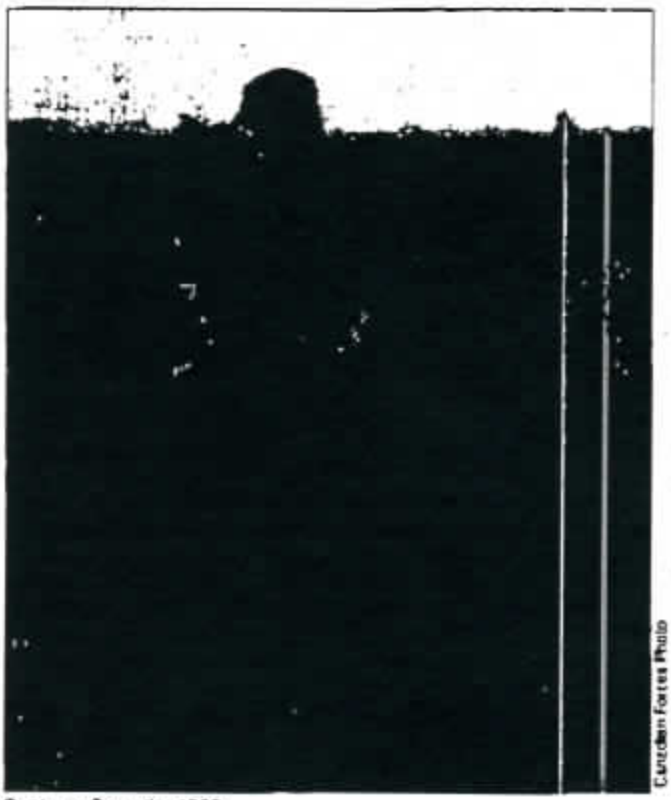
THE DEMOCRATIC WAY IN WARFARE

by Douglas Bland

Who's Setting What Examples?

It is said that "all is fair in love and war." Such may be the case in wooing, but it is certainly not true in wars fought by liberal democracies. The basis for all military activities, including operations in war, is the law. However, recent events, comments by certain senior officers before the Somalia Inquiry and in public, and the remarks of at least one influential Canadian historian suggest that this fundamental principle is not understood nor fully appreciated by Canadian Forces officers, commanders and their supporters. According to some, war and near-war ought to be controlled by doctrine and warrior skills. In the field, tactical necessity rules the day. "How," officers ask, "are we to conduct operations if we have to look over our shoulders every minute to see what the lawyers think is reasonable in the circumstances?" Many officers apparently believe, to paraphrase Dickens' Mr. Bumble, "the law is a ass — a idiot."



Canadian Forces Photo

Sentry in Somalia, 1993.

In their testimony and elsewhere in public, officers have tried to excuse the criminal acts of soldiers and officers in Somalia by implying that Canadian law did not or could not apply to the situation there. It was hot and dusty. There was no working government nor any police or justice system in the country. The "opposition" was not playing by any rules. One popular senior officer is fond of saying that the operation was conducted under United Chapter VII terms which for him, presumably, removed constraints against unlawful acts. (The same officer, on the other hand, was equally eager to say that Canadian Forces Operation Deliverance was not a UN operation.) Desmond Morton, in recent writings, seems ready to abandon the law because, in his opinion, Canadians have on occasion murdered prisoners of war and nothing can be done to change Canada's dismal war planning habits.[1] Besides, others say, criticisms of commanders, unit behaviour, and command decisions are simply motivated by "political correctness" and anti-military sentiments.

The sense of the argument one takes from these types of comments and weak analysis is that in war and peace operations the law applies when it is convenient, but in other circumstances any act that "gets the mission done" is permitted or at least excusable

However, the truth that ought to be anchored in every officer's mind is that operations conducted according to the law benefit the mission, unit discipline and morale, the armed forces as an institution, and the broad interests of Canada. The first principle of war in democracies is not to devise plans and conduct operations in ways that are convenient for the moment, but rather to conduct operations successfully and in accordance with the law. The dilemma for some officers in some situations is that they cannot, or believe that they cannot, accomplish their missions and remain within legal boundaries. What to do?

