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Research Essay

OPERATIONAL COMMANDERS, ORDERS AND THE RIGHT TO CHOOSE

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Advanced Military Studies Course 1

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OUTLINE

Thesis sentence: The ability of Canadian Forces Operational Commanders to carry out their mission is based on the premise that orders received and passed are not manifestly unlawful and therefore in accordance with the Law of Armed Conflict; however if, in the judgement of the Operational Commander, the orders received do not conform to the Law of Armed Conflict, then does not the Commander have the obligation to question that order and/or act as he sees fit.

- I. Legality of the Chain of Command and Rules and Orders.
 - A. Legality of the Chain of Command.
 1. Control of the Military by Civilian Authorities.
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THE LAW OF ARMED CONFLICT

INTRODUCTION

Vietnam, 16 March 1968.

The action for Company C began at 7:30 as their first wave of helicopters touched down near the subhamlet of My Lai 4. By 7:47 all of Company C was present and set to fight. But instead of the Viet Cong Forty-eighth Battalion, My Lai was filled with the old men, women, and children who were supposed to have gone to market. By this time, in their version of the war, and with whatever orders they thought they had heard, the men from Company C were nevertheless ready to find Viet Cong everywhere. By nightfall the official tally was 128 VC killed and three weapons captured, although later unofficial body counts ran as high as 500.¹

Iraq, January 1991.

The Green Beret commandos' secret mission had taken them 150 miles inside Iraq to spy on Saddam Hussein's Army. A Bedouin shepherd walked by the camouflaged holes the A-team had dug for

¹ Kelman, Herbert C. and Hamilton V. Lee. Crimes of Obedience. New Haven and London: Yale University Press, 1989. 3-4.

itself. Sgt 1/c [First Class] Troy Colson popped up a periscope from his hole. 'He saw us' Colson whispered to his teammate, Sgt 1/c Gary Seideman. 'Should I shoot him?' 'No' said Seideman 'he's not a combatant.' The shepherd ran away screaming.

Within minutes Iraqi soldiers surrounded the team.²

Two different wars, two different outcomes. In the first instance, Lieutenant William Calley, and soldiers under his command, massacred as many as 500 villagers at My Lai. Calley himself was originally charged with 109 of the killings. At his court martial Calley stated: "I felt then and I still do that I acted as I was directed, and I carried out the orders I was given, and I do not feel wrong in doing so, sir."³ Lieutenant Calley's court martial found him guilty of 22 killings.⁴

In the second incident "Placing a greater value on that life [the Bedouin's] than their own, these men [the Green Berets] could only watch and wait as the Bedouin drew the attention of a nearby Iraqi force that immediately encircled their position."⁵ More about this incident later.

² Zumwalt, James G., II. "The 'Law of War' – Bringing Civility to the Battlefield." Marine Corps Gazette 79 (February 1995). 45.

³ Kelman 11.

⁴ Kelman 4-5.

⁵ Zumwalt 45.

“I was only following orders” or “I acted based on what I thought was right” are comments that commanders and soldiers have used to justify their actions, lawful and/or unlawful, during periods of armed conflict. These commanders and soldiers may have acted in a manner that they thought was right. They may also have obeyed and/or disobeyed orders based on their own ideas of right and wrong, but, can soldiers, especially commanders, choose the orders they wish to obey? Must commanders and soldiers follow the orders of the chain of command?

In this paper I will examine the legality of the chain of command and by extension the lawfulness of the orders issued by the chain of command. I will also examine the responsibility of commanders and soldiers to the chain of command. The question of what constitutes an unlawful order will be covered and what a commander or soldier is to do if they receive an unlawful order. I will examine some historical examples from World War II and recent Canadian military operations and conclude by answering the question ‘Must commanders and soldiers follow the orders of the chain of command?’.

Legality of the Chain of Command

The authority, accountability and responsibility of the chain of command are based on the rules and regulations governing the Canadian Forces (CF). These are clearly enunciated in the National Defence Act (NDA), Queen’s Regulations and Orders (QR&O) and other statutes such as the Financial Administration Act. The authority, accountability and responsibility of the chain of command was succinctly stated in a 1997 report on

‘Authority, Responsibility and Accountability’ which the then Minister of National Defence (MND), The Honourable M. Douglas Young, P.C., M.P., delivered to the Prime Minister.⁶ This report stated in part:

The relationship between the armed forces and the political executive is a complex one in any democracy. Understanding the nature of that relationship is essential to understanding the workings of the military and civilian structures that direct, guide and support the armed forces. The fundamental principle governing this relationship is control of the military by civilian authorities.⁷

The report went on to say that:

The Chief of the Defence Staff [CDS] is appointed by the Governor-in-Council on the advice of the Prime Minister. The CDS also has a special relationship to the Governor General who, as the Queen’s representative in Canada, exercises virtually all of her powers under the Constitution and, therefore, serves as Commander in Chief of the Canadian Forces. Thus there is in formal terms, though not in practice, a direct “line of command” from the Head of State through the CDS to all officers who hold

⁶ Young, The Honourable M. Douglas, P.C., M.P. Report to the Prime Minister. Authority, Accountability and Responsibility. Canada. Department of National Defence, 1997. 1.

