DND photo AR2011-0125-09 by Corporal Tina Gillies.

WHERE ETHICS AND LEGALITY COLLIDE

by Michel Reid

This article has been written as a submission to the *Canadian Military Journal*. Opinions herein are meant to stimulate intellectual debate in an academic environment, and are those of the author alone.

Introduction

Legalism (obeying orders and/or the Law) is sometimes of poor counsel in matters of ethical conduct. It does *not* follow that infractions against regulations or against the Law should be ignored. There should be, in the military profession, a formal mechanism to examine cases where an ethical dilemma forces a choice between the moral and the legalist courses of action. Authorities, both Command and Legal, should recognize 'ethical imperative' exceptions in the same manner as the criminal code recognizes 'self-defence' or 'defence of necessity' exceptions in cases that would otherwise involve criminal or Code of Service Discipline liability. This article argues in favor of such a mechanism, and proposes a framework to that end.

Winston Churchill was purported to have quipped that, in foreign policy, choices are too often between the dreadful and the truly awful. I would argue that this also applies to the field of military ethics in the case of ethical dilemmas. Indeed, the very reason we teach our military personnel how to analyze ethical situations is to impart an understanding that sometimes doing the right thing is not that easy, and that sometimes all available solutions have serious negative consequences.

A good illustration of the tools of ethical decision-making was offered by Dr. Peter Bradley in a previous issue of the *Canadian Military Journal*, through analysis of a fictional case loosely based upon the Capt Semrau incident.[1] In it, a Canadian patrol encounters a dying enemy fighter, and with what appears to be the best of humanitarian intentions, the patrol leader ended the dying man's misery by firing a bullet into his head, thus committing murder in the eyes of the law. The author goes on to (accurately, I believe) state that "… regardless of the ethical merits of mercy killing, it would still be illegal,"[2] then separately states that battlefield mercy killing

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is immoral when tested with deontological,[3] utilitarian,[4] and virtue-based[5] decision-making conventions.

Dr. Bradley's analysis was addressing the issue from the strict point of view of ethics. This article will seek to examine where ethics and legality intersect, overlap, and conflict. I will argue that illegality in and of itself does not render an act morally unjustifiable. I will, of course, concede that mercy killing is not legally justifiable under both the Laws of Armed Conflict[6] (LOAC) and Canadian criminal law, and that legality should naturally be a consideration in ethical decision-making frameworks. After all, the laws of a society are (or should be) based upon the moral and ethical values of that society. Similarly, military regulations are based upon the ethics and values of the military profession.

But I contend that, at the end of the day, legality should not be a critical or essential criterion in determining whether an action is morally justifiable. I intend to show why, then propose, for consideration and debate, a framework to tackle the situations where *ethics* and *morality* collide with *legality* and *regulations.*

'For starters,' I surely would not be the first to observe that what is legal and what is 'right' are two very different concepts.[7] Any lawyer will readily admit to that. For instance, a murder in a 'no-witness-no-forensics' environment is caught by chance on a surveillance video, so the murderer, easily recognizable, is indicted. Yet, because of a 'screw-up' with respect to chain of custody the video is judged inadmissible. The perpetrator 'walks,' for lack of sufficient admissible evidence. Legally, he is innocent, even though factually, he is guilty.

Just as what is legal is not necessarily right, I would postulate that sometimes what is right is not necessarily legal. For instance, in 1968, Prime Minister Trudeau passed the law decriminalizing homosexuality because it was inconsistent with Canadian ethical mores. The same happened to same sex marriage in recent years. A similar discussion is going on now with marijuana. Ethical mores evolve and laws follow along, not necessarily at a steady pace.[8] Thus, in a military context, can some framework be developed to reconcile legality and morality where they diverge?

Ethical Problems and Ethical Dilemmas

To set the stage, I would differ slightly with the CF ethics framework,[9] in that I see a difference between an *ethical problem* and an *ethical dilemma*. In an ethical problem, the moral solution is clear, but difficult to adopt because of all the associated negative consequences. In this, I tend to approach Stephen Coleman's thoughts on tests of integrity and tests of ethics.[10]

An illustration of an ethical problem might occur as follows: You are the Deputy Commanding Officer (DCO) of a unit, and you discover that your Commanding Officer (CO) has been embezzling unit funds. Your duty is to report the case to the Commander, but your regiment has high hopes for this CO, and he would not take too kindly to seeing his career thwarted. Also, he happens to be your brother-in-law, and your sister will never forgive you. Even if you follow the 'anonymous tip' path, they are bound to find out. Difficult? Yes. But the ethical solution is clear.