The Sources of the Law

Rules and laws governing the conduct of warfare are not new. In medieval times combatants followed a code of chivalry that set out a strict and enforced regime for operations. The code provided quarter — unevenly — to fighters, protected noncombatants, and regulated sieges, among other things.[2] Later, church-based law guided combat in Europe and elsewhere. The purpose, generally, in all such regimes was to bring a degree of order and predictability to combat. One never knew, of course, whose forces would carry the day and it was usually best to arrange the rules to safeguard one's own interests in case of defeat.

The desire for predictability in warfare, safety for noncombatants, injured or captured soldiers, and the acceptance of "just war doctrine" in Christendom at least, led to the gradual

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Cadets at the Royal Military College of Canada: the "truth that ought to be anchored in every officer's mind is that operations conducted according to the law benefit the mission, unit discipline and morale, the armed forces as an institution, and the broad interests of Canada."

development of rules, codes, and treaties governing the conduct of military operations. By the 19th century, international conventions began to establish a formal body of rules and understandings aimed at controlling the uses of force in international affairs. In time, various laws of war were codified under the Hague Conventions of 1907 and the Geneva Conventions of 1949 and in the 1977 Additional Protocols to the Geneva Conventions. Today, there are conventions, treaties, agreements, and declarations covering nearly every aspect of war at sea, on land, and in the air and most of them are applicable to the operations of the Canadian Forces.

These various conventions are supported by customary laws and treaty law, particular arrangements agreed by two or more states. International law has been dubbed "soft law" in the sense that the lawmaking authority often has little or no actual power to pass and enforce binding resolutions.[3] The UN, for instance, does not have any authority over states except perhaps for moral suasion in some circumstances. During international negotiations, difficult particular issues are often covered in a soft blanket of ambiguity to serve the greater good, to produce a general treaty, for example. Enforcement mechanisms are often weak because conventions and treaties lack a legitimate body to police sanctions. Nevertheless, international law can provide the basis for control of behaviour in conflict and the enforcement of sanctions as in the former Yugoslavia today. When taken into national law, international conventions and treaties may have the force of national law. Soft laws, therefore, can never be ignored and must always be understood in the context of the times and domestic sympathies and aspirations.

Canadian Forces personnel on duty in foreign lands may be liable to the laws of the state in which they are deployed. It makes little difference whether the state is fully functioning at the time or capable of enforcing its laws. Occasionally, Canada and other states might agree to certain arrangements regarding visiting forces that could restrict the application of the host state's laws to the Canadian Forces. However, these types of arrangements are usually limited and can be set aside by the host state in serious situations. Moreover, Canadian Forces personnel and their commanders may be held accountable to a host nation's laws even after the Canadian Forces contingent has redeployed to Canada.[4]

Members of the Canadian Forces are, of course, always subject to Canadian laws no matter where they are deployed. Specifically, they are liable under the *Criminal Code of Canada* for offenses committed outside Canada while in the service of Canada. Depending on the circumstances of the deployment, Canadian Forces personnel may be tried, convicted, and imprisoned outside Canada for offenses committed under the *Criminal Code of Canada*. As well, military personnel, and in special circumstances civilians attached to the Canadian Forces, are subject to the Code of Service Discipline under the *National Defence Act*.[5]

Finally, members of the Canadian Forces, and especially commanders, may be held accountable for offenses against the "custom of the service." This is a shaded area, but it is not insignificant. Soldiers, officers and commanders are expected to conduct themselves and control their units according to standards derived from military traditions. Commanders, especially, have a duty to properly lead their units and they are always "responsible for the whole of the organization" they command. They cannot delegate "matters of general organization and policy; important matters requiring their personnel attention and decision; and the general control and supervision of the various duties that [they have] allocated to others."[6]

Although this provision comes from *Queen's Regulations and Orders for the Canadian Forces* and may be used as the basis for a charge under the *National Defence Act*, the assessment of commanders is almost always framed by other officers' perceptions of correct behaviour as defined by the custom of the service. In some cases, an inept commander may simply be relieved of command, while in other situations that result, for instance, in criminal acts by subordinates or mission failure, the commander might face a court martial. Thus, findings that an of-

ficer failed in his duty as commander involve judgements by peers and superiors based on the particulars of the case and the law, as well as judgements of the commander's actions and attitudes set against military traditions and customs. The decision usually depends on the professional standards promoted by senior leaders at the time.