⁷ Young 1.

the Queen's Commission and, through them, to all members of the Canadian Forces.⁸

The civilian authority is embodied in the MND, who as an elected Member of Parliament, is responsible to the Prime Minister and to Cabinet. The "...CDS is accountable to the Minister [MND] for the conduct of CF activities, as well as for the condition of the Forces and their ability to fulfill military commitments and obligations undertaken by the government."⁹

In the report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia, Justice Letourneau and his fellow commissioners also reinforced the legality of the military chain of command. They stated:

The chain of command in the CF as set out in the NDA and regulations is unambiguous. Beginning with the CDS, it links superior officers of the CF to every individual member of the CF. The NDA stipulates how lawful orders are to be passed down in the CF; that is, from superior to subordinate members. The regulations compel subordinates to obey any commands and orders that are not manifestly illegal [unlawful]. Furthermore, the law, regulations, and custom of the service imply that superior officers will oversee carefully the execution of lawful commands, orders,

⁸ Young 8.

⁹ Young 9.

and directions, for to do otherwise would be prejudicial to good order and discipline within the CF and a dereliction of duty. The chain of command therefore defines accountability and responsibility within the CF, because it indisputably links individuals with authority and responsibility to other individuals with lesser levels of authority and responsibility.¹⁰

It is thus through this chain of command, control, responsibility and authority that the CDS ensures the execution of government decisions involving the CF. He does this by issuing appropriate orders and instructions that are carried out by the chain of command. These orders and instructions apply equally in non-conflict and conflict situations and the duty of the chain of command to carry them out is unequivocal.

Therefore, when the CDS issues his orders and instructions to the chain of command he has a legal basis as well as an expectation that his orders and instructions will be carried out. Commanders have a legal responsibility to carry out the CDS' directions. They do not pick and choose those orders and instructions they wish to obey. Those in the chain of command who disobey, ignore, or modify the orders and instructions, for whatever reason, risk undermining the operational effectiveness of the CF, subverting the system and ultimately being held accountable for their actions under the NDA.

¹⁰ Dishonoured Legacy The Lessons of the Somalia Affair. Volume 1. Ottawa, Canada: Minister of Public Works and Government Services Canada, 1997. 73.

As well as the rules and regulations mentioned above, members of the CF are also subject to other rules and regulations. As Canadian citizens they are subject to the Criminal Code of Canada. On deployments they may find themselves subject to United Nations prescriptions, the Law of Peace, the Law of Armed Conflict,¹¹ international law and the laws of foreign nations, as well as political and diplomatic considerations.

The responsibility of the chain of command and the responsibility of commanders and soldiers to follow directions and orders issued by the chain of command are laid down in Canadian law and the NDA. It is quite clear that those in the chain of command must carry out the lawful orders they receive and further, must ensure that their subordinates carry out the orders they receive. To do otherwise would jeopardize the chain of command and the CF's ability to carry out the directions of the Canadian Government.

Lawful Orders

To adequately carry out the orders and direction of the chain of command, a commander must know what is lawful or what is unlawful. The commander must be clear in his own mind and must be sure that his soldiers are clear in their minds as to what is right and what is wrong. Lieutenant Calley was clear in his own mind as to what he thought was right. However, some of the soldiers in his platoon did not seem to agree with his interpretation of what was right.¹² As well, his court martial did not agree with his

¹¹ Use of Force in CF Operations, B-GG-005-004/AF-005. Volume 1. Ottawa: National Defence, 1997. Pg. 1-1 – 1-2.

¹² Kelman 143. "Pfc. James Joseph Dursi testified, when asked if he fired when Lieutenant Calley ordered him to: No I just stood there."

subjective morality, and he was punished. Calley was punished because he did not understand that there were rules that governed the conduct of war, the Law of Armed Conflict [Law of War]. He did not understand that as a soldier, and more importantly, as a commander, he was responsible to follow the Law of Armed Conflict, and just as importantly, as a commander ensure that his soldiers followed the Law as well.