Ethical dilemmas are a different situation. They are relatively rare compared to ethical problems, but they occur frequently enough to warrant addressing the issue. An ethical dilemma is a situation in which there is no morally acceptable solution, the only rational solution being an evil, albeit a lesser one. An ethical dilemma involves an apparent mental conflict between *moral imperatives,* in which to obey one would result in transgressing another. This is also called an ethical paradox.[11] For instance, the ship went down, and there are twenty of you in a lifeboat with a capacity for twelve. The water is freezing, and the lifeboat will capsize in short order unless its load is lightened. You are too far at sea for aircraft to help, and the nearest ship is on its way, but hours away. The choice is between solidarity at the cost of twenty lives, or survival of twelve at the cost of eight murders. If you choose solidarity, you may wish to consider that your wife and three kids might strongly disagree with your choice.

In a more military context, consider the following scenario. Your helicopter is shot down into previously uncontested Afghan territory. You, your co-pilot, and your passenger emerge only slightly injured, but you are in 'escape and evasion' mode, scrambling to put distance between you and the Taliban tracker teams that are in pursuit, no more than five-to-ten minutes away. No radio, no transponder, combat search and rescue will not be able to help for another hour, due to weather. Then it happens: the passenger trips and falls. Fractured pelvis, he cannot move on his own. Concussion, he is unconscious. He is too heavy to be carried in this broken terrain. That is when you realize the gravity of the situation: he happens to be the senior contingent intelligence officer.

The reader may wish to analyze this case using the CF's ethical decision-making framework, as Dr. Bradley illustrated, applying the following considerations. If you try to bring him with you, you will be slowed down to the point of likely being captured. If you stay with him and make a stand, the Taliban will not let you die in a blaze of glory. Rather, they will do everything to capture you alive. For propaganda value, for ransom value, and for the price they will get from selling their hostages to al-Qaeda. If you leave him behind he will be captured.

Thus, if he survives, he will be captured, with the following consequences: he will be nursed back to health, then, most likely, submitted to the tender mercies of al-Qaeda interrogators, who will inevitably break him. He is privy to so much top secret information that the consequences will be catastrophic for the entire mission, with worldwide geo-strategic implications. Also, once they are through with him, he will be beheaded on video, which will 'go viral' on YouTube, just as it did with the murder of New York Times reporter Daniel Pearl.[12] The consequences for his wife, children, and family need not be elaborated upon. This is not fantasy. This is, in fact, what happened to Marianne van Neyenhoff Pearl, who was pregnant with their first child at the time.[13]

Dieppe Raid, by Charles Comfort.

Similarly, in Dr Bradley's analysis of the Dieppe case, he recognizes that it was a difficult decision to leave the wounded on the beach because there were not enough boats to extract all the casualties, and persisting in the evacuation under withering fire would have generated more casualties. He concludes that under utilitarian analysis, leaving the wounded behind was morally justifiable because less harm would be achieved, especially since the Germans were expected to take proper care of the captured wounded.[14]

Fine as far as it goes, but what if the enemy had been Japanese, who were known to torture and murder their captives, as they did in the Pacific theatre? This is not to say that in this ethical dilemma, any disobedience was warranted, let alone that homicide for humanitarian reasons would have been appropriate. Rather, it is to ask why the expectation of proper care matters in the decision to leave the wounded behind. Should the escapees be deemed more morally culpable in this scenario?

Mission Primacy

These hypothetical cases raise two aspects that I feel are not adequately covered by the CF's ethical decision-making framework. The first is the notion of mission primacy. Bluntly put, in combat operations, the mission is more important than the lives of our troops. Or for that matter, that of *hors-de-combat* enemy troops, and even non-combatants. The expression 'harm's way' is just a euphemism to describe the act of deliberately placing our own troops in a situation where death and dismemberment is the certain outcome for at least some of them.

This is not to say that mission primacy should invariably 'trump' humanitarian considerations. Indeed, mission primacy must operate within the boundaries of the LOAC, these boundaries being further constrained by national Rules of Engagement (ROE).[15] One of the fundamental principles of the LOAC is that of proportionality.[16] This principle holds that collateral damages (or any other 'bad effect') incurred as a result of military action are permissible, as long as they are not excessive with regard to the military advantage gained.

The principle of proportionality stems from the doctrine of double effect.[17] One military application of this doctrine holds that some extra risks to own troops may need to be incurred in order to respect the ethical underpinnings of the LOAC. Thus, no matter how tempting it would be to motivate a field prisoner with a few butt-strokes to reveal the whereabouts of his colleagues on the other side of the hill, it would be an egregious breach of conduct, even if the aim was to thwart a potential ambush by the enemy.

When committed within these norms, actions are not only *legal,* they are *legitimate*, i.e. morally justifiable. Thus, I would argue that mission primacy, although not the *sole* criterion, should be a *heavier* criterion throughout the CF ethical decision-making framework.

