Miskolc Journal of International Law
MISKOLCI NEMZETKÖZI JOGI KÖZLEMÉNYEK

VOLUME 8. (2011) NO. 2. PP. 1-26.

Louis-Philippe Rouillard[1]:

Ethics, Human Rights and the Law of Armed Conflict

Introduction

There is sometimes a view echoed by some 'operators', that is the military personnel on the ground or the 'real soldier, that the law of armed conflict (LOAC) does not lend itself to effective application in an operational context since it is perceived by many in uniform that: rules of engagement are too restrictive; these rules apply only to the last conflict; law has no place in the chaos of combat; and even when it does have a place, it does not reflect the necessity of the situation. In effect, they see the law devoid of any value in itself, only as a constraint imposed by do-gooders far removed from the contemporary reality of real operations.

This brings some positivists to adopt a minimalist view of the law of armed conflict (LOAC). As a result, they act in a manner consistent with the minimal letter of the law, but eschew its actual spirit. By doing so, their actions might meet the legal requirements necessary to avoid public criticism or even prosecution, but nonetheless do not fully respect the intent of the law and the values that it encompasses. And sometimes, it simply does not meet even the minimal requirements. Examples from the last few decades involving many modern armed forces in operations abound and do not need retelling here.

In effect, some armed forces members adopt a view whereby the LOAC is an abstract concept that obliges conformity to satisfy people without first hand knowledge of the realities of operations and consequently base their decisions through mechanisms that permit to avoid sanctions rather than on decision-making processes based on the underlying intent and values of the law.

This essay will attempt to show the importance of changing this perception to one that is internalized by the entire chain of command so that the LOAC is not a stand-alone benchmark requiring a minimal 'pass or fail grade', but rather a wider set of law that incorporates the values of professional soldiers and of its society at large. This internalisation aims at furthering comprehension that the actions posed in operations by serving military reflect the nation they represent and are of paramount importance for mission success.

---

[1] Dr. Louis-Philippe Rouillard has been the Manager - Conflicts of Interest and Programme Administration for the Defence Ethics Programme of the Department of National Defence of Canada since 2008. He is a guest lecturer at the University of Ottawa and for the Canadian Forces College.The views and opinions expressed in these pages are solely those of the author and do not represent the official views of the institutions for which he might work

I will demonstrate this in three parts. First, I will show the link between the LOAC, professionalism and ethical obligations, highlighting the links between civil society and service personnel. This will include a discussion contrasting military expectations and civilian expectations of service members' application of values. This will lead into my second point, where I will demonstrate how this translates into firm obligations for service members to conform to legal norms that are punctual in their application, such as the LOAC, and applicable at all times, such as international human rights. I conclude with a demonstration of the application of ethical values and principles in operations through the prism of the law.

While in no way a definitive essay on this topic, I aim at bringing the reader to the conclusion that the application of legal norms in operations, such as the LOAC, is done not because the law stands on itself but because the law represents a wider set of values that must be respected in operations for the mission to have increased chances of success and service personnel the best odds of survival devoid of debilitating effects resulting from non-respect of these values.

Professionalism, Ethics and the LOAC

At issue when establishing the foundation and the structure of military members is always to know what they consist of, as well as to what they do obey. In the case of the Canadian Forces, these armed forces of Canada are the tri-service military is established under the authority of Parliament through the *National Defence Act*[2]. All members of the Canadian Forces, irrespective of component (Navy, Army and Air Force), are subject to the authority of their chain of command, up to and including the Chief of the Defence Staff[3].

Since Canada does not have conscription[4], it falls under the definition of a "professional army", that is a volunteer army serving in accordance with terms of service out of which an individual can elect to continue or not, and the institution can decide to re-enrol the individual, or not. Serving under terms of services, this means that the continuous training and employment in garrison or on deployment gives them a continuous professional development.
While the terms of service of the Reserve force is separated by classes of service, whether on part-time service, full-time for a determined period or for specific operations, the idea of a continuous professional development remains applicable to all service personnel.

[2] *National Defence Act,* R.S.C. 1985, c. N-5. at article 14: "The Canadian Forces are the armed forces of Her Majesty raised by Canada and consist of one Service called the Canadian Armed Forces." These are constituted of two established components named the Regular Force and the Reserve Force (see NDA at article 15) and in an emergency, or if considered necessary in consequence of any action undertaken by Canada under the United Nations Charter or the North Atlantic Treaty, the North American Aerospace Defence Command Agreement or any other similar instrument to which Canada is a party, upon establishment by the Governor in Council, a third component called the Special Force.

[3] *Ibid.*. at article 18.

[4] Even under the *Emergencies Act*, R.S. C. 1985, c. 22 (4th Supp.) which includes at its Part IV the War Emergency situation, Canada cannot enact conscription by means of a regulation or order from the Governor General in Council. It must be made by an act of Parliament.

But does this idea of continuous professional development translate into 'professionalism' as understood in the sense of a profession on par with those of prior 'liberal professions', such as medical doctors or lawyers? The question has important repercussions. Indeed, who is a professional member of the armed forces? What, in fact, defines this profession? Is only officership the heir to the notion of a military profession as managers of violence, or does it apply as much to the non-commissioned members ? Regardless of the answer, are solely those belonging to combat arms truly managers of violence or are all members of the armed forces members of the 'profession of arms'?

This is not an idle question as *Duty with Honour: The Profession of Arms in Canada* proclaims:

> "… the defence of Canada and its interests remain the primary focus of the Canadian military profession and the volunteer professionals who serve in uniform. Indeed, the fundamental purpose of the Canadian profession of arms is the ordered, lawful application of military force pursuant to governmental direction. This simple fact defines an extraordinary relationship of trust among the people of Canada, the Canadian Forces as an institution and those members of the Forces who have accepted the "unlimited liability" inherent in the profession of arms."[5]

Duty with Honour answers these questions by affirming that all officers and non-commissioned members, and all Regular force and Reserve force personnel become members of the profession of arms by swearing the Oath of Allegiance.[6] While a debate rages in the academic world as to

[5] A-PA-005-000/AP-001, Canadian Forces Leadership Institute, *Duty with Honour: The Profession of Arms in Canada*, Kingston: Canadian Defence Academy (2009) , at 4. It defines the concept of unlimited liability which is understood at page 26 of *Duty with Honour* as being: "Unlimited liability is a concept derived strictly from a professional understanding of the military function. As such, all members accept and understand that they are subject to being lawfully ordered into harm's way under conditions that could lead to the loss of their lives. It is this concept that underpins the professional precept of mission, own troops and self, in that order, and without which the military professional's commitment to mission accomplishment would be fatally undermined. It also modifies the notion of service before self, extending its meaning beyond merely enduring inconvenience or great hardship. It is an attitude associated with the military professional's philosophy of service. The concept of unlimited liability is integral to the military ethos and lies at the heart of the military professional's understanding of duty."

[6] *Ibid.*, at 11: "In Canada, an individual becomes a member of the profession of arms by swearing the Oath of Allegiance and adopting the military uniform, thus establishing an essential distinctiveness in Canadian society. Thereafter, members demonstrate their professionalism by

- embracing the military ethos;
- reaching and maintaining the point at which a member has achieved the requirements for first employment in an occupation and maintaining this qualification;
- pursuing the highest standards of the required expertise; and
- understanding, accepting and fulfilling all the commitments and responsibilities inherent in the profession of arms.