Michael Walzer and The International Committee of the Red Cross (ICRC) state that "... it is the commander's duty to ensure observance of the law of war [Law of Armed Conflict]. Every leader is responsible for giving instruction to his men and for their behaviour in action."¹³ ¹⁴ Walzer further states that "War is distinguishable from murder and massacre only when restrictions are established on the reach of battle."¹⁵

According to Walzer and the ICRC, it is clear that commanders are responsible for their soldiers and for ensuring that they and their soldiers have been trained and act in a manner that will not discredit them or their country. Therefore commanders must be diligent in the education of their soldiers in what is lawful, what is unlawful, and what is acceptable conduct. Furthermore it is incumbent upon the chain of command to ensure that their soldiers are disciplined and do not act in an unlawful manner. This requirement for commanders and soldiers to act in a manner that will credit themselves and their country is summed up in the Soldier's Rules enunciated by the ICRC, especially the first

¹³ Walzer, Michael. Just and Unjust Wars. United States of America: BasicBooks, 1977. 42.

¹⁴ De Mulinen, Frederic. The Law of War and the Armed Forces. Geneva: International Committee of the Red Cross, 1978. 22

¹⁵ Walzer 42.

which states: ***“Be a disciplined soldier. Disobedience of the laws of war dishonours your army and yourself and causes unnecessary suffering; far from weakening the enemy’s will to fight, it often strengthens it.”***¹⁶ (Emphasis mine.)

Within the Canadian Forces the Government of Canada sets the standard which determines whether orders are manifestly unlawful. As well, commanders and soldiers are expected to apply the values of their country. Commanders and soldiers are taught what those Canadian values are through training and an understanding of the orders, regulations and laws that their country believes in and follows, including the Law of Armed Conflict. These values have been embodied in the recently published Code of Conduct for CF Personnel. This document was produced to “ensure CF members carry out their duties and responsibilities in accordance with the Law of Armed Conflict.”¹⁷

The Law of Armed Conflict is predicated on the Geneva Conventions and their additional Protocols along with historical precedent and international legal rulings. In his book, The Contemporary Law of Armed Conflict, Professor Green states that: “The purpose of what is known as the law of war – *jus in bello* – is to reduce the horrors inherent therein to the greatest extent possible in view of the political purpose for which war is fought,

¹⁶ De Mulinen 27.

¹⁷ Code of Conduct for CF Personnel. Ottawa: Department of National Defence. Office of the Judge Advocate General, July 1998 Edition. 1-2.

namely to achieve one's policies by victory over one's enemy."¹⁸

Walzer, in his discussions of the Law of Armed Conflict, breaks the Law down into "...two clusters of prohibitions attached to the central principle that soldiers have an equal right to kill. The first cluster specifies when and how they can kill, the second whom they can kill."¹⁹ An understanding of the Law of Armed Conflict is a basic foundation for sound operations. Colonel Eric L. Chase sums it up when he states: "Lawless behaviour during war is arguably the greatest impediment to post-conflict stability. It even prolongs or reignites hostilities. Hence, both adherence to the law of war and its enforcement should be components of war making policy and grand strategy."²⁰ As De Mulinen states: "Respect for the law of war is a matter of order and discipline. It is the responsibility of leaders to give effect to it and to take it into account in the missions assigned to their subordinates so that recourse to military necessity will remain exceptional."²¹

It is clear that commanders are responsible for their own actions and for the training, discipline and actions of their soldiers. As well it is clear that soldiers have a personal

¹⁸ Green, L.C. The Contemporary Law of Armed Conflict. New York: Manchester University Press, 1993. 14.

¹⁹ Walzer, Michael 41.

²⁰ Chase, Eric L. "Where Policy, Grand Strategy and Justice Meet: A War Crimes Court for the New World Order." Strategic Review 21 (Spring 1993): 31.

²¹ De Mulinen 44.

responsibility for their own actions in accordance with their national military and civilian rules and regulations as well as the Law of Armed Conflict.

Lieutenant Calley failed himself and his men in this respect. He and they did not apply either the Law of Armed Conflict or the laws of their own country. As stated by De Mulinen, Calley and his soldiers fit into the category of:

Men trained to do battle and ready if need be to lay down their lives in the accomplishment of their duty [and who] do not wish to be encumbered with regulations which to their minds are just fanciful theories propounded by jurists who have no idea of the military realities. At best, even though soldiers might perhaps be inclined to observe certain elementary humanitarian principles, they are not sure that their adversaries will do likewise and they consequently yield to the urge to consider themselves free of any such obligation.²²

One does not necessarily have to agree with De Mulinen to understand that it is essential for commanders and soldiers to have a clear understanding of the Law of Armed Conflict. Calley and his soldiers did not. It is incumbent upon Canadian commanders and soldiers to learn, understand, and follow the Law of Armed Conflict so that they do

²² De Mulinen 19.

not find themselves in a situation similar to Calley. As Chase says: “[w]ar criminals violate the laws of each nation, and simultaneously, the law of all nations collectively.”²³