Double Effect and Humanitarian Imperatives

Another basic tenet of the doctrine of double effect holds that the *bad* effect must not be the means by which one achieves the *good* effect. For instance, bombing cities to encourage peace talks would be inappropriate, but bombing to destroy military resources would be appropriate. But what about ethical dilemmas, such as described above, involving, for instance, homicide for compassionate or humanitarian reasons? Is the bad effect of homicide *that bad* in the case of the Intelligence officer mentioned above?

Flight Lieutenant Carl Fellman Schaefer, Bomb Aimer, Battle of the Ruhr, 1944; CWM 19710261-5121; Beaverbrook Collection of War Art, © Canadian War Museum.

Bomb Aimer-Battle of the Ruhr, by Carl Schaefer.

Although not directly comparable, the debate has its equivalent in civil society today: the question of passive euthanasia, (such as when to overdose a terminally ill patient), and active euthanasia, such as the famous Latimer Case.[18] This Saskatchewan farmer was convicted of euthanizing his disabled 12-year-old daughter, Tracy, in 1993. Evidence showed that Tracy had a severe form of cerebral palsy and could not walk, talk, or feed herself. She had suffered considerable pain throughout her short life. A 1999 poll found that 73 percent of Canadians believed that Latimer acted out of compassion, and should have received a more lenient sentence. The same poll found that 41 percent of those surveyed believe that mercy killing should be legalized.[19]

Most contemporary moral philosophers accept the idea that the moral status of an action, at least in part, fundamentally depends upon its (expected) consequences.[20] In the context of military operations, should the legality of an action be the fundamental determinant of its moral status?

Situational Ethics

This brings forward the second aspect that I feel is not adequately covered by the CF's ethical decision-making framework. It is the theory of situational ethics.[21] This basically states that sometimes, other moral principles can be cast aside in certain situations if 'love' is best served, 'love' being understood to mean 'agape' love in the Christian sense, i.e. action that saves most lives, maximizes happiness, and so on. It attempts to find a 'middle ground' between legalistic[22] and antinomian[23] ethics. Situational ethics is often confused with utilitarianism,[24] because utilitarianism's aim is "the greatest good for the greatest number." Effectively, in situational ethics, the end can justify the means, provided there is a higher moral imperative at stake in the mind of the person. The cases below may serve to illustrate the point.

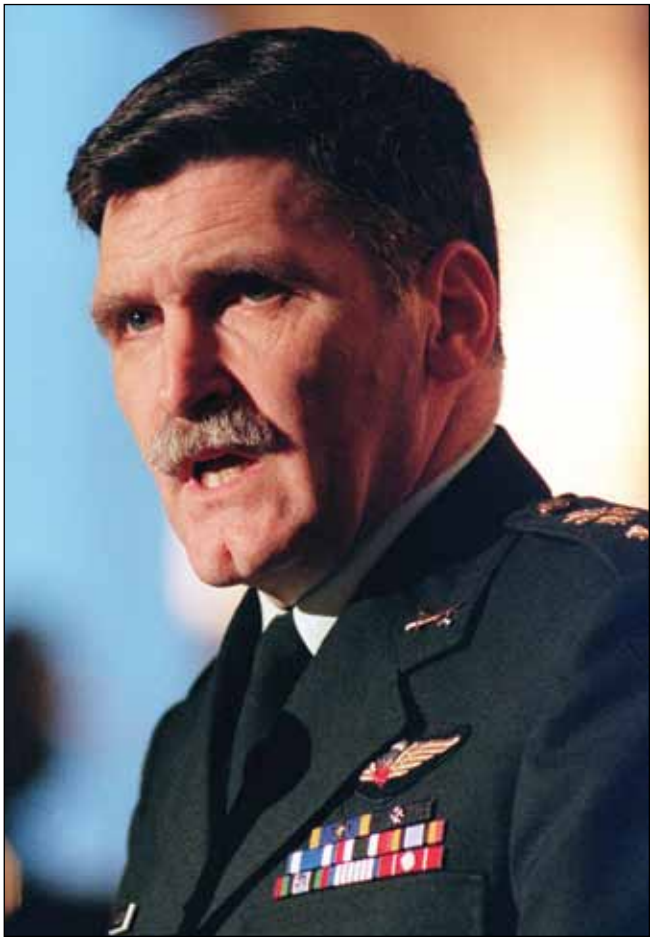
The Taliban prisoners. The following scenario is based upon a true story covered in real time by a CTV news team a few years ago:[25] You are a company commander in Afghanistan. You have two Afghan National Police (ANP) attached to your company headquarters, and your orders are to hand any Taliban prisoners you have captured to them so that they can be processed rearward under Afghan control. Yet, in the course of the two-day march towards the enemy stronghold, during which you have integrated the ANP into your team, it becomes clear through conversation with them that any prisoner handed over will more than likely have his throat slit the minute they are out of Canadian eyesight.

