Withdrawal should be effected if the Chief Officer of Police so requests, provided circumstances, in the judgment of the military commander, permit him to withdraw without endangering the safety of the troops. Throughout any such operation soldiers must continue to be guided by the principle of the use of reasonable force<sup>2</sup>. What is reasonable must be judged by the military commander. His is the sole responsibility while troops are committed and he is under a duty to use even lethal force if there is no other way to stop the violence and it is in all other respects reasonable to take that extreme action.

Law Relating to Public Order

Knowledge of Law.

5.023. Those responsible at all levels for the deployment of troops within the state must know the extent and limitations of their legal powers. In addition, they must have sufficient knowledge of the law relating to public order to ensure they understand the nature of public order offences. Success in the subsequent prosecution of offenders depends upon the availability of evidence; this is provided by those who observed the events. They must know what to look for and pay sufficient attention to enable them to make detailed statements and later to give evidence in court.

Unlawful Assembly.

5.024. The law permits the dispersal of an unlawful assembly even though no act of violence has been committed. In an old case<sup>3</sup> it was said "it is better that individuals should be stopped, before they proceed to outrage and violence." An unlawful assembly is an assembly of three or more persons with intent either:

- (a) to commit [or to encourage the commissions of] a crime by open force or
- (b) to carry out any common purpose,

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1. See, however, in relation to grave and sudden emergencies, para. 5.005.  
 2. See paras. 5.014 to 5.019.  
 3. R. v. Vincent.

whether lawful or unlawful, in such a manner as to give firm and courageous persons in the neighbourhood of such assembly reasonable grounds to apprehend a breach of the peace in consequence of it<sup>1</sup>.

The commission of an act of violence by one or more of those assembled is not necessary to make the assembly unlawful if its character and circumstances are such as to be calculated to alarm not only foolish and timid people, but persons of reasonable firmness and courage<sup>2</sup>. If the assembly is for a lawful purpose and with no intention of carrying out that purpose in an unlawful manner, the assembly is not necessarily an unlawful assembly, even though the persons assembling know that the assembly is likely to be resisted by others<sup>3</sup>.

However, a lawful meeting may become unlawful if words are spoken at it which are likely to cause a breach of the peace<sup>4</sup>.

Rout. 5.025. Rout is a disturbance of the peace by persons who assemble together with an intention to do something which, if executed, will amount to a riot (see para. 5.026) and who actually make a move towards the execution of their common purpose, but do not complete it<sup>1</sup>. Rout is not included in an indictment as a separate offence (count). A jury is, however, empowered to convict of the offence of rout on a count of riot if the complete riot is not proved.

Riot. 5.026. It is the duty of every citizen (including a soldier) and the special duty of police officers to suppress riots. A riot is a tumultuous disturbance of the peace by three or more persons who assemble together of their own authority, with an intent mutually to assist one another against any who oppose them in the execution of an enterprise of a private nature and afterwards actually execute the same in a violent and turbulent manner to the terror of the people<sup>1</sup>. The common purpose need not be unlawful. Doing together with mutual support something which would otherwise be lawful in a manner calculated to inspire people with terror is punishable whether the enterprise is otherwise lawful or not. Where, however, the object of an assembly is lawful, strong evidence of the means used to cause terror and of the terror actually caused will be needed. Evidence of those actually terrorised is helpful but not always necessary. The purpose of a crowd may be divined in many different ways. Evidence of shouts and chants and of banners carried may be helpful. Evidence of the behaviour of identified rioters is necessary. Photographs, video tapes and devices such as dye sprayed from a water cannon or hose may assist. Above all, the alert observation of troops participating in the suppression operation is essential.

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1. Archbold : Criminal Pleading, Evidence and Practice (42nd Ed.).
  2. R. v. Vincent.
  3. Beatty v. Gillbanks.
  4. R. v. Burns.