The Reasons Why

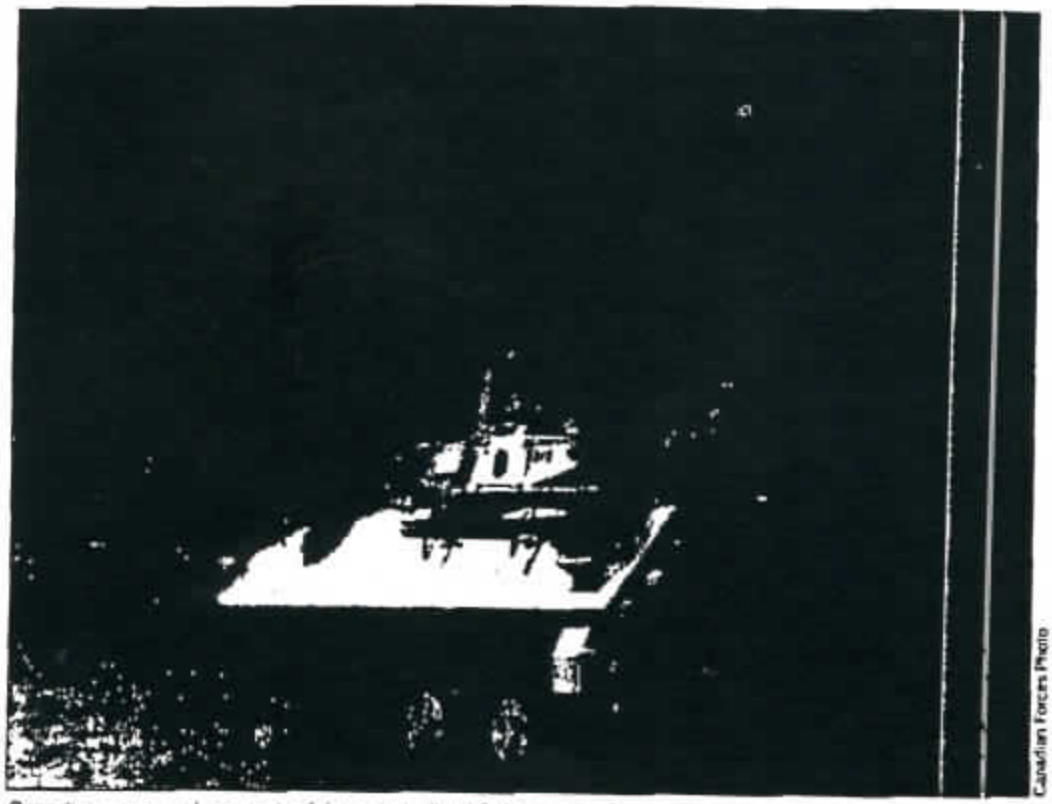
Strangely, the reasons why the law in conflict should be the basis for operations is not well understood by many officers in the Canadian Forces, or so it seems from the testimony of some and the public attitudes of others. Officers, of course, know that the law is the basis for command and often mouth support for the concept, but as often they place conditions on the application of the law in operational situations. Many officers view the law, or their perceptions of the law, as an encumbrance forcing them to fight with one hand tied behind their backs. Properly understood, however, the law provides the armed forces with a powerful weapon in combat and in the national political arena.

The various laws of Canada, including laws derived from conventions and treaties agreed by Canada, must be obeyed because they are the laws of the land. The law provides no license for individuals or groups of individuals to act arbitrarily or capriciously. Every soldier, sailor, rich or poor person, doctor, lawyer, police officer, and politician is accountable under the law for his or her actions. Officers, before the Somalia Inquiry and in public, argued too often that the situations armed forces face in conflict and during peace operations should excuse the unfortunate actions of individuals. They sometimes resent, therefore, those who judge them and their actions according to laws made in Canada in peacetime.