You eventually make contact with the enemy, and sure enough, you end up with a couple of enemy prisoners. You try to convince higher headquarters over the radio that you are not prepared to be a passive accomplice to murder. The response is that the policy is clear, it is approved policy, you have your orders, you cannot prove future intent, so get on with it. You are not authorized to detach some troops to accompany the ANP, because the upcoming battle will require 'all hands.' But if you obey orders and something bad happens, you will be indicted because you 'knew or should have known.' Stating that you were compelled to follow orders will only invite sarcastic parallels to Nuremberg. If you persist in refusing to hand over the prisoners, you risk being court-martialled for disobeying a lawful order, and you will be unable to prove what might have happened.

Srebrenica. Another real life case is that of the hapless Lieutenant-Colonel Thom Karremans, commander of the 370 Dutch soldiers stationed at the Muslim enclave of Srebrenica, Bosnia, in an effort to protect it from the bloody grasp of the Bosnian Serbs. He was a member of the United Nations peacekeeping force that stood meekly by as Bosnian Serbs rounded up Muslims and transported them away. Later, it was learned that the Dutch soldiers' passivity was a vital ingredient in what became the largest act of genocide in Europe since the Second World War: Eight thousand men and boys murdered; 25 000 refugees ethnically cleansed.[26] It is one of three legally validated genocides that occurred during the Bosnian war, commonly referred to as the Bosnian genocide.[27]

In spite of repeated pleas to UNPROFOR Headquarters,[28] Lieutenant-Colonel Karremans felt compelled to obey orders

to hand over the city and its population to the Serbs.[29] The uproar resonates to this day. Yet, legally, he did the right thing. To illustrate how even being legally right can have consequences, Karremans was compelled to accept early retirement, he and his wife had to move to Spain, partly due to death threats he received in his native Netherlands, and in 2010, his former interpreter and relatives of murdered former employees of the Dutch battalion (Dutchbat), lodged a legal complaint of genocide and war crimes against him.[30]



The Canadian Press (Fred Chartrand)

Major-General Romeo Dallaire in 1995.

Rwanda. The same can be said of then-Brigadier-General Dallaire in Rwanda, who repeatedly pleaded with UN Headquarters to let him capture four major weapons caches in light of captured documents exposing plans by the Hutus for the extermination of Tutsis.[31] Instead, he was ordered to notify President Habyarimana of possible Arusha Accords violations and his concerns, and then report back on measures taken.[32] He reluctantly complied. At least 800,000 people were killed in the ensuing genocide.[33] Lieutenant-General Dallaire remains psychologically shaken to this day, which is a testament to his profound humanity. Yet, legally, he did the right thing. In a now-famous professional disagreement with Dallaire,[34] Major-General MacKenzie contends to this day that "…in some (rare) circumstances, ill-conceived and impossible to execute orders ... should be ignored or disobeyed."[35]

San Fortunato. Several cases illustrate Major-General MacKenzie's point. One is that of then-Lieutenant-Colonel Jean-Victor Allard, Commanding officer of the R22eR (the Van Doos) at the battle of San Fortunato in Italy. On 19 September 1944, he was ordered to assault the 125 metre high crest that dominates the countryside. The problem was that his battalion was the brigade reserve, and the two other battalions of the brigade had just been repelled in a daylight frontal assault on that same objective. In a classic case of reinforcing failure, the brigade commander ordered the Van Doos into the fray forthwith. Lieutenant-Colonel Allard, recognizing the folly of the mission, stalled for several hours, invoking a series of false pretexts to avoid moving until last light, when he led his battalion in a daring night infiltration attack that paved the way for a two-brigade exploitation, earning him a bar (second award) to his Distinguished Service Order (DSO).[36] He went on to become Chief of the Defence Staff (CDS) in the 1960s, but might have been court-martialled for disobedience in the face of the enemy in 1944.

The Knin refugees. Another more recent instance is that of then-Brigadier-General Alain Forand, commander of the Southern Sector of Croatia, comprising 5000 UN troops occupying over 2000 square kilometres in the Krajina region of the former Republic of Yugoslavia. On the morning of 4 August 1995, the Croatian offensive in the Krajina region commenced, so that by nightfall, a large number of Serb (and some Croatian) refugees had gathered at the gate of Brigadier-General Forand's headquarters compound in Knin. Despite the strong entreaties of the representative of the High Commissioner for Refugees, and despite clear UN principles relating to the neutrality of UN compounds,[37] General Forand let the refugees in, and offered them protection.[38] Easy call, you might say. Humanitarian imperative and all that.