Insurrection and Treason. 5.027. A riot has in view some enterprise of a private nature. It is not directed against the Crown or the state, for a riot is distinct from treason in that the acts done need not involve a resistance to or an attempt to overthrow the authority or prerogative of the Crown<sup>1</sup>. An insurrection, on the other hand, savours of treason and contemplates some enterprise of a general and public nature<sup>2</sup>. An insurrection, in short, involves an intention to "levy war against the Queen", as it is technically called, or otherwise to act in general defiance of the government of the country. For example, a determined mob assembling to burn down a building belonging to their civil employers with whom they have a dispute are engaged in a riot as soon as they have actually commenced their purpose provided all the ingredients of a riot are present. If their object were to attack a barracks with a view to arming themselves in order to undertake armed rebellion against the government, they would be engaged in an insurrection.

The duty to suppress unlawful assemblies and riots is all the stronger in the case of insurrections or riots which savour of rebellion. In such cases the use of arms (i.e. lethal force) must be regarded as "reasonable in the circumstances" as soon as the intention of the insurgents to carry out their purpose by force of arms is demonstrated and it becomes apparent that immediate action by the use of arms is necessary.

Conclusions. 5.028. As public disorder escalates a number of decisions may have to be made:

- (a) whether to use force to suppress the disorder. The responsibility rests firmly on the Chief Officer of Police although, as the situation increases in gravity he will be ever more closely in touch with central government;
- (b) the degree of force to be used; a whole range of options are available from the use of the minimum manual force necessary to effect arrests up to and including the use of baton rounds and, when faced by gunmen, the use of specially trained armed police;
- (c) whether and when to call out troops to assist the civil power. As indicated in para. 5.021 and subject to the remarks about 'grave and sudden emergency' in para. 5.005, such decisions are likely to be taken at ministerial level.

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1. R. v. Lord George Gordon. Lord George Gordon was indicted for High Treason, but acquitted on the ground that his acts, in the opinion of the jury, did not amount to constructive levying of war against the Crown.

2. R. v. Vincent.

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(d) Once troops are deployed to the scene the Chief Officer of Police must decide whether and when to request their use. However, in strict law, the military commander cannot escape responsibility for the decision whether or not the troops should be employed. He must use his own judgment if he is in possession of the facts. If it is not possible in the particular situation for him to ascertain the facts, he must accept that they are as represented by the Chief Officer of Police. Once troops are on the spot, however, the military commander is probably in as good a position as the civil authority to form an appreciation of the situation. The fact that a request for action has or has not been made must be given due weight but in neither case is the military commander absolved from his legal duty which is to use such force and no more as is both necessary for the restoration of order and the checking of violence and is reasonable in the circumstances. It is difficult for the military commander "to hit the precise line [of his duty] ... but that, difficult as it may be, he is bound to do<sup>1</sup>." If by his acts he causes death, he is liable to be indicted for murder or manslaughter; and if he does not act he may be tried in respect of his breach of duty. The same is true, however, for all those engaged in the preservation of public order, whether police officer or public official. It is equally true of the private soldier on the street armed with a lethal weapon. Such comfort as there is can be gained from the fact that the last word will rest with a jury who, properly directed, can probably be relied upon to make liberal allowance for these difficulties when those concerned have acted honestly and to the best of their respective judgments.

#### National Emergencies and Industrial Disputes

- Disposition of the Armed Forces. 5.029. The disposition of the armed forces is within the exclusive right of the Crown under the Royal Prerogative and that right is not open to challenge in the courts. Whether a particular disposition is within the limits of the Royal Prerogative and whether in carrying out particular tasks the actions of individual members of the armed forces are lawful are, however, matters into which the courts may enquire.
- Orders to undertake non-military tasks. 5.030. Under normal circumstances an order to a subordinate is lawful only if it is not contrary to English or International Law and can be justified by military law.<sup>2</sup> An order to a soldier to empty dustbins, to drive an ambulance for the assistance of civilians or to assist in unloading a non-military commercial cargo from a ship might not be seen as fulfilling any military duty and, therefore, as justified or enforceable under military law. However, the following provision was made by Regulation 6 of the Defence (Armed Forces) Regulations, 1939:

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1. Littledale J. in R. v. Pinney.

2. See note 3 to A.A.1955, s.34 (M.M.L. I, p. 296).

"6. The Admiralty, the Army Council or the Air Council<sup>1</sup> may by order authorise officers and men of His Majesty's naval, military or air forces under their respective control to be temporarily employed in agricultural work or such other work as may be approved in accordance with instructions<sup>2</sup> issued by the Admiralty, the Army Council or the Air Council, as the case may be, as being urgent work of national importance, and thereupon it shall be the duty of every person subject to the Naval Discipline Act, military law or air force law to obey any command given by his superior officer in relation to such employment, and every such command shall be deemed to be a lawful command within the meaning of the Naval Discipline Act, the Army Act 1955 or the Air Force Act 1955, as the case may be."