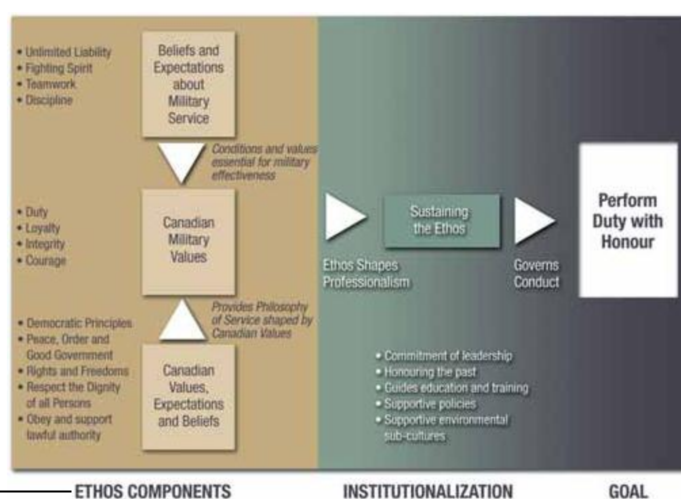
In the Canadian Forces, all non-commissioned members (NCMs), especially non-commissioned officers (NCOs), warrant officers (WOs), chief petty officers and petty officers (CPOs and POs), share leadership responsibilities and are required to master complex skills and gain extensive knowledge of the theory of conflict. Therefore, and in accordance with the criteria listed, all regular force members of the CF, regardless of rank, are members of the profession of arms. Although not necessarily on full-time service, primary reserve members are an essential component of the nation's military capability and meet the criteria, and thus are accorded professional status. On active duty, they assume the status and identity of full-time military professionals."

whether this inclusiveness is warranted[7], it will suffice for our purposes to adopt *Duty with Honour*'s all-encompassing view and to accept its criteria for determining what constitutes a profession.[8] The criteria stated are:

> "the profession of arms is distinguished by the concept of service before self, the lawful, ordered application of military force and the acceptance of the concept of unlimited liability. Its members possess a systematic and specialized body of military knowledge and skills acquired through education, training and experience, and they apply this expertise competently and objectively in the accomplishment of their missions. Members of the Canadian profession of arms share a set of core values and beliefs found in the military ethos that guides them in the performance of their duty and allows a special relationship of trust to be maintained with Canadian society."

In many ways, this reflects the historical and sociological criteria stated by many theorists regarding the nature of the military profession. Depending on which armed forces are concerned and the political regime in place, these criteria are generally understood at the individual level, with some differences depending on the theorist, as being manifested by specialized knowledge and skills, as well as an adherence to professional norms[9].

These professional norms are understood in the Canadian context as being the values and beliefs found in the military ethos. This military ethos is understood as "the foundation upon which the legitimacy, effectiveness and honour of the Canadian Forces depend"[10] and consist of:[11]



[7] See A. English, A., *Professionalism and the Military - Past, Present, and Future: A Canadian Perspective* , paper prepared for the Canadian Forces Leadership Institute, May 2002, Web,[?] confronting the notions of Huntington, Jarowitz and Abrahamsson with the historical development of professions and the changing nature of the sociological concepts of the military profession.

[8] *Duty with Honour*, *supra*, note 4 at 10.

[9] S. Fitch, S., "Military Professionalism, National Security and Democracy: Lessons from the Latin American Experience", *Pacific Focus,* Vol. IV, No. 2 (Fall 1989) 101.

[10] *Duty with Honour*, *supra*, note 4 at 25.

[11] *Ibid.* at 33.

As seen here, the ethos governs conduct in order to perform the service member's duty with honour, but rests upon a set of Canadian values from the society at large, composed of expectations and beliefs, as well as a set of Military Service beliefs and expectations, both of which are transcended in a set of Canadian Military Values. These are the core values which guides service personnel actions and decisions.

As stated in *Duty with Honour*, this military ethos reflecting national values and beliefs leads to a unique Canadian style of military operations — one in which CF members perform their mission and tasks to the highest professional standards, meeting the expectations of Canadians at large.[12]

And here is where the Canadian Forces differ from many other armed forces: they are not only expected to abide by its military ethos, but also to apply a common set of values it shares with another institution responsible for all matters related to the national defence of Canada: the Department of National Defence.

Established under Article 4 of the *National Defence Act*[13], the Department is under the responsibility of the Minister of National Defence who is vested with power over the management and direction of the Canadian Forces and all matters relating to national defence.[14] Thus, the interaction between the two necessitates a common set of values under which to act.

However, since the Department is composed of civilian public servants who fall under the rules of the *Public Service Employment Act* [15](PSEA), they are held to the values of the public service of Canada as affirmed in the *Values and Ethics Code for the Public Service*[16].

In order to reconcile the two, the Deputy Minister of the DND and the CDS jointly established the Defence Ethics Programme in 1997. In short order, the DEP produced a *Statement of Defence Ethics*[17] which combined both Canadian Military Values and Public Service Values in a set of principles and obligations to which both military members and public servants must adhere. While the terminology may be different, this alters in no way the fundamental values by which

[12] *Ibid.* at 34.

[13] *National Defence Act,supra,* note 1 at article 3 : "There is hereby established a department of the Government of Canada called the Department of National Defence over which the Minister of National Defence appointed by commission under the Great Seal shall preside."

[14] *Ibid.* at article 4.: "The Minister holds office during pleasure, has the management and direction of the Canadian Forces and of all matters relating to national defence and is responsible for: (a) the construction and maintenance of all defence establishments and works for the defence of Canada; and (b) research relating to the defence of Canada and to the development of and improvements in materiel. "

[15] *Public Service Employment Act*, R.S.C 2003, c. 22, ss. 12, 13.

[16] *Values and Ethics Code for the Public Service*, available at: < http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/tb_851/vec-cve-eng.asp> accessed 25 January 2011.

[17] The three ethical principles are: respect the dignity of all persons; serve Canada before self; and obey and support lawful authority. Its six ethical obligations are: [no caps here] Integrity, Loyalty, Courage, Honesty, Fairness and Responsibility. Available at; < http://www.dep-ped.forces.gc.ca/dep-ped/about-ausujet/stmt-enc-eng.aspx> accessed January 25, 2011.

military members must abide by in their official role. For example, if the concept of duty encompasses as much the obligation of responsibility of the *Statement of Defence Ethics*, the concept of unlimited liability that underlines this obligation for serving personnel continues to exist. It is only because responsibility does not imply this concept for public servants that the concept of responsibility is accepted as the common shared valued of the two institutions. Still, in no way does this abrogate the military values to which serving personnel are expected to conform.

The issue it brings to the fore, however, is that there is a perception by some [who?] that military morale and its values have been eroded by the "transference of civilian values and management techniques to the Forces".[18] However, even proponent of having a different set of values in the 1980s recognised that "an ethos which resulted in alienation of the Forces from the Canadian public or the civil service is regarded as highly undesirable".[19]

As we have seen, there are good reasons for this; the military ethos is composed, amongst others, of the Canadian society's values. If it was otherwise, a divide would be created and the very armed forces which are supposed to represent and defend Canadian ideals would base itself on its own set of values for doing so and not on the wider set of beliefs and expectations that the citizens hold.

This is not a minor detail but a fundamental aspect of the bond of trust that must exist between all citizens forming civil society and those citizens in uniform that serve in the defence of all. The concept for an armed force within a liberal democracy is not new. Indeed, everyone and everything, from individual to corporations to states, have a trust account, much like a bank account. Some critics state that this trust "is a function of two things: character and competence. Character includes your integrity, your motive, your intent with people. Competence includes your capabilities, your skills, your results, your track record. And both are vital."[20] Trust means confidence. And we have a limited amount of it available in our account. Each time that our competence and skills, or our character and moral rectitude is tainted by an event, we withdraw some of our capital of confidence. When we reach a point where there is none to withdraw anymore, it can mean moral bankruptcy and an armed forces devoid of the trust of fellow citizens.

And this bond of trust between citizens and uniformed citizens does matter, as it impacts on the 'social capital' a nation has invested in, in the form of trained uniformed citizens prepared to defend the nation. Lack of moral rectitude will have a direct impact on moral and performance, and even more in retention and recruiting. Also, it will impact on the devolution of resources to the armed forces, which will further impact competence and morale. Once in this vicious circle, the bond of trust further dissolves and may take decades to rebuild.

---

[18] Kasurak, P., "Civilianization and the military ethos: civil-military relations in Canada", *Canadian Public Administration*, 25.1 (1982): 108.

[19] *Ibid.*, at 108.

[20] Huackabee, G., "The Politicizing of Military Law- Fruit of the Poisonous Tree", Gonzalez Law Review 45 (2009-2010) 611, citing Stephen M.R Covey, *The Speed of Trust*, 2006, print at 30.

Let's take for example, the military covenant between civil society and the military. The terminology originates from the United Kingdom, where the British *Army Doctrine Publication 5* entitled '*Soldiering: the Military Covenant*' was published in 2000[21]. In short, the military covenant is described as the moral basis of the Army's output. It describes how the concept of unlimited liability makes soldiering unique and what a (British) soldier should expect in return for surrendering some civil liberties while under the uniform[22]. It is important to mention that this is in essence an Army doctrine: it does not, by itself, apply to the Royal Navy or the Royal Air Force. However, it is understood that its principles do apply to all three services of the United Kingdom.