Not so fast… Brigadier-General Forand readily admits that, at the time, in the heat of the moment, with artillery shells falling all around the compound, his only concern was for the safety of the refugees, and he reacted with his heart with little concern or patience for political or personal consequences.[39] And yet, potential consequences existed.

Canadian Military units were subject to two parallel command structures, National and United Nations, and the National authorities had an infuriating habit at the time of directly ordering the Canadian battalion to abandon UN observation posts the minute war broke out between the belligerents, thus demonstrating a very risk-averse mindset.[40] Barely a month earlier, Brigadier-General Forand had had to threaten the Deputy Chief of the Defence Staff (DCDS) with a very public resignation should Canada act in that manner 'during his watch.'[41]

Also, as was seen in the Srebrenica case, the UN had clear instructions to avoid doing anything that might risk compromising the appearance of the neutrality of the UN contingent. General Forand's action clearly went against that policy. Finally, the belligerent parties were known to take reprisals against UN troops when they interfered with their plans by getting involved. Thus, the French contingent had had members assassinated by snipers as payback for having gotten in the way of ethnic cleansing operations.[42] In this case, there

was a great possibility that Croat artillery might have followed the refugees into the UN compound. In the words of Brigadier-General Forand: "I knew that I was creating for myself an administrative burden and future problems with the Croats, but my conscience did not allow me to do otherwise." [43]

Thus, Brigadier-General Forand fully knew that he was contravening both written and unwritten policy when he essentially broke neutrality by protecting one side against the other. In a worst case scenario, he was risking removal from command, or even court-martial, he was risking criminal charges because collateral Canadian casualties would have been incurred as a result of his contravening orders, and he could have been sued for damages by the families of the victims for the same reason. [44]

"However, obeying one's conscience instead of the rules can have its pitfalls."

In short, General Forand's decision took considerable moral courage. In the event, everything turned out for the best: he received nothing but support for his decision by Canadian military authorities, the Croatian army did not retaliate, and no Canadian troops were harmed. He went on to command Land Force Quebec Area, and, following retirement, he is now Colonel of the R22eR. Acting by one's conscience paid off in this case, but things might very well have gone the other way.

The Kibeho Massacre. Then-Brigadier-General Guy Tousignan succeeded then-Brigadier-General Dallaire in Rwanda. In April 1995, 125,000 'internally displaced persons' (IDP) had converged on the Kibeho IDP camp. Soldiers of the Rwandese Army were closing in on the camp, for what was expected to be a massacre. Instructions received from UN headquarters in New York forbade the Force Commander (Tousignan) from using peacekeeping troops to intervene between IDPs and soldiers of the Rwandese army. Yet, despite this order from New York, Tousignan felt morally obliged to keep UNAMIR's Zambian battalion at Kibeho to at least maintain a presence that might lessen potential tensions. In the event, the massacre commenced, and some 4000 IDP were killed, but it was eventually thwarted, and UNAMIR's interference prevented many thousands more from being killed.

As Tousignan admits: "Rationalizing a decision not to follow directions from UN Headquarters on a moral issue … certainly does not relieve the Commander of his responsibilities towards his superiors. Not to execute a lawful command is rarely justifiable and it is clear that I defied an order from New York at Kibeho. As a result the UN would have had the right to defy me to justify my behaviour. … As an officer, I was constantly reminded that with the position of command comes difficult choices and in my best judgement this was the best choice for the Kibeho situation. I also remain fully cognizant that a jury of my peers might question that choice since it is one of ethical dilemma." [45]

I have deliberately used several examples in order to illustrate that such situations are not as rare as one would like to think, and to illustrate that legalism, i.e. the obligation to obey lawful orders or regulations, may not always be the best answer, either for morality or for mission primacy.

Pitfalls of Situational Ethics

However, obeying one's conscience instead of the rules can have its pitfalls.[46] The problem with situational ethics is that it provides an excuse for not obeying the rules when it suits people to do so. If someone wants to do something badly enough, they are likely to be able to justify it to themselves. 'Agape' love is an ideal, whereas humanity is a practical species full of selfishness and other flaws. Also, consequential theories,[47] such as situational ethics, are problematic in that they are based on future consequences, and the future is quite hard to predict in some cases, and impossible to prove at the time of decision. Finally, situational ethics is subjective, because decisions are made by the individual from within the perceived situation, thus calling into question the reliability of that choice. In essence, the very real danger of unfettered situational ethics is: "It will all descend into moral chaos."[48]

And yet, as we have seen in the examples and scenarios above, there surely must be a place for situational ethics as one tool of ethical analysis. But there must be a morally sound way of avoiding its pitfalls.