This Regulation has been made permanent by s.2 of the Emergency Powers Act 1964. Its effect is to remove any possibility of doubt about the legality of orders given to troops to perform what may appear to be non-military duties provided those duties are connected with work duly authorised by the Defence Council in accordance with the Regulation.

Authorised  
Emergency  
Work in time  
of disaster. 5.031. The Defence Council has authorised<sup>3</sup> the temporary employment of troops under Reg. 6 of the Defence (Armed Forces) Regulations 1939 on work which a local commander, at the time when the work requires to be performed, considers to be urgently necessary to alleviate distress and to preserve and safeguard lives and property in time of disaster. The Defence Council has also approved such work as urgent work of national importance<sup>4</sup>.

Maintenance  
of Essential  
Supplies  
during  
Industrial  
Disputes. 5.032. Specific authority for the temporary employment of troops under Reg. 6 is required for each separate situation in which essential supplies and public services are threatened by industrial disputes<sup>5</sup>. As a matter of practice, although not of law, similar authority is required in respect of agricultural work.

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1. For the transfer of functions of the Admiralty, the Army Council and the Air Council to the Defence Council, see the Defence (Transfer of Functions) Act 1964, ss.1(3), (7) and 3(2) (M.M.L. I., pp. 606-608).  
2. Instructions were issued by the Defence Council on 10th Feb. 1982 and are reproduced as Instr. No.            in the App.  
3. By Order dated 17th Jan. 1983; see Instr. No.            in the App.  
4. See Q.R.(1975) para. J.11.008 as to how applications for assistance are made.  
5. See ibid., paras. J.11.005-J.11.007.

National  
Emergencies.

5.033. Under s.1 of the Emergency Powers Act 1920 (as amended by s.1 of the Emergency Powers Act 1964) if at any time it appears that there have occurred or are about to occur, events of such a nature as to be calculated by interfering with the supply and distribution of food, water, fuel or light or with the means of locomotion, to deprive the community or any substantial portion of the community, of the essentials of life, Her Majesty may, by proclamation, declare that a state of emergency exists. Such a proclamation may remain in force for one month, but may be renewed thereafter by further proclamations.

So long as such a proclamation remains in force it is lawful for Her Majesty, by order, to make regulations for securing the essentials of life to the community, and those regulations may confer or impose on a Secretary of State or other Government Departments or on any other persons in Her Majesty's service or acting on Her Majesty's behalf, such powers and duties as Her Majesty may deem necessary for the preservation of peace, for securing and regulating the supply and distribution of food, water, fuel, light and other necessities, for maintaining the means of transport or locomotion, and for any other purposes essential to the public safety and the life of the community.

Under this Act regulations may be made requiring soldiers to perform duties not otherwise regarded as military duties<sup>1</sup>. The statutory provision is also wide enough to confer special powers upon troops to enable them to execute their allotted tasks.

Distinction  
between  
roles.

5.034. The use of troops to provide military aid to the civil power (M.A.C.(P).) to assist in maintaining or restoring order is to be distinguished from that of troops employed to provide military aid to the civil ministries (M.A.C.(M).) in the maintenance of essential supplies and services (whether in pursuance of a Defence Council authorization or emergency regulations made under a Royal Proclamation). This is particularly important during times of industrial unrest or disturbance. Troops employed in the distribution of essential supplies may well find they are required to cross picket lines and it would be lawful for them to be ordered to do so. While in law they have the normal rights of the citizen (e.g. of self-defence or the use of reasonable force in the prevention of crime) they should normally look to the police to protect them and to provide escorts. If the situation deteriorates to the point when the police are no longer able to provide the necessary protection, the troops should be withdrawn. A request from the police for assistance in restoring public order should be treated as a separate operation and handled in accordance with earlier paras. of this Ch.<sup>2</sup>.