The Canadian Forces have adopted a concept very similar to that of the military covenant, but calls it instead the 'social contract'. In the CF context, this is understood in *Duty with Honour* as being a "national commitment — *in essence a moral commitment.*"[23] This view is interesting since, as in the case of the UK's military covenant where it is viewed as a '*psychological contract*', the social contract is viewed not as a legally binding contract, but as a '*moral commitment*'.

In the Canadian context, it is understood as resting on the foundations of elements brought into the public eye by the *Standing Committee on National Defence and Veterans Affairs* (SCONDVA), which stated that this moral commitment to the Canadian Forces must be based on concrete principles[24], including: being fairly and equitably compensated for their services, all members and their families being provided with ready access to suitable and affordable accommodations, as well as be provided with access to a full and adequate range of support services, receiving suitable recognition, care and compensation be provided to veterans and those injured, assuring reasonable career progression, being treated with dignity and respect and be provided with the appropriate equipment. The Canadian Government, in its response, took note of the SCONDVA

---

[21] Tipping, Christianne, "Understanding the Military Covenant", *The RUSI Journal*, 153. 3 (2011): 12-15 at 12.

[22] *Idem*.

[23], *Duty with Honour, supra*, note 4 at 44.

[24]Standing Committee on National Defence and Veterans Affairs, *Moving Forward: A Strategic Plan for Quality of Life Improvements in the Canadian Forces*, October 1998, www.parl.gc.ca/InfoComDoc/36/1/NDVA/Studies/Reports/ndvarp03-e.htm#toc on August 3, 2003. The recommendations in full are: "That the members of the Canadian Forces are fairly and equitably compensated for the services they perform and the skills they exercise in performance of their many duties. And that such compensation properly take into account the unique nature of military service.", "That all members and their families are provided with ready access to suitable and affordable accommodation. Accommodation provided must conform to modern standards and the reasonable expectations of those living in today's society.", "That military personnel and their families be provided with access to a full and adequate range of support services, offered in both official languages, that will ensure their financial, physical and spiritual well-being.", "That suitable recognition, care and compensation be provided to veterans and those injured in the service of Canada. Here the guiding principle must always be compassion.", "That members be assured reasonable career progression and that in their service they be treated with dignity and respect. In addition, they must be provided with the appropriate equipment and kit commensurate with their tasking." The Government's response to the report took note of the committee's recommendations and reaffirmed its "commitment to the Canadian Forces as a national institution." It went on to say, "The men and women of the Canadian Forces have made a tremendous contribution to their country. They deserve the respect and appreciation of their government and their fellow citizens."

recommendations and reiterated its commitment to the Canadian Forces as an institution[25].

This clearly states the expectation of the institution of the Canadian Forces on behalf of its service personnel. It is an arrangement that is not dissimilar to that of the British military covenant or of most Western armed forces serving in liberal democracies. As a result, the Canadian who becomes a member of the profession of arms upon swearing of his or her Oath of Allegiance can expect fair and respectful treatment that extends as much to his or her terms of service as to having the means attributed by civil society in order to accomplish the task given by the government. Therefore, there is an expectation of fairness from service personnel, for which civil society expects an output, one that may include sending its uniformed citizens deliberately in harm's way in order to support the policies of its government. Service personnel expect that this will be done very carefully on a costs and benefits evaluation, without better solutions being available or having no other way out[26]. It does stand to reason that if one is liable in an unlimited manner up to and including forfeiting one's right to life, one would not want it to be done for trifle or petty reasons. And if one has been injured during this task, one can reasonably expect to be cared for by the civil society that required this sacrifice.

Yet, many commentators mention an unravelling of the military covenant, or social contract. In the United Kingdom, the United States and in Canada, parties now sitting in government have claimed that service personnel are not provided with adequate equipment in adequate time; that wounded veterans and families of the fallen are not treated with care, respect and compassion; and that the mission amounts to a misuse of personnel and is an encroachment of their right to life or to the quality of life they are to expect. In short, service personnel are described as being used as commodities and veterans discarded and[27]. Some argue that because of the disconnect between the armed forces and civil society, especially since the numbers of service personnel have dwindled compared to the Second World War and Cold War eras, there is always less of a link between society as a whole and it military[28].

Yet, in the same breath it is argued that in western liberal democracies, civil society do not like the use of force as it is by nature antithetical to their own liberal outlook and that if they must enter a fight, that their armed forces do so in a manner that reflects their own core liberal values[29]. As such, civil societies increasingly question the legitimate use of force[30]. Furthermore, the very same civil societies have become ever more intolerant of casualties, especially when these

---

25 *Government Response to the Report of the Standing Committee on National Defence and Veterans Affairs (SCONDVA) on Quality of Life in the Canadian Forces*, 25 March 1999, www.dnd.ca/hr/scondva/engraph/response1_e.asp?cat=1 on August 3, 2003.

26 Giacomello, Giampiero, "In Harm's Way: Why and When a Modern Democracy Risks the Lives of Its Uniformed Citizens", *European Security*, 16. 2 (2007): 163-182.

27 McCartney, H., "The military covenant and the civil–military contract in Britain", *International Affairs* 86: 2 (2010): 411–428 at 411.

28 *Ibid.* at 421, citing Hew Strachan, "Liberalism and conscription: 1789–1919", in Hew Strachan, ed., *The British Army: manpower and society into the twenty-first century*, London: Frank Cass, 2000, print at 13 .

29 *Ibid.* at 414 citing Lawrence Freedman, *The transformation of strategic affairs*, Abingdon: Routledge, 2006, print at 41.

30 *Ibid.* at 413, citing Martha Finnemore, *The purpose of intervention*, Ithaca, NY: Cornell University Press, 2003 at 19; Theo Farrell, *Norms of war: cultural belief and modern conflict*, Boulder, CO: Lynne Rienner, 2005 at 178.

are perceived as being unnecessary in light of misguided foreign policies[31].

In effect, while civil society supports the troops, that is the military members and the institutions they serve, they often disapprove of the missions in which they serve and of the foreign policies of the government that directed those missions. This is so because civil society has been forged by the end of the Cold War and the receding of the direct threats again its civil liberties, like the menace of Nazism during World War II or that of communism during the Cold War. If anything, civil society wants the best bang for the defence buck much like the case of Sweden and its military, one that has not had to fight a war for nearly two centuries[32] or, if they must fight, that they do so in conflicts where there are expectations of zero casualties, such as in the Kosovo campaign[33].

If anything, this new framework can be seen in a very positive light where civilian expectations do in fact conform to the fairness expectations of serving personnel. If this is the case, then why is there a multiplication of accusations that there is an erosion of our social capital due to an unravelling of the moral contract? The answer is not simple. In part, the root cause might be for some the desire to score political capital, but it is also because real mistakes were made in the past and these mistakes ran much against the expectations of civil society and of service personnel. From the care provided to soldiers wounded in Iraq and Afghanistan at Bethesda to the criticism of the unsuitability of the Nimrod vehicles being for the protection of British soldiers in Iraq, errors made by governments in the treatment of their service personnel combined with a doubtful legitimacy of entering this conflict – in example the lack of weapons of mass destruction in Iraq or the doubts concerning the attachment of the Afghan government to western liberal democracy – have all create pressures and moral questions.

This state of affairs occurs precisely when western liberal democracies have never had such a well-educated population that internalizes civil society values and demands ethical conduct for the public sector, of which the armed forces constitute a large part[34]. Society's expectations have increased and now are on par with its knowledge. The education of the governing members of civil society and access to knowledge are now very much equivalent in and out of the public sector, rendering civil society apt at making its own judgement and justified in questioning the use of public resources.

---

[31] *Ibid* at 419, citing Christopher Dandeker, "Recruiting the All-Volunteer Force: continuity and change in the British Army, 1963–2008", in Stuart A. Cohen, ed., *The new citizen armies: Israel's armed forces in comparative perspective*, London: Routledge, forthcoming 2010, for the British context, but which can certainly be accepted as applicable to most western liberal democracies.

[32] Catasu, Bino, and Gronlund, Anders, "More Peace for Less Money: Measurement and Accountability in the Swedish Armed Forces", *Financial Accountability & Management*, 21.4 (2005) at 469.

[33] Burke, "Just war or ethical peace? Moral discourses of strategic violence after 9/11, International Affairs" 80.2 (2004): 329-354 at 331, citing Micheal Ignatieff arguing that: 'from an ethical standpoint, it transforms the expectations that govern the morality of war … a war ceases to be just when it becomes a turkey-shoot … NATO could only preserve its sense of moral advantage by observing especially strict rules of engagement.'[10] Michael Ignatieff, *Virtual war*, London: Chatto & Windus, 2000 at 165.