To now return to the matter of manifestly unlawful orders and the question of what constitutes a manifestly unlawful order. History provides some background in this matter. In 1474 Peter von Hagenbach was tried by an “international tribunal” for ‘crimes against humanity’. “The trial ... deserves to be considered as a forerunner of contemporary war crimes trials. It is all the more relevant because the oral proceedings at this trial centred on one of the most controversial issues of post-1945 war crimes trials: the defence of superior orders.”²⁴ The evidence against Hagenbach stated that he “... had ‘trampled under foot the laws of God and man.’”²⁵ Hagenbach and his spokesman both pleaded the defence of following a superior’s orders. “[T]he Tribunal refused this request on the grounds that to accept the defence put forward by, and on behalf of, Hagenbach, would be contrary to the law of God....”²⁶ Hagenbach was sentenced to death and before his execution he “... was deprived of his knighthood as one who had committed all the crimes it had been his duty as a knight to prevent.”²⁷ Hagenbach had carried out orders from his superior that the tribunal considered clearly unlawful. Hagenbach, as a knight, should have known better and should not have carried out the orders. Hagenbach knew

²³ Chase 31.

²⁴ Schwarzenberger, Georg. International Law as Applied by the International Courts and Tribunals. London: Stevens & Sons Limited, 1968. 462.

²⁵ Barante, A.G. de. Histoire des Ducs de Bourgogne de la Maison de Valois, 1364-1477. 1839. Vol. 9. As quoted in Schwarzenberger, 465.

²⁶ Schwarzenberger, 466.

²⁷ Schwarzenberger, 466.

what his duties were as a reasonable knight. He did not follow these duties and was punished. The orders he received were manifestly unlawful and a manifestly unlawful order is not to be obeyed.

The findings of this international tribunal were reinforced in a recent Supreme Court of Canada decision. In a war crimes case it found that:

Military orders can and must be obeyed unless they are manifestly unlawful. When is an order from a superior manifestly unlawful? It must be one that offends the conscience of every reasonable, right-thinking person; it must be an order which is obviously and flagrantly wrong. The order cannot be in a grey area or be merely questionable; rather it must be patently and obviously wrong.²⁸

Therefore we can conclude by stating that a manifestly unlawful order is one that a reasonable soldier would think is unlawful.

Rules of Engagement

In operations, commanders and soldiers are also restricted by National Rules of Engagement (ROE). The importance of ROE can be summed up in a quote from Canada's Army:

Rules of engagement (ROE) are directives issued by competent military authority that define the circumstances, conditions, degree, manner and limitations within which forces may be applied to achieve military objectives. Rules of engagement take the form of prohibitions permissions and have assumed a particular importance in operations other than war. They are lawful orders and are not merely guidelines.²⁹

Canada's Army goes on to say that:

Rules of engagement are issued with the authority of the Chief of the Defence Staff and no commander or member of the Canadian Forces may issue rules of engagement or orders that allow for permissions other than those authorized by the Chief of Defence Staff.³⁰

The Commissioners for the Somalia Inquiry stated that:

Rules of engagement are the operational directions that guide the application of armed force by soldiers in a theatre of operations. The ROE define the degree and manner and the circumstances and the limitations surrounding the application of force. To take an example that had some prominence during our hearings, the rules

²⁹ Canada' Army - We Stand on Guard for Thee, B-GL-300-00/FP-000. Ottawa: National Defence, 1998.

of engagement tell soldiers when they can fire a weapon and whether it is appropriate to shoot to kill.

The rules of engagement in effect constitute official commands. They are an expression of government policy and are promulgated by the Chief of the Defence Staff. ROE are the means by which the government ensures that military action aligns with Canadian foreign policy and legal objectives. In *R. v. Mathieu*, Mr. Justice Hugessen stated that the ROE “constitute orders to Commanders and Commanding Officers”, which is undoubtedly correct, but they are of crucial importance to soldiers in the field, since they are the clearest and most concise authoritative expression of when force can be employed. For this reason, the ROE are condensed and printed on a soldier’s card, to be carried at all times by soldiers on duty in an operational theatre.³¹

Further elaboration of ROE is found in the Use of Force in CF Operations publication. It states:

ROE have become an indispensable instrument of command and control (C2) for ordering and controlling the use of force during military operations. ROE are orders issued by competent military

99.

³⁰ Canada’s Army 99.

authority that define the circumstances, conditions, degree, manner and limitations within which force, or actions which might be construed as provocative, may be applied to achieve military objectives in accordance with national policy.³²

The importance of ROE and their legality as orders should not be in doubt. The Use of Force in CF Operations publication further states:

The Canadian Forces (CF) are an instrument of national policy and power. Therefore deployment of the CF on operations and the use of force by the CF are controlled by and subject to the authority and direction of the Canadian Government. Both national and international law require that any use of force by the CF must be controlled and limited to the extent necessary to achieve legitimate military objectives.³³

As can be seen from the above quotations, ROE are orders from the Government of Canada promulgated through the chain of command by the CDS. They are based on and limited by law. As orders they are to be obeyed by commanders and commanders are to ensure that their soldiers understand and comply with the ROE.