These critics, many of whom, presumably, have conducted military summary trials, apparently forget that legal procedures allow for mitigating circumstances, but only after a legal hearing and a finding. No one denies that military operations in hostile circumstances are difficult, but that difficulty cannot negate the law, although it might influence the type and degree of sanctions awarded to an individual found guilty of an offense.

The laws of Canada and particularly the *National Defence Act* and *Queen's Regulations and Orders for the Canadian Forces* are the basis for command in the Canadian Forces. The concept of a lawful command is the root of all commands, orders, and regulations in the armed forces and applies equally in war and peace. Members of the Canadian Forces obey "superior officers" because they are obliged to do so in every instance, except when they are given manifestly illegal orders.

The law, including international laws governing conflict, provides the foundation for "good order and discipline" in units and the means by which officers control individuals under their command. Officers and commanders who say that their actions should be conditioned by the circumstances of the day and not by law, leave themselves open to the same argument from soldiers. What happens to discipline if soldiers decide that they will obey commands and orders only after they decide whether they are reasonable and if they expect disorderly behaviour to be excused because their duties are difficult. Officers who seek redress from the law and their customary responsibilities because command in operations is difficult ought to think very carefully about the example and the standard they are setting for their subordinates.



Canadian Forces Photo

Canadian personnel conduct a joint patrol with U.S. Marines in Somalia: "imagine...if officers of the Canadian Forces on duty in Canada in some future Aid of the Civil Power mission were to conduct themselves as they did in Somalia."

The essential difference separating "armies of the night," criminal military units like the *Waffen SS*, armed forces under the control of dictators, and armed mobs from the armed forces of democratic states is that the latter function under the law and are accountable to the people. Citizens in liberal democracies, like Canada, expect members of the armed forces to conduct operations in ways that differentiate them from the enemies of democracies. This is a demanding standard and not every soldier in every situation is up to the task. Yet, if an armed force routinely disavows its democratic roots or fails to police itself adequately according to society's standards, it risks breaking the bond between the military and society. Once broken, the fracture is difficult to mend.

Soldiers, sailors and air force personnel have always served, intentionally or not, as ambassadors for their countries. How soldiers and officers behave while abroad signals to others the character of their native land. More often now than at any other time, perhaps, governments and citizens in liberal democracies expect members of their armed forces to reflect the success and stability of democracies. This policy objective is not more chauvinistic flag-waving, but a reasoned strategy based on the strong supposition that democracies are relatively peaceful entities. Members of the Canadian Forces have a mission and a duty to spread by example the democratic message to individuals in other countries and particularly to military officers in emerging democracies.

The first message is that the Canadian Forces is subservient to civil authority. Senior officers, especially, should eagerly demonstrate that they willingly follow the directives and policies of the government of the day, facilitate the oversight of the armed forces by ministers and their agents, and steadfastly obey and enforce the laws of Canada. Second, every member of the Canadian Forces should proudly proclaim that the success of Canadian arms in war and peace has always come from the armed forces' democratic standards. Democracies are not only inherently peaceful, but they win wars when they follow their principles. This is an extraordinarily important point to make whenever members of the Canadian Forces encounter individuals from other countries who believe that raw brutality and military rule produce effective armed forces. Canada's military legacy, certainly over the last 25 years, speaks otherwise loudly.

Finally, members of the Canadian Forces need to understand and to explain to others that the basis for the success of democratic armed forces is their close connection with the society they support. Armed forces in democracies are linked to their fellow citizens because soldiers are citizens and because the military is under effective civil control. Civil control flows from the law and the acceptance of the law by soldiers. The strong bond between the "people's army" and society encourages and reinforces society's willingness to make sacrifices and to provide commanders with extraordinary powers over the lives of citizens. The Canadian Forces has a Code of Service Discipline and a nearly separate legal system not simply because it is needed for wartime, but because Canadians trust officers to command the armed forces according to laws citizens approve.