[34] Erakovich, "A Normative Approach to Ethics Training in Central and Eastern Europe", *International Journal of Public Administration* 29, (2006): 1229–1257 at 1231.

And this judgement includes a perception that entering a conflict must be done with prudence and legitimacy, and further creates expectations that the conduct of their service personnel will be done in conformity with civil society's values.

Such values must form part of the armed forces' values and cannot depart from them; they must be aligned or the social contract would further be completely severed. The application of these values for armed forces therefore becomes military ethics: the right and wrong actions of an armed force and its very real consequences on the lives of men and women in uniform[35].

These actions must conform to expected behaviours and these behaviours are prescribed by rules, both written and unwritten. The unwritten rules are those expectations aligned with the moral rectitude expected of service personnel through their military values, while the written rules are those which are both internal (laws, a Code of Service Discipline) and external (international treaties and customary norms).

In the past, society has always expected its service personnel to behave with absolute honour at all times, but nonetheless has often turned a blind eye to less than honourable behaviour[36]. But, as we have seen, society's expectations have grown, and perhaps outpaced what armed forces can truly produce as an output answering this standard of behaviour.

Hence the emergence of military ethics, which is in part a species of the genus of professional ethics[37]. As in any other profession's ethics, one criterion for its existence is that it answer to a specific conceptual framework, including a legal and regulatory framework. In the case of military ethics, this legal framework is formed by the LOAC.

Yet, ethics concerns itself not with the legality of an action, but with the notion of knowing whether this action is morally right or wrong. Since law is not concerned with the right or wrong of an action but solely on its legality, how does one reconcile the two?

This is where there is a case to examine whether the LOAC respect military ethics and to demonstrate how the one relates to the other. The LOAC is not an altruistic framework to prevent right and wrong: it is a preventative and repressive instrument to attempt to prevent violence from continuing once the political objectives have been accomplished and to prevent escalation to levels too abhorrent for the conscience of civil society.

Military Ethics, the LOAC and Human Rights

[35] Bonadonna, Reed R., "Doing Military Ethics with War Literature", *Journal of Military Ethics*, 7: 3 (2008) : 231- 242 at 231.
[36] Mackmin, S, "Why Do Professional Soldiers Commit Acts of Personal Violence that Contravene the Law of Armed Conflict?", *Defence Studies*, 7.1 (2007): 65–89 at 66.
[37] Cook, Martin L. and Syse, Henrik , "What Should We Mean by 'Military Ethics'?", *Journal of Military Ethics*, 9.2 (2010): 119-122 at 119.

The LOAC, also called the Law of War in much of the American and British literature and International Humanitarian Law (IHL) in others, is not a new concept. The idea that armed conflict between people of different clans, tribes, nations or even political affiliations must have some shared ground rules, has existed since early writings has recorded it.

For example, the Jewish tradition of combat is encapsulated in a large part in the Bible and the Torah, even though commentators did not exactly agree on all the prerequisites prior to entering a conflict; some arguing that there is a requirement to favour peace up to the last possible moment and others affirming that this is not in any way a requirement[38]. But even in the customary approach to law that is taken through religious text, one aspect arises: the morality – or the ethics – to apply to battlefield situations[39].

Many jurists, by professional deviancy, tend to adopt the view that the law is the law and that morality has nothing to do with it. In the same vein, some soldiers profess that morality has nothing to do on the battlefield. Since lives of comrades and compatriots are at stake, and since political goals of the State are at play, winning with the fewest casualties on one's side is all that matters. Indeed, this view is an old one: Thucydides' work *The History of the Peloponnesian War* is often used to show the Melian Dialogues and is often taught in military colleges and academies around the world as the principle for realism in the theories of war and that, as such, morality has nothing to do with international relations, including its practical application through the use of armed force[40].

However, a careful reading of Thucydides contradicts this view. In fact, all implication of the ethics of strategic choices and their impacts on both the Athenians and allies are looked upon and questioned by the very participants. Nicias' leading of the Syracuse expedition, despite his own firm belief that it over-stretches Athenian forces and does not align with the aim of the war, puts into question the very moral question of the initiation of hostility and the manner in which an armed conflict is carried out. Here, the question is whether Nicias had exhausted all his ethical obligations toward his civilian leadership (the Athenian assembly) to head off the expedition[41]. This very question is asked obliquely in command and staff courses around the world to field grade and superior officers; yet, most come to the conclusion that it is not theirs to question why, but theirs to do and hopefully have the most of their command survive and win the fight.

As we can see, tradition seems to have warranted two types of requirement: firstly, the question of whether entering a conflict is justified and secondly that of the manner in which the hostilities are waged. Through time, and (mostly, but not limited to) Christianity, a tradition of 'Just War' evolved, comprised of two sets of principles: the first governing the resort to armed force (*jus ad*

---

[38] Broyde, Michael J., "Battlefield Ethics in the Jewish Tradition", American Society International Law Proceedings 95 (2001): 82-99, at 94 and 95, opposing the Bible to the Sifri, one of oldest of the midrashic source books of Jewish law.

[39] *Ibid.* at 93.

[40] Cook, M., "Thucydides as a Resource for Teaching Ethics and Leadership in Military Education Environments", *Journal of Military Ethics*, 5.4 (2006): 353-362 at 353.

[41] *Ibid* at 358.

bellum) and the second governing conduct in the hostilities created (*jus in bello*)[42].

However, the tradition of just war is just that: a tradition. It is not a code of law that can be answered to in an interpretative manner by a judge and brought to appeal for further discussion. It is a amalgamation of concepts, not a legal prescription, even though one could make an arguable link between the precepts of canon law and the concepts of the just war tradition. This is even more the case when one considers that in Christianity many legal commentators and philosophers have attempted to describe the provisions of this tradition[43].

Through time, rituals of battle – or their savagery, depending on the region and the epoch – evolved in a general set of traditions. In example, European warfare invented and reinvented for itself the notion of honourable surrender where quarter is given. A notion nonetheless left to the quirks and desires of the nobility in charge and by no means regarded as obligatory. Similar notions certainly took root elsewhere; but so did the discretionary character of their implementation.

Through the industrialisation period, means of warfare evolved rapidly and permitted even more carnage. Recognising that conflict was to be expected and that general limits would perhaps minimise the maiming and killing, by the end of the 19th century actual treaties regulating the use of these means in war, such as the *St-Petersburg Declaration* of 1868, or regulating the entrance into a conflict and the means to be used, such as the 1899 *Hague Convention*, or the conduct to adopt in war, such as the 1864 First *Geneva Convention* led to the establishment of a body of law identifiable as that of the Law of War.

Of course, it remained mostly ineffective and attempts to remodel its content following various conflicts, such as the 1906 Second *Geneva Convention* following the disastrous (for Russia) Russian-Japanese war of 1904 and the 1907 *Hague Convention*, could not prevent increases in means of delivery of death on the battlefield, including and up to artillery barrage literally altering the landscape of Belgium and the use of poison gases during the First World War.

Attempts were therefore done to actualise these laws and to regulate treatment of prisoners on the battlefield. The Third *Geneva Convention* in 1929 attempted just this and resulted in the biggest fiasco in World War Two, with Allied prisoners of war being literally worked as slaves by their Japanese captors and Russian prisoners of war starved to death by the millions in German captivity. Still, what atrocities went beyond the imagination of most was the treatment of civilians, with estimates calculating that over 6 million Jews and 1 million Roma were exterminated through means of rounding up, mopping up, transporting and mass executing by various means - not counting civilians of all sorts and 'undesirables' as well as civilian casualties

---

[42] McMahan, Jeff, "The Ethics of Killing in War", *Ethics* 114 (2004): 693–733, at 114.

[43] Ruys, T., "Licence to Kill? State-Sponsored Assassination under International Law", Military Law & Law War Review 13 (2005): 1-50 at 23. For example, Ruys mentions both St. Thomas Aquinas and Sir Thomas More approving of the killing of a sovereign if he acts with cruelty in an evil manner in order to spare the innocent and punish those responsible for wars.

from the conflict itself, evaluated at a minimum of 20 millions for the U.S.S.R. alone.

After the Second World War, the immensity of the loss of life and the deliberate murderous rampage of some regimes, the Allies decide to convene military tribunals for violations of the law of war by the occupiers in countries that suffered them and for major war criminals at Nuremberg.

