

1991

# Legal Liability of the Armed Forces When Dealing With Internal Disturbances: The Unsatisfactory Anglo-American Approach

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## Recommended Citation

Michael F. Noone, Legal Liability of the Armed Forces When Dealing With Internal Disturbances: The Unsatisfactory Anglo-American Approach, 12 RECUEILS DE LA SOCIETE INTERNATIONALE DE DROIT MILITAIRE ET DROIT DE LA GUERRE 677 (1991).

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# INTERVENTION

by

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## **Legal liability of the Armed Forces when dealing with internal disturbances : The unsatisfactory Anglo-American approach**

### *Introduction*

Andrew Jackson was the Norman Schwartzkopf of his time. Sent to command the US Forces defending the city of New Orleans from British attack during what we call the War of 1812, he soundly defeated them: killing and wounding 1.500 of a force of 5.000 and taking 500 prisoner at the expense of seven killed and six wounded among his own forces (1). His great victory was only slightly tarnished when both armies discovered a month later that the war had been officially concluded seventeen days before the battle by the Treaty of Ghent.

However, there is a darker side to this story: when Jackson arrived in New Orleans he declared martial law — the Anglo American equivalent of the state of siege, although the legal consequences are not, I believe, identical. Two months after the battle and the announcement of peace, Jackson offended a local judge by refusing to release a civilian journalist whom the military had arrested for criticizing the general's decision to continue the system of martial law until the terms of the peace treaty were known. The judge demanded that General Jackson appear before him, and when the General did so, the Judge fined him \$ 1.000 (a very large sum in those days) which the hero paid in order to show his respect for the law. This story — which is told in detail in a recent issue of the US Army's *Military Law Review* (2) illustrates a perennial problem that arises when military forces are used

to suppress domestic turmoil: should individual members of the armed forces be exempt from peacetime civilian laws which establish the criteria for criminal and civil liability?

It could be said that, even though the **external** war was over, General Jackson was operating in its aftermath, and wartime rules applied. However General Jackson maintained military control because of the threat of **internal** disorders. New Orleans had been founded by the French in 1718, transferred to Spain in 1768, reacquired by the French in 1800 and sold to the US in 1803. Jackson concluded that the local population of Creoles might look on his army as an occupying force rather than saviors. Therefore the incident falls squarely within the terms of reference for this topic. I selected Jackson's incident for another reason as well: he had sought legal advice and had been told that his actions continuing martial law were justified, yet he was penalized. How could this be? His legal advisors were well qualified and objective — but the legal rules were (and in my judgement, still are) confusing.

The balance of this paper will outline the historical development and current state of the Anglo-American law regarding the criminal and civil liability of military force when they are used in aid of the civil forces in the hope that it will elicit two kind of response — criticism of my thesis, and research by individuals into this timely and difficult problem.

### **Criminal Liability**

*Silent enim leges inter arma* (3) — «in time of war, the law is silent» — readers of this journal know how misleading that statement is. Criminal law is enforced in wartime — particularly in the case of soldiers: penalties may be increased, special tribunals established, and rules of liability modified, but all legal systems demand that members of the armed forces must answer to some legal authority for their crimes. Must they also answer for their civil wrongs — what we call «torts» — committed on behalf of the state? The question rarely arises in practice: soldiers — except a few of superior rank — neither have the personal resources nor liability insurance to pay for any damage caused. I suspect that most governments have made some provisions for compensating their own civilians — even in wartime — for some types of damage caused by the armed forces. These provisions, whatever they may be, merit the appellation of law. Thus, the Ciceronian maxim is only partially true, even in wartime. Is it any more true in times of domestic violence?

In describing the Common Law (as distinguished from European Civil Law) response to this question, it is important to maintain the categories of civil and criminal liability, while adding two additional categories which are intended to differentiate between law as a set of rules of liability (law as a product) and law as a system for applying those rules (law as a process).

The Common Law rules regarding criminal liability are relatively simple: a member of the armed forces who commits a crime while assisting in maintaining civil order is not protected from criminal prosecution because of his military status. The soldier who carelessly shoots a civilian during a riot will be treated like a policeman; both may be prosecuted. Should the rules be identical? Traditionally the policeman receives far more training in avoiding deadly force than does the soldier.

One can point to the example of Trooper Barlow, a young British soldier in Northern Ireland who was surrounded by unarmed women who took away his rifle and held him (by crowding around him) until an IRA gunman arrived and killed him (4). It is easy to say that Barlow should not have permitted himself to be disarmed and detained. His training may have been deficient. But if had used force — perhaps even deadly force — to deter the unarmed women's efforts to disarm and detain him, how would national law evaluate his behavior? Is it sufficient to say that the process for determining which cases are to be prosecuted will protect the ill-trained soldier, and that the rules for soldier and police should be the same?

One British soldier has been convicted of a duty-related homicide in Northern Ireland. He was imprisoned briefly and then returned to duty with his unit. Would a police officer have been treated in the same fashion? While the abstract rules regarding criminal liability seem clear, the concrete practice is more obscure. Whatever the rules, another issue arises regarding the legal process: Which is more appropriate: to expose the soldier accused of criminal behavior to a potentially hostile civilian legal system? Or to an overly sympathetic military system?

With regard to the criminal process, U.S. practice is quite distinctive. Unlike the British (and many other Common Law countries), we claim the right to court-martial our soldiers for **all** offenses committed while they are on active service. The military rules of criminal liability are similar to those he would face in a civilian court, but the military system or process that applies them would be capable of far more empathy. The military can waive its rights to court-martial

and turn the soldier over to the civilian system. What criteria should decide the disposition of his case: domestic political considerations? The effect of the prosecution on military morale? These are difficult questions which are not limited to the lower ranks. As one nineteenth century English general phrased the issue: If an officer decides not to fire on a crowd, he may be court-martialed and shot for dereliction of duty. If he does fire on the crowd, he may be tried and hanged for murder (5). Neither US law nor its military training program would help a twentieth century general resolve the dilemma. Can military lawyers facilitate the decision?