³¹ Dishonoured Legacy The Lessons of the Somalia Affair. Volume 1. 29.

³² Use of Force pg. 2-6

³³ Use of Force pg. 1-1.

ROE, the Law of Armed Conflict, and national and international legal prescriptions guide the operational actions of the CF and its commanders and soldiers. The impact of the law, in a military context, applies in respect of the obligation to obey commands.

Deviation from this guidance could impact on the operational aspects of a mission and discipline within units. Lieutenant Colonel Watkin summed it up in his lecture when he asked: “ROEs are orders. If they are contravened, do we take action?” The question, although rhetorical, should need no answer. Obviously the answer is – yes.

The final word on ROE goes to Lieutenant Colonel Lorenz who states: “Though often misunderstood and maligned, ROE have become an essential tool in military operations. An operation may succeed or fail on the basis of how well ROE are conceived, understood and implemented.”³⁴

Ethical Concerns

We have established there is a legal chain of command that issues legal orders and directions. We have established that commanders and soldiers are legally bound to follow these orders. But are commanders and soldiers morally and ethically bound to follow orders? An order that is manifestly unlawful is not to be obeyed. However, if there is doubt as to the lawfulness of the order or direction, or it is ambiguous, or there is a moral or ethical concern with the order, what is a commander or soldier to do?

In his book, *A Moral Military*, Sidney Axinn develops a number of themes, which help to provide guidance in answering the question. The ones that are germane are:

Law. It is the nature of law to tell us what to be shocked at and what to do about it. Laws do not prevent crimes: they tell us what we are to call a crime and what responses to make. These features of law also hold for the laws of war – the International Conventions.

Universal Fairness. The boundaries of a morally acceptable rule are fixed by the principle that only rules that could apply to all are fair.

Honor. Military honor has dual requirements. Obeying commanding officers *and* obeying the Geneva and Hague Conventions. When these two requirements conflict, the Conventions are the legal orders, even when obeying them hurts. The professional military ethic. Where military honor forbids or demands an action, that honor should be the deciding factor. The matter may be explained to others, but not ignored. *The military must not resign its conscience to the politicians, or to anyone else.*

The commander in chief must be obeyed: When honor forbids that,

³⁴ Lorenz, Frederick M. “Standing Rules of Engagement: Rules to Live by.” Marine Corps Gazette 80 (February 1996): 20-21.

a soldier must resign rather than commit a war crime.³⁵

The forces that pull a commander and a soldier to follow these themes can be extreme. Anthony E. Hartle, in his book, Moral Issues in Military Decision Making, relates a conversation that was held between Colonel Harry Summers and General Harold K. Johnson. General Johnson had been the American Army's Deputy Chief of Staff for Operations during the Vietnam War and later the Army Chief of Staff. In a response to the question, "If you had your life to live over again, what would you do differently?" General Johnson responded:

I remember the day I was ready to go to the Oval Office and give my four stars to the President and tell him, "You have refused to tell the country they cannot win a war without mobilization; you have required me to send men into battle with little hope of their ultimate victory; and you have forced us in the military to violate almost everyone of the principles of war in Vietnam. Therefore I resign and will hold a press conference after I walk out of your door."

But, of course, General Johnson did not do so, and, "with a look of anguish, ' he reportedly said, "I made the typical mistake of believing I could do more for the country and the Army if I stayed

³⁵ Axinn, Sidney. A Moral Military. Philadelphia: Temple University Press, 1989. 180-181.

in than if I got out. I am now going to my grave with that burden of lapse of moral courage on my back.”³⁶

Hartle goes on to say: “Following the morally correct alternative is sometimes more than even exceptional men can accomplish.”³⁷

As can be seen by these two short examples of General Johnson’s ethical dilemma and Axinn’s themes for a moral military, there is a conflict between what may be considered lawful, and the moral and ethical responsibilities of soldiers. One can only trust that the orders received through the chain of command are manifestly lawful and therefore both ethical and moral. However, when this is not the case, a commander and soldier must follow their professional military ethic. In the Parameters of Military Ethics, Clay T. Buckingham, in his article, “Ethics and the Senior Officer” summed it up nicely when he stated:

I think it should be an absolute rule among military people that ends do not justify the means. Nor that means justify the ends. Both ends and means must be consistent with our fundamental values. Honorable ends cannot be achieved by dishonorable

³⁶ Hartle, Anthony E. Moral Issues in Military Decision Making. Lawrence, Kansas: University Press of Kansas, 1989. 143-144.