The idea of prosecuting for illegitimately causing the war and for conduct during the hostilities was not new: the peaces treaties issued in Versailles, St-Germain-en-Laye and Trianon in 1919 and 1920 provided some mechanisms of this sort. However, there was no experience and real political desire to prosecute what was not entirely perceived as individual violations.

Indeed, what must be understood that the LOAC is a state obligation. In order to impose an international legal constraint against an agent of that state, for example a sergeant or even a general officer, this state's obligation must be internalised by the country ratifying the treaty creating the international obligation for the state to, for example, respect prisoners of war under its control. It is for that state to provide education and training to its agents, such as its service members, and to punish violators of these obligations. With Nuremberg, following the Postdam Agreement, this regime that was before the province of the victor's justice evolved into a body of law now recognised and enforceable[44].

Then, a Fourth *Geneva Convention* was brought forth in 1949 and all three preceding ones were revised and updated. To this will be added two additional protocols in 1977 and a third protocol in 2005, while a myriad of legal instruments regulate particular technology (i.e. blinding laser, cluster bombs) and prohibit military activities in precise locations (i.e. Antarctica and space).

However, so far all these treaties have either been violated in some form or another or have not yet been tested. That is because the law is a reactive instrument to be interpreted. And, usually, counsel will interpret it to the advantage of his or her client. In the case of the military, the interpretation is often widened because it is in the best interest of the forces desiring to use a mean of armed force to interpret it as such. And counsel will provide this measure of interpretation. Furthermore, interpretation of an action on the battlefield is often made after the fact and justice systems are often reticent to criticise *ex post facto* while not having first hand knowledge of the conditions and the state of mind in which a battlefield decision is made.

Still, justice systems are composed of jurists. And jurists are often the elected members of our democratic assemblies, whether they are parliaments or congress or assemblies. It is therefore sometimes disconcerting to note that there is a dissonance in the message coming one way and the message going the other; whether it is for the decision to enter a conflict or for the conduct during hostilities.

As mentioned, some believe morality has nothing to do on a battlefield. But since we have not had the predicted apocalypse of Soviet forces crossing the Fulda Gap, it is hard to compare the cataclysm of the Second World War with current conflicts of choice, such as the Iraqi (2003) and Afghan invasions (2001). Certainly, the intensity of combat and the type of conflicts are very different from twentieth century conventional and symmetric forces meeting head-on with the objective of seizing a capital and its political regime, decapitating it and replacing it with an occupation force until ready to accept a method of governance on which the West agrees, under the careful quartering of the territories for the duration of the occupation under geostrategic pressures, such as the occupation of Berlin was warfare.

And since many positivists believe that morality has no place on the battlefield and that realism is the only doctrine of international relations that is relevant, they will also argue that morality has nothing to do with entering a conflict; whether as the aggressed or as the aggressor. As long as the international regime has blessed (even *ex post facto*) the use of armed force, then some will argue that all is good and morality should not have to be considered.

However, let us compare this for a moment with the preparatory phase that enlarged the Second World War, which most scholars agree started in 1939 with the invasion of Poland, but which really reached its another crescendo with the entrance of the United States into the war at the end of 1941.

The President of the United States, Franklin D. Roosevelt, had, announced in his Annual Message to Congress on January 6, 1941, his concept of "Four Freedoms": freedom of speech and expression everywhere in the world; freedom to worship God in his own way everywhere in the world; freedom from want, meaning economic security and healthy peacetime life for all inhabitants everywhere in the world; and freedom from fear, translating into world-wide reduction of armaments so that no nation should be capable of physical aggression [45]. This message was precursor to the *Lend-Lease Act* of March 11, 1941, which would buoyed the United Kingdom under the Nazi onslaught until the U.S. could be pulled in, as clearly wished Roosevelt[46].

While this would be an excellent moment for realists to exercise their cynicism, this statement and its translation into an act of support for the United Kingdom clearly states a policy that the American president intended to pursue – and which he did. Furthermore, it did not stay as a message to Americans. On August 10, 1941, Roosevelt met with Prime Minister Winston Churchill off the coast of Newfoundland. From their meeting at sea emerged a document that became, for all intents and purposes, the policy statement of the entrance into war of the United States as an ally of the United Kingdom. A joint declaration followed, the *Atlantic Charter*, on August 12, 1941. Its clear statement of alliance of the Anglo-Saxon world is undeniably made against "aggression" and the "Hitlerite Government of Germany" calling "after the final

[45] Borgwartz, Elizabeth, "When you State a Moral Principle, you are stuck with it", Virginia Journal of International Law 46 (2005-2006): 501-562 at 517.

destruction of Nazi tyranny (…) assurance that all men in all lands may live out their lives in freedom from fear and want" and that respect for "the right of all peoples to choose the form of government under which they live"[47]. This might seem just a principled declaration, but as the aptly title article of Elizabeth Borgwatz states: when you state a moral principle, you are stuck with it. And here, the United States and United Kingdom did not just state the kind of right they desired to see after the conclusion of the war in order to avoid the mistake of 1919. The *Atlantic Charter* affirmed the rights as they apply not to States but also to "peoples" and to "all men in all the lands".

It is important to remember here that the United States was not officially part of the hostilities and yet already the *Atlantic Charter* establishes the moral justification for supporting the combative United Kingdom against the Nazi steamroller. And this justification was not for states to enjoy prestige or dominate as classical realism would want it in international relations' theory; instead, it was a statement to provide collective security and personal enjoyment within this prospective system. Through a liberal approach, it was building the argument as to the justness of the entrance into war when the time would come for the United States, answering to the *jus ad bellum* principle of the Just War tradition.

The problem with having just cause for entering a conflict is that it does not necessarily equate with justly conducting the hostilities once entered. And the tradition of justness is to be understood as being rightly conducted as opposed to wrongly conducted. Within the Just War theory Michael Walzer argues that the two sets of principles of the just war tradition are "logically independent. [Therefore] It is perfectly possible for a just war to be fought unjustly and for an unjust war to be fought in strict accordance with the rules."[48]

As a result, an unjust combatant is one that legally is a combatant but who fights on the side of a state not having met the criteria of *jus ad bellum* – therefore fighting for an unjust cause - while a just combatant is one that fights on the side of a state having met these criteria and therefore fighting for a just cause. Since *jus in bello* is independent of *jus ad bellum*, it therefore makes no difference as to the permissibility of an "unjust combatant" to fight; it is then the conduct in the fight that matters. This is a view criticised by some, certain authors deeming the conclusion untenable, but which is nonetheless largely accepted by armed forces and governments across the world[49].

In the case of the *Atlantic Charter*, while discussion ensued then as to its interpretation and the aim for the globalization of the rights and freedoms it proposed and contained, it can be stated as a minimum that these goals are certainly more a justification than the 'Hitlerite' demands that led to the invasion of Poland. And since its statement was in existence prior to Imperial Japan's attack on American forces in the Pacific, one can safely extend its concepts to the aim of defeat of the Empire of Japan during the Second World War. As such, just cause can be attributed to

[47] *The Atlantic Charter*, 14 August 1941.

[48] Walzer, Michael, *Just and Unjust Wars,* Harmondsworth: Penguin, 1977 at 21.

[49] McMahan, Jeff, "The Ethics of Killing in War", *Ethics* 114 (2004): 693-733 at 693.

the United States armed forces and its combatants.

Accepting that combatants on both sides were perceived as legitimate combatants, both under international law of the time and under the independent understanding of the just war tradition, the justness of their cause nonetheless evokes different reactions and even more so when compared with the conduct.

The accepted benchmark is the LOAC and provides a set of rules as to the manner in which one may cause harm to physical integrity, including the arbitrary denial of the right to life, as well as harm to property, both private and public. Its whole premise rests on the principle of humanity and this is enacted by something seen as "a triumvirate equation under which military necessity is framed by the prohibition of unnecessary suffering during the proportionate application of military force, in an effort to 'humanize' a reality"[50].

One argue that in the case of the Second World War, for United States military, there seems to have been a convergence between the stated aims of the conflict prior to its government declaring its entrance into it and the fundamental reasons motivating the pursuit of the these goals. The conflict was seen by Roosevelt as the entrenchment of rights and freedoms for "all men in all lands" and therefore gained the higher moral ground from which to operate. Furthermore, as the victim of an armed aggression upon its armed forces in a belatedly declared war, the United States was given the entire grounds of *jus ad bellum* to react while Japan ran afoul of established conventions by declaring the war belatedly and by committing an act of aggression.