Proposed Framework

I would argue in favour of an 'ethical disobedience clause' to be introduced in military regulations, that is to say, a regulation enabling one to invoke the moral duty of disobedience, due to a higher ethical imperative. This concept would be similar to that of invoking the 'self-defence clause' that already exists in criminal law. "Yes I did shoot the guy and thus commit a homicide, but I contend it is justified because I felt in immediate fear for my life." Then, of course, one would have to demonstrate to a judge and/or jury that that fear was justified in the mind of a reasonable person.

This concept would also be analogous to what is called the American 'defense of necessity.' Under US criminal law, necessity may be either a possible justification, or exculpation for breaking the law. Defendants seeking to rely on this defence argue that they should not be held liable for their actions as a crime, because their conduct was necessary to prevent some greater harm, and also when that conduct is not excused under some other more specific provision of law, such as self defence. Except for a few statutory exemptions, and in some medical cases, there is no corresponding defence under English Law.

Canadian criminal law, for its part, allows for a common law defence of necessity.[49] Judge J. Dickson of the Supreme Court, while recognizing that the defence must be "… strictly controlled and scrupulously limited," described the rationale for the defence as a recognition that: "… a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience."[50]

Supreme Court of Canada photo by Philippe Landreville

The Supreme Court of Canada in Ottawa.

Thus, defendants invoking necessity would have to explain themselves before a judge, as they do for self-defence. To avoid the moral relativism of situational ethics, the justification for military ethical disobedience would similarly have to be validated by an 'ethics board,' instead of being left to the subjective judgment of the beholder. The board would be composed of a jury of peers, that is to say, members of the profession of arms, and it would rule on actions committed by military personnel in the exercise of their military duties.

There is nothing new in this concept. In the medical world, at the national level, the Canadian Medical Association has a code of ethics which states outright: "Physicians may experience tension between different ethical principles, between ethical and legal or regulatory requirements…"[51] Matters of clinical judgment are dealt with the provincial level, by the professional order. For instance, at the College of Physicians and Surgeons of Ontario, if the clinical judgment of a practitioner is called into question (by a patient, by a hospital authority, by a colleague, and so on), that matter is referred to a screening committee composed of peers who are experts in that medical field.[52]

That Committee of Peers is called upon to rule whether it was reasonable to have deviated from standard medical protocol in a given circumstance. If that committee rules against the practitioner, this is considered grounds to convene a disciplinary committee, where the matter will be adjudicated, once again, within the profession. Thus, when a patient dies on the operating table due to a surgical procedure that the surgeon, in a judgment call, thought would be appropriate, but which did not turn out to be the case, nobody thinks of automatically charging the surgeon with assault, or criminal negligence, or reckless disregard. On the other hand, the police would be expected to be interested in the findings of the disciplinary committee.[53]

To be clear, no disobedience or criminal act should be ignored or 'swept under the rug.' Rather, for the sake of transparency, and also for the sake of good order and discipline, any disobedience or criminal act should be the object of an indictment under the Code of Service Discipline, or the Criminal Code of Canada.

At this stage, the accused would invoke the 'ethical disobedience clause.' Then, all disciplinary or criminal proceedings would be stayed pending the findings of a military ethics board, which would be convened in due course. The board would have the mandate to analyze the action on its moral and ethical merits, and, (and this is important), it would be expressly precluded from considering whether the act was illegal, or contrary to orders or regulations.

The ethics board would analyze the elements that led the accused to reach his decision. It would consider the elements that the accused should have considered, including the availability of options to circumvent or eliminate the problem. It would consider the time the accused had at his disposal to analyze and make a judgment call. The ethics board would not need unanimity of its members. After all, nothing new here. The Supreme Court does not require unanimity, either.

The military ethics board would not require proof beyond a reasonable doubt, but rather, it would rule based upon the preponderance of evidence. Again, nothing new here: civil courts, harassment investigations, and so on, rule, based upon a preponderance of evidence. An important aspect is that the military ethics board would not rule, based upon what the accused thought was the moral or ethical thing to do. To do so would fall into the trap of situational ethics. Rather, the board would rule, based upon the moral and ethical values of the military profession at that place and at that time.

That is to say, what would a reasonable person, with the benefit of expertise as a member of the profession of arms and the experience of having 'been there,' have done if placed in that ethical dilemma? That rationale may seem too imprecise to some, but here again, this is nothing new. As an analogy, the US Supreme Court held, in 1973, in what has come to be known as "The Miller Test," that 'community standards' be used by judges to determine which elements of pornography should be deemed illegal, and which elements should not.[54]

There are those who would argue that there should be no difference between the moral and ethical values prevailing in Canadian society, and those of its armed forces, and that, for the sake of transparency and credibility in the eyes of the Canadian population it seeks to represent, the military ethics boards should include a civilian ethicist and/or a thoughtful representative of the public, as do some medical boards. These are legitimate concerns, to be sure. However, I would argue that there are indeed differences between the civilian and the military value systems.