³⁷ Hartle 144.

means, nor do honorable means justify dishonorable or unethical ends.³⁸

What is a commander or soldier is to do if there is doubt as to the lawfulness of the order or direction, or there is a moral or ethical concern with the order? We already have two examples. The first is the young soldier from Lieutenant Calley's platoon, Pfc. James Joseph Dursi, who followed his professional military ethic and refused to fire on the villagers when ordered to do so. In his words "...I just stood there." He refused to obey a command that he felt was not right. The second is General Johnson, who did not follow his professional military ethic and in his words: "I am now going to my grave with that burden of lapse of moral courage on my back."

Historical Examples

Throughout history there have been examples of commanders who ordered their soldiers to perform unlawful acts, who failed to ensure that their soldiers acted in a lawful manner or who failed to question unlawful orders. Lieutenant Calley is just one of many.

At the end of World War II, the Allies held a number of war tribunals to try commanders for war crimes. A number of these individuals were held accountable for their acts because they committed a crime or infraction that would have been considered unlawful

³⁸ Matthews, Lloyd J. and Brown, Dale E., eds. The Parameters of Military Ethics. Washington: Pergamon-Brassey's International Defense Publishers, Inc., 1989. 89.

in the eyes of a reasonable commander in like circumstances. As well they were held accountable for failing to act on knowledge that they as reasonable commanders should have known and should have acted on.

In the European Theatre, the Nuremberg trials dealt with war crimes committed by Germany and her allies. From the Canadian perspective, the trial of S.S. Brigadefuhrer Kurt Meyer is significant. He was charged with war crimes for directing his soldiers to “deny quarter” to the enemy, kill Canadian prisoners of war and being responsible for the killing of prisoners that had been taken by his division. In addressing the court, the Judge Advocate stated:

[A]n officer may be convicted of a war crime if he incites and counsels troops under his command to deny quarter, whether or not prisoners were killed as a result thereof. It seems to be common sense to say that not only those members of the enemy who unlawfully kill prisoners may be charged as war criminals, but any superior military commander who incites and counsels his troops to commit such offences....

There is no evidence that anyone heard the words uttered by the accused which would constitute an order, but it is not essential that such evidence be adduced. The giving of the order may be proved circumstantially; that is to say, you may consider the facts you find

to be proved bearing upon the question whether the alleged order was given, and if you find that the only reasonable inference is that an order the prisoners be killed was given by the accused at the time and place alleged, and the prisoners were killed as a result of that order, you may find the accused guilty.³⁹

Kurt Meyer was found guilty.

In this case the responsibility of a commander for the actions of his soldiers and for his own actions was upheld by the international tribunal and was consistent with the Laws of Armed Conflict.

This case emphasizes the point that commanders have a responsibility to ensure that the orders they issue are manifestly lawful and that their subordinates carry out those orders in a manifestly lawful manner.

Recent Canadian Experiences

There are two recent Canadian examples when commanders did what they thought was

³⁹ Trial of S.S. Bigadefuhrer Kurt Meyer (Abbaye Ardenne Case), 4 United Nations War Crimes commission, Law Reports of Crimes of War Criminals 97 (Can. Mil. Ct. 1945) as quoted in Case Study – Law of Armed Conflict and Command Responsibility – A/AS/JCO/DOC/LD-1. Toronto: Canadian Forces College. 1998.

right. The first example is found in the experiences of The Canadian Airborne Regiment Battle Group (CARBG) in Somalia. The CARBG was warned for deployment to Somalia initially under Chapter VI of the United Nations Charter – Peacekeeping. At the last moment:

The mission changed from peacekeeping under Chapter VI of the UN Charter to peace enforcement under Chapter VII. The planned deployment took place in a rapidly changing environment in which the ROE were very slow to find their way to the soldiers. In addition the interpretation of the ROE changed significantly during the deployment, resulting in serious confusion about the meaning and application of the rules.⁴⁰

The ROE, once received, were interpreted differently by people in the chain of command, including the Commanding Officer. The situation in Somalia was not always pleasant and the ROE did not seem to address the situations confronting the CARBG soldiers or did not allow them to act as they thought they should be able to act, especially with regards to thieves. In their report on the Somalia Affair, Justice Letourneau and his fellow commissioners stated that:

Frustration increased as infiltrations by thieves persisted. These circumstances led to an orders group meeting on January 28, 1993 at which LCol [Lieutenant Colonel] Mathieu reviewed the ROE.

⁴⁰ Dishonoured Legacy The Lessons of the Somalia Affair. Volume 1. 30.

He stated that deadly force was permitted against Somalis found inside the compounds or running away with Canadian kit, whether or not they were armed. He also elaborated on the concepts of a “hostile act” and “hostile intent”, indicating that touching the perimeter wire could be interpreted as a hostile act, meaning that soldiers then could initiate the escalation process leading to the use of deadly force.