The *Atlantic Charter* not only incorporated Roosevelt's 'Four Freedoms', but also provided for a statement of political rights as core values of the reason why the war would be fought, a vision of individuals in a new system of collective security as opposed to the previous one composed solely of the interests of states and emphasising the application of these principles domestically as much as internationally. All these elements "continue to inform our conception of the term 'human rights'"[51]. Simply said, the Allies defined its war in terms of a fight for human rights. The Axis did not.

At its roots, the principle of humanity rests precisely on the very first right of "all men in all lands": the right to life. And the application of this very principle is fundamental to apply towards those who are *innocents*, in the Latin sense of the words 'not *nocentes'*. *Nocentes* means "those who injure or are harmful". By contrast, *innocents* are: those who do not injure or are harmless. In the just war tradition, the innocents are therefore "morally immune" to attacks. Their status in the just war tradition is translated in the LOAC in the distinction between combatants, who are *nocentes*, as they do pose a threat and therefore lose their immunity and are liable to attacks, and 'not *nocentes*', the *innocents* who are noncombatants because they do not pose a threat[52].

---

[50] Solomon, Solon, "Targeted Killings and the Soldier's Right to Life", *International Law Student Association Journal of International & Comparative Law* (2007): 99-120 at 105-106.
[51] Borgwartz, *supra,* note 44 at 506.
[52] McMahan, Jeff, *supra,* note 48 at 695.

Yet, as opposed to contemporary international human rights where the right to life cannot be arbitrarily denied[53], the LOAC does provide for arbitrary deprivation of this right – for combatants and noncombatants alike. The proposition is not contrary to the existing LOAC: indeed, the LOAC provides clearly for the criteria of proportionality, whereby an attack on combatants that is deemed a military necessity becomes justifiable if it provides for economy of force even if collateral damage in terms of noncombatants is expected. The criteria of proportionality demands that the military advantage gained from the attack is superior to the expected noncombatant casualties. The facts that miscalculation occurs and that collateral damages are much greater than anticipated are not at issue: it is the expectations prior to the attack being executed that matter (including during the attack if knowledge of disproportional noncombatant casualties become available). As long as noncombatants were not directly targeted and the expectation of proportionality was respected, it is permissible to deny arbitrarily noncombatants of their right to life[54].

And here is where the professional soldier must think beyond the narrow confines of the LOAC, even though he is trained precisely in its application in the course of his professional activities, namely waging warfare upon the enemy combatants. As a professional soldier one must remember that while subjected to the LOAC, the soldier also remains an agent of the state and must continue to apply international human rights law, which is not suspended from their application during an armed conflict, with the exception of the provisions that are permitted to be suspended under customary and treaty law and that are effectively stated as being suspended. However, said soldier should know that there are international obligations, for which he or she, as an agent of the state subject to international law and who will be held to account for transgressions of this body of law, that are present prior to the existence of an armed conflict and which continues during the time of conflict and which will further continue to exist after the conclusion of this conflict.

For Canadian military members deployed abroad, the LOAC certainly applies. But so does the *International Covenant on Civil and Political Rights*, which is binding on states and therefore necessitates its agents to conform to its application that clearly states that certain rights continue to apply even in times of public emergencies threatening the existence of the nation. Among these, the right to life, as we have seen, is paramount. Some positivist jurists will immediately signal that the *Covenant* only applies to "State Party to the present Covenant [and thereby has them] undertakes to respect and to ensure to all individuals *within its territory* ***and*** *subject to its*

[53] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368, *entered into force* Mar. 23, 1976, accession by Canada 19 May 1976, at article 6, especially 6(2) which stipulates that: "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court".

[54] Solomon, *supra,* note 49 at 104.

jurisdiction the rights recognized in the present Covenant"[55]. Their interpretation of this sentence is that both conditions must be in force for the provision of the *Covenant* to be applicable. In this manner of thinking, the result would be that even though the United States has Taliban fighters thought to also be Al-Qaida operatives under its jurisdiction in Guantanamo Bay, its Attorney General argued that it was not on its territory and therefore these provisions did not apply[56].

In true Alberto Gonzalez fashion (the very same author of the infamous "torture memo" justifying the use of techniques in clear breach of international prohibition of torture under both international human rights law and the LOAC, as well as under U.S. laws and which have since been debunked[57]) this argument conveniently ignores previous precisions by the United Nations Human Rights Committee, which is the international body responsible for the implementation of the *Covenant*. The Committee clarified the sentence and affirmed: ""a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party" and that the International Court of Justice in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* recognized that the jurisdiction of States is primarily territorial, but concluded that the *Covenant* extends to "acts done by a State in the exercise of its jurisdiction outside of its own territory"[58].

The International Court of Justice's decisions are binding and of the highest possible level of legal expertise [or do you mean authority vice expertise]. As a result, one is to accept the concept that the *Covenant* is indeed binding on states, even outside of their territory, where they have anyone within their power or under their effective control – even if not situated within the territory of the state at concern[59]. This includes counter-insurgency operations after an invasion or when operating by invitation of a state, such as in Iraq or in Afghanistan.
Having established that there is an interdependence between the LOAC and international human rights law, we come to the conclusion that a state's agent member of its armed forces must abide by the provisions set by international instruments such as the *Covenant* and apply non-derogable human rights at all times, subject only to the *lex specialis* that is the LAOC, since as a general rule of law the specialised law will take precedence of the general (or more generally applicable) law.

---

[55] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368, at article 2.
[56] "Reply of the Government of the United States of America to the Report of the Five UNHCR Special Rapporteurs on Detainees in Guantanamo Bay, Cuba", *International Legal Material* 45 (2006): 742-767 at 743.
[57] See Rouillard, Louis-Philippe F., "Misinterpreting the Prohibition of Torture under International Law: The Office of Legal Counsel Memorandum", *American University International Law Review*, 21 1 (2005):. 9-42.
[58] Human Rights Committee, *General Comment No. 31* (2004), CCPR/C/21/Rev.1/Add.13,para. 10 and the International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, I.C.J. Reports 2004 (9 July 2004), where the ICJ reached the same conclusion with regard to the applicability of the Convention on the Rights of the Child (para. 113). As far as the Convention against Torture is concerned, articles 2 (1) and 16 (1) refer to each State party's obligation to prevent acts of torture "in any territory under its jurisdiction". Accordingly, the territorial applicability of the Convention to United States activities at Guantánamo Bay is even less disputable than the territorial applicability of ICCPR, which refers (art. 2 (1)) to "all individuals within its territory and subject to its jurisdiction".
[59] Commission on Human Rights, *Situation of detainees at Guantánamo Bay*, E/CN.4/2006/120, 27 February 2006, , Sixty-second session, Items 10 and 11 of the provisional agenda, at p. 6, para 11.

Therefore, the right to life cannot be arbitrarily denied to an individual by an agent of a state under international human rights law, unless superseded by the imperative of a specialised law which permits such denial. The LOAC permits this explicitly, but only under the constraints of its over-arching principle of humanity, through the application of the principles of military necessity, proportionality and discrimination between combatants and noncombatants.

But the right to life is not the only right protected by international human rights law. Other rights which cannot be suspended from being exercised are[60]: the protection against torture, cruel, inhuman and degrading treatments[61], the protection against slavery and servitude[62], the imprisonment on the ground of inability to meet contractual engagement[63], the protection against not being condemned for crimes that did not exist at the time of commission whether under national or international law[64], recognition before the law[65] and freedom of thought and of religion[66].

But, if a final doubt existed as to the application of human rights during armed conflicts, including universal[67] and regional human rights[68], one only needs to read the International Court of Justice decision in its Advisory Opinion on the *Legality of the threat or Use of Nuclear Weapons*[69].

---

[60] *International Covenant on Civil and Political Rights, supra,* note 56 at article 4(2) : 2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

[61] *Ibid.* at article 7, and which include protection against medical or scientific experimentation without free consent.

[62] *Ibid.* at article 8(1) and (2).

[63] *Ibid.* at article 11.

[64] *Ibid.* at article 15.

[65] *Ibid.* at article 16.

[66] *Ibid.* at article 18.