For instance, no capture of any criminal in the wake of a shoot-out with the police is worth the life of an innocent bystander. Yet, collateral casualties are perfectly admissible (within limits) under the LOAC. Judging by the howls of indignation that can be heard in the media whenever an air strike inadvertently kills a few civilians, it is clear that there is dissonance between the civilian and the military value systems in this case.

Indeed, there are many instances of such dissonance. Another example: A sniper is allowed to use deadly force against a person that does not pose a 'direct and immediate threat' to another person, which is the only permissible justification for deadly force in criminal law. Thus, the ethical environment of armed conflict is so different from that of civil society that Western liberal democracies throughout the 19th and 20th Centuries have felt the need to craft a legal framework distinct from that of national criminal law to address the issue of combatant conduct. Thus, the Laws of Armed Conflict.

"For instance, no capture of any criminal in the wake of a shoot-out with the police is worth the life of an innocent bystander."

And therefore, it cannot be overemphasized that members of a military ethics board should be experienced in military operations, notably combat operations. They must have fully internalized the difference between the rules of civilian criminal law, and those of the LOAC. Military operations, whether of a combat or a peacekeeping nature, involve a specific set of ethical values as to what is considered appropriate, acceptable, and moral behaviour, and thus they generate their own entirely different set of ethical dilemmas.

Therefore, following scrutiny by a military ethics board, the judgment of the accused would have to be found to be congruent with the moral and ethical values of the military profession, in other words, they would have to be congruent with the standards of the warrior community. If the ethics board validated the action of the accused, then the Crown Prosecutor would exercise its judicial discretion and drop charges, in consideration of mitigating ethical circumstances. On the other hand, if the ethics board found against the accused, he would be automatically liable for prosecution under the LOAC or under Canadian law. Those interested in ethical analysis may wish to war game the cases and scenarios mentioned earlier, based on this framework.

To those who would argue that an ethical disobedience clause does not exist in the LOAC, and that such a mandate of the military ethics board is incompatible with it, I would respond as follows: "There you go again with that legalism thing…" Furthermore, it is up to member countries to act on breaches of the LOAC by members of their armed forces. If Canada chooses to exercise its judicial discretion in some relatively rare cases, then so be it.

Some would argue that the International Criminal Court (ICC) in The Hague[55] would then be empowered to take up cases when nations are loath to act. I would respond that the ICC might be ill-advised to take up a case involving a breach of the LOAC that had been judged to be a lesser evil by a military ethics board. By the very nature of the ethical dilemma involved, the Court would probably not find it in its best interest to take up a case that would be very likely to generate a huge controversy in the world media.

Conclusion

This article has sought to put forward the following propositions: That legalism is sometimes of poor counsel in matters of ethical conduct. That it does not follow that infractions against regulations, or against the Law, should be ignored. That there should be, in the military profession, a formal mechanism to examine cases where an ethical dilemma forces a choice between the *moral* and the *obedient* courses of action. That authorities, both Command and Legal, should recognize 'ethical imperative' exceptions in the same manner as the criminal code recognizes 'self-defence' or 'defence of necessity' exceptions in cases that would otherwise involve criminal liability. And that the process of ethical disobedience involves the requirement for moral courage, analytical capability and sound judgment.

Jacques Duchesneau, then-Director of the Montréal Urban Community Police Department, once wrote that "Ethics judges morality the way justice judges legality."[56] While legality may be ethics-based in our society, justice is often ill-placed to judge morality. Duchesneau again: "Procedures do not embody the spirit and greatness of an organization. Rather, its fundamental values do."[57]

Colonel Don Matthews, a pilot who served in the UN peacekeeping mission in Haiti in 1995, neatly summarized the quandary in an address to the 1996 Conference on Ethics in Canadian Defence as follows: "An argument could be made that one merely has to follow the rules. Our nation will only employ the CF in situations in which we are governed by the LOAC and ROEs. In all cases these rules are legal and binding according to Canadian and international law. Therefore, if we are on the just side and we are led by just laws it should simply be enough to follow the rules. This is true to a point. However, the majority of ethical dilemmas occur because of the laws, not in spite of them. The battle really occurs in the heart.[58]

DND photo IS2011-2002-01 by Master Corporal Angela Abbey.