The power of democratic armed forces originates in the people's belief in the essential rightness of their cause and their expectation that it can be and must be defended within the boundaries set by democratic principles. Criticism from citizens and the media directed at leaders of the armed forces is an early indication that government policies and/or the conduct of military affairs are out of harmony with this fundamental democratic expectation. Military officers who disregard the people's faith in the democratic way in warfare or its power in domestic politics risk the armed forces and, at times, the state itself. Imagine, for instance, if officers of the Canadian Forces on duty in Canada in some future Aid of the Civil Power mission were to conduct themselves there as they did in Somalia. Whither Canada then?

Canadian officers and commanders send the wrong message to foreign officers unsure of democratic ways, whenever they challenge the laws of Canada. Blatant disregard for the law, unwarranted hostility toward agents of the government ordered by cabinet to inquire into the actions and decisions of officers, arrogant behaviour in public, and disrespect for the institutions of government are activities officers in other countries watch. Neither the officer corps nor Canada benefits from such behaviour. It is especially unfortunate when Canada and her NATO allies are trying to encourage the development of civil control over the military in emerging democracies.[7]

The Law and Operations

Certain "practical questions" facing Canadian Forces officers concerning the law and operations remain unresolved despite the findings of the Somalia Inquiry and the changes recently initiated by the Chief of the Defence Staff. Typical questions arise from the complexity of international operations and from the dilemmas soldiers and officers face in the field where the letter of the law seems difficult to apply. There is no space in this brief essay to address, never mind answer, the many questions in this area needing examination. However, two issues may provide examples of how to proceed towards some general answers.

Rules of engagement (ROE), their preparation, interpretation, and application in international operations and with allies, are a major worry for commanders. ROEs seldom seem to fit the situations in which they are to be used. The complaint is that they lack tactical relevance. This criticism may be perfectly sensible, particularly if the ROEs are poorly drafted, inappropriate to the situation, and when soldiers are not properly instructed on them. However, when the complaint is based simply on an observation that the ROEs make it difficult to conduct operations, then the criticism is ill-founded.

The concept of ROEs is not new to the armed forces and their value is well understood by any infantry section commander who gives fire orders to her soldiers. These types of orders are clearly tactical in origin and application. Rules of Engagement for national operations, on the other hand, are an extension of national policy and, among other things, help to situate the laws of Canada in operational settings. That is to say, ROEs are law-based instructions meant to limit and otherwise control the application of force by members of the Canadian Forces in operations. As such then, there can be no complaint that ROEs are tactically irrelevant because they lead and do not follow tactical necessity, national ROEs are the foundation on which tactical battle plans must be constructed.

Commanders who wish for or believe that ROEs should be subject to tactical necessity (as they see it), also usually call for the "harmonization" of national ROEs with those of allied or coalition forces working with the Canadian Forces. There is a certain, though limited, logic in such thinking; a unified force

should have a coherent, unified set of orders. One could argue that in some situations, as in Somalia, the mere fact of unity does not necessarily support the argument for harmonized ROEs. If tactical factors prevail, then the tactical situation in various parts of the theatre of operations would likely promote a variety of ROEs. But this argument for and against harmonization is moot, because tactical necessity is not the basis for national ROEs. The United Nations is not a state and cannot issue or enforce ROEs without the consent of states. The question for those favouring harmonization is which nation's laws will form the basis for the coalition's or United Nations' rules?

Rules of Engagement for the Canadian Forces must always be based on the laws of Canada. No Canadian and no Canadian court would or should accept ROEs for the armed forces that disregard or ignore Canadian laws. In fact, it would probably be unlawful to issue ROEs that contravene the law and soldiers would be right to disobey commands based on such ROEs. Therefore, because ROEs are founded on Canadian laws, no Canadian Forces personnel or unit could operate under harmonized coalition rules unless those rules were in every aspect in accordance with Canadian law. Harmonization could be arranged, if other nations would acquiesce to the laws of Canada. But is that a reasonable expectation?

A second and more difficult question is what should members of the Canadian Forces do when the ROEs or the laws of Canada seem inappropriate to the situation of the moment? There are, at least, two levels of analysis in this question, one at the level of the individual and one at the level of the commander.