[67] Understood as the International Bill of Human Rights from the United Nations: *Universal Declaration of Human Rights*, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948); *International Covenant on Economic, Social and Cultural Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976; *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights,* G.A. res. 63/117 (2008); *Open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights,* U.N. Doc. A/HRC/8/WG.4/3 (Apr. 4, 2008); *International Covenant on Civil and Political Rights,* G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976; *Optional Protocol to the International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, *entered into force* March 23, 1976; *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, G.A. res. 44/128, annex, 44 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/44/49 (1989), *entered into force* July 11, 1991; *United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc. E/CN.4/1985/4, Annex (1985).

[68] Such as those of the human rights instruments contained in the treaties, declarations and conventions of the Organisation of American States, the Council of Europe, the European Union and that of the African Union.

[69] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 79 (July 8) at paragraph 25: "25. The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis,* namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself."

Further, application of precise concepts of human rights law is recognised through the developing field of international criminal law. Canada has accepted the jurisdiction of the International Criminal Court and that of the *Rome Statute*, which it has internalised and rendered opposable to its agents by means of the *Crimes Against Humanity and War Crimes Act*[70]. For Canada's agents, as well as for any person subject to its jurisdiction, including government civilian employees, police personnel and service personnel, the act recognises three types of crimes under international law for which its agents might be prosecuted: genocide; crime against humanity; and war crimes. Although the crime of aggression is include in the *Rome Statute*, as it has yet to be defined it is not integrated into the national order at this time but remains a matter of international law under customary law.

For our purpose, internalising an international treaty into national law is the act by which a state makes international law applicable to persons under its jurisdiction. As the *Rome Statute* incorporates crimes recognised by the LOAC and some also recognised under international human rights law, including crimes that are recognised as such under customary law, its is clear that for all Canadian service personnel at the very least, both under international and national law there are obligations part of the LOAC and of international human rights law that must be respected.

The final element that allows for the interaction of the LOAC with international human rights law is the LOAC itself. Through its adoption of the *Marten's clause*, which is a statement of humanity attributed to Fyodor F. Martens, the Russian representative at the *Hague Convention* of 1899, and which was slightly modified in the *Hague Convention* of 1907 and reprised in another modified form in the *Geneva Conventions* of 1949[71]. In this last form, its states: "(…) Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience." While there remains a debate as to whether this is to be interpreted liberally or restrictively, the final part of the statement clearly links international law applicable in armed conflict with the precepts of public conscience – therefore of morally acceptable conduct, regardless of the LOAC being applicable by and of itself. As a result, it is clear that as agents of the state, military members must know the requirement for them to apply the very minimal norms contained in such international instruments. Training pertaining to the LOAC is provided in most armed forces, but very little is said of human rights obligations.

Yet, this is important. As explained above, entrance in an operational theatre – whether in a peacekeeping role, a peacemaking one, a nation-building coalition, a "war against terrorism", an international armed conflict or in support operations by invitation of a foreign government – is,

---

[70] *Crimes Against Humanity and War Crimes Act*, R.S.C. 2000, c. 24.

[71] *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*. Geneva, 12 August 1949 at article 63 *in fine*; *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*. Geneva, 12 August 1949 at article 62 *in fine*; *Convention (III) relative to the Treatment of Prisoners of War*. Geneva, 12 August 1949 at article 142 *in fine* and *Convention (IV) relative to the Protection of Civilian Persons in Time of War*. Geneva, 12 August 1949 at article 158 *in fine*.

for liberal democracies, most often justify on the very premise that armed forces are sent to stop gross and widespread violations of human rights and to guarantee the future exercise of these very human rights though the establishment and support of a democratic government. In short, the justification is provided on a moral – not solely a legal – basis.

When carried out within the collective security system that has been in force through the United Nations since 1945, this provides political and legal legitimacy as well as a moral justification for the use of force and the possibility of arbitrary denial of the right to life, and other infringements of physical integrity and of personal or public property, in accordance with applicable legal norms as understood under the LOAC, even if contrary in principle to international human rights law. For military members to comprehend their obligations under international human rights law when deployed is to comprehend something more: the moral justification for their deployment in the first place. This creates the moral context framing the thinking of service personnel and represents a capital advance [awkward phrasing] in the formulating of the mission. Instead of a political statement issued by the government stating the political goal of the use of armed forces, for service personnel it becomes the moral and legal basis upon which their role in the deployment rests. This, in turn, ensures the alignment of the moral and legal goals in all actions and decisions taken on the ground by the real "operators".

If framed in this perspective, then international human rights law becomes the overall frame of operations, and the LOAC the operative legal basis within the bounds of which service personnel are to conduct themselves in the attainment of the larger objective of guaranteeing the exercised of universal and regional (if applicable) human rights. This, in turn, provides the moral guidance under which all operations are conducted.

As such, if actions and decisions made in the course of operations are in contradiction with the stated aim of bringing a larger enjoyment of human rights or if the methods proposed to bring this enjoyment of human rights are contradictory to human rights in the first place, then it becomes clear that either the stated political goal is dissonant with the public conscience or that the actions as well as the decisions taken in the attainment of these goals are dissonant with the public conscience and should not be committed.

The link between this understanding and committing unethical behaviour cannot be overstated. If a conflict is framed in another manner that does not include human rights at its basis and its respect, through international human rights law and the LOAC as a mode of operations, then the critical thought process of military planners and operators will also be framed through another prism and will influence decisions and actions with diminished (or no) consideration for the minimal norms applicable to conduct and will most likely lead to unethical conduct that will disgrace the military, or part thereof, and impact on the trust of citizens toward their institutions and uniformed citizens.

The Importance of the Ethical climate and its Setting by Those with Vested Authority

The reasons why service personnel may commit acts of unnecessary violence, thereby violating positive legal norms as set in the LOAC or international human rights law, or commit acts defying public conscience, are more or less understood. There are most certainly elements of human psychology (predispositions, needs), sociology (notably anthropological group interaction dependent on cultures and sub-cultures) that creates the conditions that could become permissive to such conduct.

Some such conditions start from the general. Indeed, Colonel (Retired) David Grossman in his books *On Killing* and *On Combat*, makes a point to state that 1% to 2% of society are sociopaths or psychopaths of varying degrees. It stands to reason that they may be drawn toward some aspects of military service. Yet, soldiers are not permitted to stray from the unit's mission and go on a personal rampage. Therefore, we can deduce that authority and discipline can restrain and constrain such tendencies to a certain degree.

Context and authority intrinsic to the chain of command are other factors. The Milgram experiments have clearly shown the propensity of persons put in position of authority – even in a fictional context – to become brutal even without outside pressures – apart from boredom[72]. While this lends credence to a military truism about soldiers having nothing to do, it would hardly seem sufficient to explain disgraceful conducts such as those of Bagram and Abu Ghraib. And yet, this is exactly the context of the Milgram experiment.

And sub-culture can certainly be a factor. Psychologists contend that humans are 'herd animals' and that in groups, such as in armed forces, the individual "is submerged in group acts in which" they have little investment, creating a 'group mind'. In a less fancy phrasing: peer pressure is intense[73]. And in the case of 'specialist units' – the elites – it is argued that "externally directed aggressive behaviour, which enjoyed a maximum of group condonence, tended to relieve the individual of any feeling of vulnerability"[74].

I addressed some of these psychological and sociological sources, as well as others, in previous writings[75], and their validity appears to be supported by experience. Many authors have commented on the cause of inglorious behaviour, and most are more than likely right in some way or another as to the convergence of factors that can lead to unethical actions being committed or decisions being taken. The question is to know what preventative measures can be implemented to diminish the odds of occurrence of actions that would contradict the established set of defence values.

This can be couched in theoretical terms, whereby the solution would be to adopt as a frame of

---

[72] Mackmin, *supra,* note 35 at 81.
[73] *Idem.*
[74] *Idem.*
[75] Rouillard, Louis-Philippe, *Precise of the Laws of Armed Conflicts: With Essays Concerning the Combatant Status of the Guantanamo Detainees and the Statute of the Iraqi Special Tribunal*, Lincoln NE: iUniverse (2004) at Chapter 13.

reference either utilitarianism, having civilian employees of defence departments and service personnel of armed forces focus on achieving good consequences from a conflict or by adopting the deontological approach of Kant, by which it is one's duty to ensure ethical conduct in an armed conflict[76]. In the first, ethical actions brings out good results and uses individual to secure good consequences. In the second, the concept of duty demands ethical action for their own sake and people are to be treated as always with respect, not as means to an end, as a primary moral imperative.