NOTES

1. *Canadian Military Journal*, Vol. 11, No. 1, Winter 2010, p. 7.
2. Ibid. p. 14.
3. Wikipedia: Deontological ethics.
4. Wikipedia: Utilitarianism.
5. Wikipedia: Virtue ethics.
6. Wikipedia: Laws of war.
7. Louis Paul Pojman, *Ethics: Discovering Right and Wrong* , 5e.ed., 2006, Cp. 1.
8. Comment by Dr. Bradley to the author, Wednesday, 30 March 2011.
9. Department of national Defence, Canada: Defence Ethics Programme, at http://www.dep-ped.forces.gc.ca/
10. Stephen Coleman, "The Problem of Duty and Loyalty," in *Journal of Military Ethics*, Vol. 8 (2009), p. 106.
11. Wikipedia: Ethical dilemma.
12. Wikipedia: Daniel Pearl.
13. Ibid.
14. *Canadian Military Journal*, p. 13.
15. Wikipedia: Rules of engagement.
16. Protocol 1 additional to the Geneva Conventions of 12 August 1949, Art 51 (5) (b).
17. Wikipedia: Principle of double effect.
18. Wikipedia: Robert Latimer.
19. *Three quarters (73%) of Canadians believe Robert Latimer ended his daughter's life out of compassion.* Ipsos News Center. 10 January 1999.
20. Ibid.
21. Wikipedia: Situation Ethics.
22. Wikipedia: Legalism (theology).
23. Wikipedia: Antinomianism.
24. Wikipedia: Utilitarianism.
25. Drawn from the memory of the author, who has been unable to locate the specific TV news clip for reference.
26. *A Dutch peacekeeper remembers Srebrenica,* in *Der Spiegel* Online International, 12 July 2005.
27. Wikipedia: Srebrenica genocide.
28. Wikipedia: United Nations Protection Force.
29. *Der Spiegel*.
30. Wikipedia: Thom Karremans.
31. Wikipedia: Rwandan genocide.
32. Alison Des Forges,. "Leave No One to Tell the Story: Genocide in Rwanda," in *Human Rights Watch,* (1999).
33. Lewis MacKenzie, *Soldiers Made Me Look Good* (Toronto: Douglas & McIntyre, 2008), Cp. 21.
34. Ibid. As quoted by Peter Worthington, *The Toronto Sun*, 8 September 2008.
35. Lewis MacKenzie, "Dallaire's Deadly Error," in Maclean's, 20 August 2008, available at: http://www.macleans.ca/canada/national/article.jsp?content=20080820_93682_93682.
36. Jane Boulden, "Mandates Matter: An Exploration of Impartiality in United Nations Operations," in *Global Governance*, Vol. 11, 2005. Source here is: Army Training and Doctrine Bulletin, Vol. 6, No. 1, Spring 2003, Letter to the Editor by Colonel Mike Cessford, p. 58.
37. Proceedings of the Conference on Ethics in Canadian Defence, Ottawa, 24-25 October 1996, p.32. Address by Major-General Forand. Available at: http://www.ethics.forces.gc.ca/dl-tc/publications/conf1996-fra.pdf.
38. Conversation with Major-General (ret'd) Forand, 13 April 2011.
39. Proceedings, p. 32.
40. Ibid.
41. Steven L. Burg, Paul S. Shoup , *The War in Bosnia-Herzegovina: ethnic conflict and international intervention*, Cp. 4, p. 154.
42. Proceedings, p. 32.
43. Comment by Brigadier-General Forand, 30 March 2011.
44. Proceedings, p. 34, Address by Major-General Tousignan.
45. Ibid. p. 35-36.
46. P. Olsthoorn, "A Critique of Integrity: Has a Commander a Moral Obligation to Uphold his Own Principles?" in *Journal of Military Ethics*, Vol. 8, No. 2, pp. 90-104.
47. Wikipedia: Consequentialism.
48. John Robinson, an Anglican Bishop of Woolwich and Dean of Trinity College, as quoted in Wikipedia .
49. Wikipedia: Necessity in Canadian Law.
50. *Perka v. The Queen* [1984] 2 S.C.R. 232.
51. Code of Ethics (Update 2004), Canadian Medical Association, Para 3. Available at: http://policybase.cma.ca/dbtw-wpd/PolicyPDF/PD04-06F.pdf.
52. Conversation with Ms Kathryn Clarke, Senior Communications Officer, College of Physicians and Surgeons of Ontario.
53. Ibid.
54. Wikipedia: The Miller Test.
55. Wikipedia: International Criminal Court.
56. Proceedings of the Conference on Ethics in Canadian Defence, 30-31 October 1997, p.15, Address by M. Jacques Duchesneau*: Ethics, a gift we give ourselves.* Available at: http://www.ethics.forces.gc.ca/dl-tc/publications/conf1997-fra.pdf.
57. Ibid., p.19.
58. Proceedings of the Conference on Ethics in Canadian Defence, Ottawa 24-25 October 1996, p.40, Address by Colonel Don Matthews.