What is the soldier to do when he faces a critical situation where the ROEs demand one action and common human decency, for instance, demands another? For example, lawful ROEs might order a soldier to remain neutral towards belligerents who are about to kill noncumbatants. Moral judgements, and perhaps the law in some circumstances, demand that the soldier intervene to protect innocent life. This dilemma is, arguably, a matter of ethics and not the law, but the law may provide a way out of the dilemma if it has the chance to run its full course. The soldier in this simply stated case should act as his conscience dictates and trust to the laws of Canada.

At the command level, what is an officer to do if she is convinced that the laws when applied to the situation at hand are manifestly inappropriate and interfere with the successful accomplishment of the mission? The wrong answer, in almost every case, is to take the law into her own hands and act according to tactical doctrine. One might be able to argue that necessity calls for action. This defence, however, could only be advanced in singular situations. At a more general level, the only recourse for the commander is to obey the law while seeking recourse from the law or ROEs from her superior. This process might in some situations require the Chief of the Defence Staff to ask the government for a change in laws or a new mission. Ignoring or amending the law to suit tactical necessity is never a command decision.

Principled Command

It is obvious from recent events and the actions of commanders in the field and in public discourse that officers generally do not understand well enough the relationship between the laws of Canada and the command of Canadian Forces units in conflict and in peace operations. This problem cannot be overcome by leaders' declarations for honesty and by regulations alone, although both are plainly needed. Officers aspiring to command need to be educated in the law of armed conflict and convinced of the benefits that will accrue to them and their subordinates when they act within the law. They need to understand also the special ethical problems that face soldiers on operations, how to resolve contradictions between what they are asked to do and what they are allowed to do, and they need techniques and skills for making complex decisions in ambiguous circumstances. Current tactical doctrine services none of these needs.

Canadian Forces staff colleges and units should routinely include ethical and legal problems in operational training exercises. Unfortunately, there are few textbook answers (or even textbooks) to guide officers in the law and operations. Nevertheless, six critical principles of lawful operations are easy to learn and teach:

- The law, and not tactical necessity, is the basis for military operations.
- Commanders must obey the law.
- Orders, commands, rules, and plans must be lawful.
- Subordinates must be instructed and practiced in lawful operations and continuously supervised in training and in the field in this respect.
- Deviations from lawful operations and unlawful commands, orders and acts must be identified, promptly investigated, and prosecuted no matter the consequences for individuals, including commanders.
- When the law and tactical necessity are in conflict, obey the law and seek redress from higher authority.

Above all else, officers ought to remember that they were commissioned "to keep [subordinates] in good order and discipline" and that this Royal command applies without exception in the barracks and in the field. This duty, based on lawful orders and faithfully executed, safeguards individuals, units, the Canadian Forces, and the nation. When officers and commanders break and bend the spirit and letter of the law or allow individuals who do to go unpunished, good order and discipline disintegrates and nothing of value is safe.

NOTES

1. "Prisoners have been killed by the Canadian Forces in both world wars and its notorious except to veterans who want that memory suppressed." Desmond Morton, as quoted in the *Kingston Whig-Standard*, 21 February 1998, p.11. See also, Desmond Morton, "An Officer and a Bureaucrat" in *National Network News*, Vol.IV, No.4 (Fall 1997), pp.7-8.
2. See, for example, Theodore Meron, "Shakespeare's Henry the Fifth and the Law of War" in *American Journal of International Law*, Vol.1, No.45, 1992.
3. See, for example, Michael Reisman and Chris Antoniou, eds., *The Laws of War: A Comprehensive Collection of Primary Documents on International Laws Governing Armed Conflict* (New York: Vintage Books, 1994), pp.xvii-xxxi.
4. See James M. Simpson, *Law Applicable to Canadian Forces in Somalia 1992/93*, a study prepared for the *Commission of Inquiry into the Deployment of the Canadian Forces to Somalia*, pp.1-7.
5. Simpson, *Law Applicable to Canadian Forces in Somalia 1992/93*, pp.7-9.
6. Canada, *Queen's Regulations and Orders for the Canadian Forces*, Article 4.20.
7. For a useful overview of Canadian initiatives in this area, see Marina Caparini, "The Challenge of Establishing Democratic Civilian Control over the Armed Forces of Central and Eastern Europe", *Canadian Defence Quarterly*, Vol.27, No.2 (Winter 1997), pp.16-24.