After LCol Mathieu finished his discussion of the ROE, a number of the officers (Maj[or] Pommet, Maj[or] Magee, and others) immediately objected to or expressed reservations about his interpretation of the ROE. However, LCol Mathieu was insistent that if a Somali touched the compound wire, soldiers could initiate the process to the escalation to deadly force. He had also suggested that another level of escalation, cocking the rifle, could be used. These instructions were explained by LCol Mathieu at a meeting with clan elders in Belet Huen on January 30, 1993.

Eventually the CO’s instructions were amended, and the troops were told to “shoot between the skirt and the flip flops”, that is, at the legs, in order to apprehend thieves and deter incursions into the Canadian compound.⁴¹

⁴¹ Dishonoured Legacy The Lessons of the Somalia Affair. Volume 1. 295-296.

In reviewing the ROE issued by the CDS⁴², and by the Canadian Joint Force Commander⁴³, for the Somalia deployment, the paragraph, dealing with unarmed harassment (under which unarmed theft would probably fall), is quite specific. The escalation of force goes from verbal warnings, through show of force, to warning shots. Deadly force is not mentioned or authorized. It should be noted that a number of Lieutenant Colonel Mathieu's subordinates were not willing to follow Mathieu's interpretation of the ROEs.⁴⁴

Lieutenant Colonel Mathieu was court martialled for negligently performing his military duty as a commanding officer. He was found not guilty.

There are some questions that need to be asked in this matter.

- Did the Commanding Officer ensure that he was familiar with the ROE and that his interpretation was correct?
- Were he and his soldiers aware of and well trained in the law of armed conflict?
- If the ROE had been more specific to the mission, would these incidents have happened?

⁴² Canadian Joint Force Somalia, Rules of Engagement, OPERATION DELIVERANCE. Paragraph 20.

⁴³ CJFS ROE – OPERATION DELIVERANCE, Proposed Commander CJFS Guidance to Subordinate Commanders. Paragraph 6.

⁴⁴ Conversation with Lieutenant Colonel Watkin, October 1998.

We may never know the answers to these questions. But, as with Kurt Meyer, is not a Commanding Officer responsible for his actions and those of his officers and soldiers?

Since the Somalia incident, ROE have been crafted with the specific mission in mind.

Training in ROE has become an integral part of pre-deployment training for all members of the CF.

The second incident involved the deployment of a Canadian contingent to Sector South in Croatia in 1995. Major-General Forand related his experiences at The Many Faces of Ethics in Defence seminar held in Ottawa in 1996. He prefaced his remarks with the following observations:

Let's remember that a soldier is trained to kill. He can commit, in the course of duty, an intensely personal act, the memory of which may haunt him for the rest of his days. These days, not only the public, but also, of course, the soldier is now far more aware and far better educated than in the past. He tends to be quizzical of authority. Consequently, whether he likes it or not (and he may not), he answers to a more acute and demanding conscience.

Conscience could be described as a fallible moral judgement which, if acknowledged, produces action and which if ignored, merely produces guilt.

I believe that once a soldier's conscience is aroused, it defines a line he dares not cross and deeds he does not commit regardless of orders, because those very deeds would destroy something in him which he values more than life itself. However, the possibility of a clash between conscience and duty, through ignorance and misjudgment, is still very real.

The conflict between morality and necessity is eternal. But at the end of the day, the soldier's moral dilemma is only resolved if he remains true to himself.

...the Blue Helmet witnesses in such countries immoral acts of violence against civilians and combatants, perpetrated by belligerents for whom killing an enemy is not enough. To be victorious, human beings, both civilian and military, must be made to suffer, and corpses must be mutilated....how under these conditions, having witnessed these scenes and the weakness of the reactions of the UN force and of public opinion, could our officers and NCOs still believe in the rules of warfare that nonetheless constitute one of the foundations of the military ethic?⁴⁵

At that time Major-General A.R. Forand was Commander, of the Southern Sector in Croatia in August 1995, when the Croat Army attacked to re-capture the Krajina region

⁴⁵ The Many Faces of Ethics in Defence. Ottawa, Ont: Minister of Public works and government Services Canada, 1996: 30-31.

that the Serbo-Croats had previously captured in 1991. He had under his command about 5000 troops and was responsible for over 2000 square kilometres.

As the possibility of hostilities was imminent, MGen Forand had issued orders that the soldiers under his command, including the Canadians, were to remain in their positions and were not to abandon them in the face of hostilities. He gave these orders knowing that earlier that year, Canadian soldiers in CANBAT 2 had been ordered to withdraw from some of their positions.⁴⁶

He stated:

If the Canadians, who had the most secure observation posts, who were professional soldiers with adequate equipment and superior training were ordered by their government to withdraw, I knew that the troops of the other countries under my command would be very inclined to follow them. Moreover, my credibility would have been completely compromised by the fact that I had ordered everyone to remain in position, and I would have no choice but to resign.