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1. A similar effect is achieved without the need for a proclamation of emergency by Defence Council authorization under r.6 of the Defence (Armed Forces) Regulations 1939 (see paras. 5.030-5.032).  
2. See paras. 5.021 and 5.022.

Trade Disputes.

5.035. Troops on duty at a time of industrial unrest and involved in, e.g., the distribution of essential supplies, should be aware in general terms of some of the provisions of the law relating to trade disputes. The Trade Union and Labour Relations Act 1974, s.15<sup>1</sup> provides that it shall be lawful for a person in contemplation or furtherance of a trade dispute to attend:

- (a) at or near his own place of work, or
- (b) if he is an official of a trade union, at or near the place of work of a member of that union whom he is accompanying and whom he represents,

for the purpose only of peacefully obtaining or communicating information or peacefully persuading any person to work or abstain from working. It should be noted that:

- (a) picketing a person's residence is unlawful;
- (b) persuasion used by pickets must be peaceful.
- (c) there is no numerical limit on pickets, although if the police consider it reasonably necessary to prevent a breach of the peace, they may decide how many pickets should be allowed. In a Code of Practice issued by the Secretary of State for Trade and Industry under s.3 of the Employment Act 1980 containing practical guidance aimed at promoting the improvement of industrial relations, it is said that, "it will be rare for the number of lawful pickets to exceed 6". Not to obey a police officer's instruction may amount to the offence of obstructing a police officer in the execution of his duty;
- (d) apart from the limited immunity granted by this provision pickets remain subject to the ordinary law; the section provides no defence to criminal charges of, e.g., assault, criminal damage or breach of the peace, or even of obstructing the highway;
- (e) pickets cannot lawfully prevent anyone (and this includes troops) from crossing a picket line.

Intimidation of Workers.

5.036. Under the Conspiracy and Protection of Property Act 1875, s.7, subject to the right of peaceful picketing mentioned in para. 5.035, an offence<sup>2</sup> is committed by any person who, with a view to compelling any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority:

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1. As substituted by the Employment Act 1980, s.16.  
 2. Not, however, an arrestable offence (see para. 5.014).

(a) uses violence to or intimidates such other person or his wife or children, or injures his property; or

(b) persistently follows such other person about from place to place; or

(c) hides any tools, clothes or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or

(d) watches or besets the house or other place where such other person resides, or works or carries on business, or happens to be, or the approach to such house or place; or

(e) follows such other person with two or more other persons in a disorderly manner in or through any street or road.

"Intimidates" in sub-para. (a) above means putting persons in fear by an exhibition of force or violence, or the threat of force or violence, and there is no limitation restricting the meaning to cases of violence or threats of violence to the person<sup>1</sup>.

#### Scotland

- Differences in the law. 5.037. The law to be applied in situations covered in this chapter may be different in detail in Scotland although general principles remain the same.
- Breach of the Peace. 5.038. A private individual in Scotland may not arrest for breach of the peace. He may try to stop it. In Scotland a breach of the peace at common law is committed where one or more persons behave in a riotous or disorderly manner to the alarm, annoyance or disturbance of some person or persons.
- General powers of arrest. 5.039. In respect of all other common law crimes in Scotland private individuals (including soldiers) do have the power of arrest (e.g., for murder, assault, theft, fire raising, malicious damage to property) provided the individual actually sees the crime being committed and is not merely acting on suspicion or on information received. These powers do not depend upon classification of the offences as 'arrestable'.
- Criminal Law Act 1967, s.2. 5.040. Section 2 of the Criminal Law Act 1967 applies in Scotland. This provision is similar to s.24 of the Police and Criminal Evidence Act 1984 which applies in England and Wales. Both provisions deal with arrest by private individuals for arrestable offences. See para. 5.014.
- Use of force to effect arrests. 5.041. The law in Scotland is that only the minimum amount of force required to effect the arrest of an offender may be used. This formula should be contrasted with that contained in s.3 of the Criminal Law Act 1967 as applying in England and Wales (see para. 5.015).

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1. R. v. Jones.

Corrobor-  
ation.

5.042. Whereas in Crown Courts in England and Wales a conviction of a defendant may be possible on the evidence of one witness, in Scotland there is generally a need for corroboration (i.e., independent supporting evidence) from at least one other witness.