But there is a more practical – that is, applied – method of doing this; the instilment of the highest moral standards and indoctrination in applied ethics for all current and new service personnel and civilian employees working for the defence departments and armed forces. In the Canadian system, this is precisely the approach taken through its Defence Ethics Programme. It does not answer to a single set of theoretical framework, but rather adopts a larger values-based and distributed on-going programme of indoctrination.

And this is perhaps one of the better methods of bringing service personnel and civilian employees to adopt an ethical stance in their actions and decisions. If anything, according to Brigadier-General H.R. MacMaster who wrote as ISAF HQ Staff very recently, it does correlate with proposed theories such as that of Jim Frederick in his book *Black Hearts* (Frederick, 2010), where he presents the following four factors as leading to unethical conduct[77]: ignorance; uncertainty; fear; and combat trauma.

One can see that the premise that the environment influences the risk of unethical conduct is subscribed to by both authors, and it is also the belief of this author that together they form a large portion of the factors contributing to a permissible context that slides into unethical conduct.

To inoculate soldiers against this, Brigadier-General MacMaster proposes a concerted effort in four areas: applied ethics or values-based instructions; training that replicates as closely as possible situations that soldiers are likely to encounter; education about culture and historical experience of the people among whom a conflict is being waged; and lastly leadership that strives

[76] McMaster, H.R., "Remaining True to Our Values - Reflections on Military Ethics in Trying Times", *Journal of Military Ethics* 9.3, (2010): 183-194 at 187 and 188.

[77] *Ibid.* at 187-188, as stated in MacMaster : First - ignorance. Ignorance concerning the mission, the environment or a failure to understand or internalize the warrior ethos or professional military ethic. This results in the breaking of the covenant or sacred trust that binds soldiers to our society and to each other; Second - uncertainty. Ignorance causes uncertainty and uncertainty can lead to mistakes, mistakes that can harm civilians unnecessarily. Warfare will always remain firmly in the realm of uncertainty, but leaders must strive to reduce uncertainty for their troopers and units;

Third - fear. Uncertainty combines with the persistent danger inherent in combat to incite fear in individuals and units. Leaders must strive not only to reduce uncertainty for their troopers, but also to build confident units. Confidence serves as a bulwark against fear and fear's corrosive effect on morale, discipline, and combat effectiveness; Fourth - combat trauma. Rage is often a result of combat trauma. Fear experienced over time or a traumatic experience can lead to combat trauma. And combat trauma often manifests itself in rage and actions that compromise the mission.

to set the example, keep soldiers informed and manages combat stress[78].

There is no doubt that training will help reduce fear and combat trauma, while education of cultural and historical experience of the country's inhabitants will address the question of ignorance. However, the point regarding uncertainty is not entirely covered in and of itself. Certainly, when speaking of leadership and keeping soldiers informed, this contributes to reduce uncertainty. Yet, it is perhaps not only the uncertainty in the conflict that is so much at play – although for personnel on the ground it is surely the primary factor – but uncertainty about the reasons of the mission and the commitment of service personnel and of civilians also has a part to play.

As with the example of the *Atlantic Charter* during the Second World War and its insertion in the moral and legal continuum that frame the conflict, certainty as to the moral foundations of a conflict has its part to play and transcends the concept of humanity found in the just war tradition. And this humanity is transposed not only in dealings with the general population and with enemy forces, but also the humanity for a state's own armed forces.

One of the responsibilities of persons vested with authority, from a private first class or a lance-corporal to a marshal, is to preserve his or her own troops. This means of course the application of the military concept of economy of force, whereby one does not sacrifice unnecessarily personnel and materiel. But it is also means to preserve the individuals forming this troop; the preservation of their own humanity.

As I wrote previously[79], admittedly without empirical data, and which is also said by other authors, there is a contention that whether justified or not under *jus ad bellum* and *jus in bello*, as well as being morally justified, the act of killing damages one's humanity[80].

In order to protect this humanity, it is the responsibility of the leadership, at all levels, to act in a manner that guides service personnel, even in the direst of situations. Leaders must take a proactive stance and enact orders and directives that clearly acknowledge the context in which they must act and clearly state the restraints and constraints imposed by their values-based ethical system.

It is not a coincidence that many an unethical act in an operation or an unethical decision are first create because orders where unclear. From My Lai, where ambiguity about whether Lt. Calley was 'ordered' or not to kill all he sees in the village since they were expected to be hostile, to a Sergeant in Somalia saying to Master-Corporal Matchee to do what he wants with his prisoner short of killing him, it is the imprecision of the commands given – the poor leadership shown –

[78] *Ibid.* at 188.
[79] Rouillard, *Precise, supra*, note 74 at Chapter 13. My phrasing is that it imposes a scar on the individual who commits the action, even when fully justified.
[80] French, S., "Sergeant Davis's Stern Charge: The Obligation of Officers to Preserve the Humanity of Their Troops", *Journal of Military Ethics* 8.2 (2009): 116-126 at 118.

that resulted in unethical actions at the tactical level that undermined the strategic objectives of the mission[81].

Therefore, above all else, the primary element that must be in place to prevent unethical behaviour that will undermine a mission and impact on the humanity of service personnel is to create the proper ethical climate, indoctrinating all within a defence department and the armed forces, and then imposing the best leaders that have the proper competence and the proper values-based ethical frame of reference so that he or she enforces this at all time within the leadership structure.

A true leader in command of armed forces will show commitment to the ethics of waging warfare within a framework of reference that will truly circumscribe the operations he command in terms of its effects on supporting and enabling the exercise of human rights. He of she will abide by this as it will fully respect the legal obligations of the LOAC but further reinforce the applicability of its *jus ad bellum* and *jus in bello* principles, such as military necessity, proportionality and discrimination between combatants and noncombatants, thereby protecting his or her personnel's humanity. He or she will demonstrate fortitude and courage even in the most difficult situation to enforce the values for which the armed forces are committed to the fight, thereby preserving the mission and preserving the personnel deployed. By doing this, such a leader will have created and will maintain the ethical command climate that will guide the mission.

Conclusion

As stated at the beginning, this article is solely a proposal to reframe ethical thinking, when looking at applied ethics in operations and in regard of the applicable body of law, as a framework that must be coherent with its primary objective and its means of implementation, as well as to propose a method by which to achieve this implementation through the existing international legal system, including the collective security system, the LOAC and international human rights.

Human rights are, at their core, freedoms to be exercised in accordance with the values fought for through collective or individual action. They are in constant evolution, but universal as such and therefore apply to all, in all lands. Any use of armed force should be made in the aim of permitting or re-establishing this free exercise of inherent rights based on the human person. International human rights provide the framework of operation for this enjoyment while the LOAC states the operative method by which the use of force may be engaged in support of human rights. The values proclaimed by armed forces must therefore be aligned on these very human rights, or else there will be a dissonance between the objectives and the means.

An incoherent mission contradicting this aim will create uncertainty and a faulty ethical command climate, where mission success means acquiring a piece of ground or destroying enemy forces,

[81] McMaster, *supra,* note 75 at 189.

but does not met the concerns of the political and strategic aims of the use of force.

Such a faulty ethical climate creates a permissible context of ensuring survival first, but not planning beyond the immediate end of armed hostilities. However, this in itself is incoherent. Since the use of armed forces is to impose a state of affair that would be applicable in peacetime, in example sovereignty on a territory or stopping gross and widespread violations of human rights, winning the war without implementing proper means of winning the peace is a sure-fire way to ensure prolongation of the conflict, embitterment of the general population and undermining support toward one's strategic objective.

Embarking on a mission of this type will not only leave a state with armed forces diminished through casualties, both physical and psychological, but will destroy the very humanity which its armed forces are supposed to protect and help enforce. In such interventions, the best one can expect is an "honourable end to hostilities", a signature phrasing that usually means failure to attain mission success.

Even when there is convergence between the framing of the goals and the values underlying them, the means of implementation of these goals through the use of armed force must respect the LOAC, in their larger form as accepted by the public conscience. The means must be aligned on the goals and must therefore respect our values within the confines of the proper ethical command climate.

The burden placed upon leaders to create this ethical climate is enormous; but so is the responsibility to adhere to one's values. In a western liberal democracy, the uniformed citizen cannot be of a different set of values than that the citizen, otherwise the institution is leading its own private charge in the wrong direction and contradicts the public interest.

Whether at home or abroad, the uniformed citizens are vested with great responsibility, through the devolution of trust by their government and their fellow citizens. Their values must be their first guidance and must be reflected in their application of legal norms.