### **Civil Liability**

Somewhat different issues arise when we examine the civil liability of soldiers performing internal security duties. Admittedly the problem posed is somewhat unrealistic because few, if any, soldiers have the resources or insurance to pay for their civil wrongs. In the mid 1940's the US and UK passed laws generally permitting tort suits against the sovereign (although some exceptions remain) and other nations have similar laws — in many cases, predating the Anglo-American efforts. Today, were a soldier to kill or injure a civilian while performing internal security duties, a claim could be made against the state. In the Common Law system, the state would first determine whether the soldier was performing official duties, and then decide whether the injury was due to fault. If these criteria were satisfied, the claimant would be eligible for compensation. If these criteria were not satisfied, the government might still offer compensation as a matter of grace, although such exgratia payments are rare. Three problems arise even if a state compensation system exists.

#### **1. Should civil suits against soldiers be prohibited?**

At Common Law a soldier's status did not affect his legal liability although he could offer reasons for his behavior which might preclude liability. The same principle applied in both civil and criminal law. In the aftermath of civil unrest, when martial law had been declared, civilians would sue soldiers. In order to prevent the legal harassment of soldiers Parliament routinely passed Indemnity Acts (6) which prohibited suits against them for acts done in good faith during the emergency. A similar approach was taken by the American Congress during our Civil War (7). Presently, a US statute prohibits tort suits against

any government official (including soldiers) for acts done in the performance of duty unless the injured person can establish that the individual was acting in bad faith. As a practical consequence the soldier need only satisfy his military superiors that his actions were appropriate; if they are satisfied he will not be subject to military or civil penalties. Civil libertarians object to this approach because it removes the threat of civil sanctions.

**2. It is appropriate to evaluate a soldier's behavior using civilian standards of liability?**

Because the Anglo American system is still based on fault one is faced with the question of deciding when a soldier's decision failed to meet the standard set by what a reasonably prudent person would have done under similar circumstances. In two cases, one arising in Northern Ireland, the other in the South, civilian judges ruled that military authorities were at fault in siting observation posts and that this fault caused the injuries complained of (8). Are civilian standards appropriate in such cases? If the standards are not appropriate, should the injured persons simply be told that they are the unfortunate victims of a *fait du guerre* and that no compensation is warranted? Or, in the alternative should payment be made solely on the basis of causation without concern for fault? Both the British and Israelis have taken the latter approach, describing their payments as « acts of grace » finally.

**3. Whether or not fault is considered in determining tort liability should the claimant's loyalty to the regime affect the determination?**

The United States has not faced this problem for 125 years when, after our Civil War, we demanded an oath of loyalty before compensation would be paid for acts of the security forces. I know that the British in Northern Ireland have faced this problem and believe that they have rather recently concluded that all save individuals convicted of political violence may receive *ex gratia* payments. The Israeli response is less clear. If payment is made as an act of grace, then presumably the sovereign can set whatever conditions it sees fit. If payment is made on the basis of legal liability, should disloyal victims be compensated? If you conclude they should not, you must be willing to accept the fact that the organs of state security will sometimes err in determining loyalty. If you decide that loyalty to the regime should be disregarded, you expose the government to loyalist criticism for generosity and to false rebel claims.

### **Conclusion**

I have raised questions without answers; questions that may not be important to those of us have not known domestic violence requiring use of the military. Although we may represent the majority of readers of this journal, our nations represent the exception. Our luck may change and, whether or not it does, I suggest that we need to reevaluate the common law legal rules regarding the civil and criminal liability of soldiers used in situations of domestic violence.

NOTES AND REFERENCES

(1) R. Dupuy and T. Dupuy, *The Encyclopedia of Military History*, (New York: Harper and Row, 2nd ed. 1986) 802.

(2) J. Lurie, Andrew Jackson, Martial Law, Civilian Control of the Military, and American Politics: An Interesting Amalgam, *Military Law Review* 126: 133-145 (Fall 1989).

(3) Cicero, *Pro Milone*, IV. xi.

(4) The story is told in D. Hammil, *Pig in the Middle: the British Army in Northern Ireland 1969-84* (London: Methuen, 1985) 137, 139.

(5) Sir Charles Napier, *Remarks on Military law and the punishment of flogging* (1837), L. Radzinowickz, *A History of the English Criminal Law and its Administration from 1750* (London: Stevens, 1948) IV, 151.

(6) The earliest was passed in 1647, C. M. Clode, *The Military Forces of the Crown* (London: John Murray (1869). I 10; others were passed after the Glorious Revolution, the Scottish Rebellion of 1745, and the Irish Rebellion of 1798. The Acts are favorably described in W. F. Finlason, *Review of the Authorities As to the Repression of Riot or Rebellion* (London: Stevens, 1868), and criticized in C. Townshend, *Martial Law: « Legal and Administrative Problems in Britain and the Empire 1800-1940 »*. *The Historical Journal*: 5: 167 at 176 (1982).

(7) *See*, e.g. *Mitchell v. Clark*, 110 US 633 (1864).

(8) *Ryan v. Ireland* (1989) ILRM 544 (alleged careless placement caused injury to soldier); *Farrell v. Secretary of State for Defence* (1978) 7 N.I.J. 13 (sub nom. *McLaughlin v. Ministry of Defence*) (C.A. (N.I.)); (1980) 1 All E.R. 166 (H.L.) (alleged careless placement caused injury to civilian).