I had advised the Deputy Chief of the Defence Staff on this in early July and had explained to him in no uncertain terms that if

⁴⁶ The Many Faces of Ethics in Defence, 31-32.

Canada were to evacuate its observation posts, I would be on the first aircraft back to Canada.⁴⁷

In this instance, General Forand, as the commander on the ground, had made an estimate of the situation, advised his chain of command what steps he was taking, and receiving the support of the chain of command, executed them. Whether or not his actions were contrary to his original ROEs is a moot point. He had followed his professional military ethic and, by informing his chain of command of his intentions, he had allowed the chain of command time to react. If the chain of command had not agreed with his intent, they would have informed him and General Forand would probably have resigned his command as he could not have followed orders he could not personally support.

In another related incident General Forand had to make a decision involving civilians in his sector. He stated:

At about 2000 hrs on 4 August, a large number of refugees gathered at the gate of my HQ. The advice – I would even say entreaties – that I received from the representative of the UN High Commissioner for Refugees was not to allow them to get inside because I would be fully responsible; that they were not refugees but displaced persons; that we could not accommodate them, we did not have enough food, etc. However, artillery shells were

⁴⁷ The Many Faces of Ethics in Defence 32.

falling on the town and their lives were in danger. I therefore decided to let them in.

I knew that as soon as I opened the doors, I could not close them again. I was, I think fully aware of the consequences and of my responsibilities to provide them with shelter, protection and safety, food, welfare and medical care, besides creating for myself an administrative burden and future problems with the Croats, but my conscience did not allow me to do otherwise.⁴⁸

In this second incident, his actions were based on his moral conscience and the law of war. In his book, Professor Green states: “ One of the oldest rules of the law of war provides for the protection of the civilian non-combatant population and forbids making civilians the direct object of attack.”⁴⁹

Conclusion

The ability of operational commanders to carry out their assigned missions is based on the premise that there is no doubt as to the legality of the chain of command, and that the orders received through the chain of command are manifestly lawful. There should also be no doubt that orders that are not manifestly unlawful are to be obeyed by commanders

⁴⁸ The Many Faces of Ethics in Defence 32.

⁴⁹ Green, L.C., 220.

and their soldiers. Furthermore, there is no doubt that commanders are responsible for ensuring that their soldiers are trained and educated to act in a lawful manner at all times and in accordance with the Law of Armed Conflict.

Operational commanders have the duty and responsibility to question an order that is manifestly unlawful. They must act in a manner that will not dishonour themselves, their soldiers, their military and, their country. If there is a conflict between their professional military ethic and a lawful order, commanders must seek clarification of the order. To do otherwise would be an abrogation of their responsibilities as commanders. Commanders who are not happy with the clarification provided and cannot carry out a lawful order, have no choice but to resign.

ROE are based on and limited by law. The impact of ROE and the Law of Armed Conflict, in a military context, applies in respect of the obligation to disobey unlawful commands. Buckingham stated it quite clearly when he wrote: “Honorable ends cannot be achieved by dishonorable means, nor do honorable means justify dishonorable or unethical ends.”⁵⁰

General Forand was guided by his conscience, his professional military ethic. He made it quite clear to the chain of command what he intended to do and what the consequences

⁵⁰ Matthews, Lloyd J. and Brown, Dale E., eds. 89.

were. He was guided by more than just legal obligations. He knew that he also had an obligation to his soldiers and the victims of war. He followed those obligations.

Before closing I would like to return to the Green Berets in Iraq. Had they done the right thing by not killing the Bedouin when he had discovered them? The answer is yes. The ROE the Green Berets were following clearly stated: “Should a civilian come across SOF [Special Operations Forces] during a reconnaissance mission, the civilian may not be attacked unless they commit a hostile act or show hostile intent.”⁵¹

The last words go to Lieutenant William Calley:

I thought, could it be I did something wrong?...I had killed, but I knew so did a million others. I sat there and I couldn't find the key. I pictured the people of My Lai: the bodies, and they didn't bother me....Killing those men at My Lai didn't haunt me.⁵²

Calley was a commander. He had a choice, in fact an obligation to himself and his soldiers, to follow the Law of Armed Conflict. Calley did not understand. He had a choice. He chose poorly.

⁵¹ DESERT SHIELD/STORM SPECIAL OPERATIONS FORCES RULES OF ENGAGEMENT IN IRAQ. Paragraph F.

⁵² Wells, Donald A. War Crimes and Laws of War. Lanham, MD: University Press of America, 1984. 143.

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