

# THE OPERATIONAL LAWYER: AN ESSENTIAL RESOURCE FOR THE MODERN COMMANDER

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*They say soldiers and lawyers could never thrive both together in one shire.*

Barnabe Rich: The Anatomy of Ireland, 1615

*Decisions were impacted by legal considerations at every level, [the law of war] proved invaluable in the decision-making process.*

General Colin Powell, Chairman, U.S. Joint Chiefs of Staff: "Conduct of the Persian Gulf War, "Final Report to Congress, April 1992

## INTRODUCTION

Legal considerations have become an essential part of the conduct of military operations. As is reflected in General Powell's statement the laws applicable to military operations impact at every level of command. The modern commander must have a knowledge of, and appreciation for, the legal aspects of the conduct of operations. This article will outline the wide scope of "operational law" and provide insight into the assistance available to the commander in the form of the operational lawyer.

Operational law can be defined as follows:

That body of law, both domestic and international, impacting specifically upon legal issues associated with the planning for and deployment of [military forces] in both peacetime and combat environments.<sup>1</sup>

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<sup>1</sup> This definition is an adaptation of one found in G.C. Coleman, "Operational Law and Contingency Planning at XVIII Airborne Corps". The Army Lawyer. Mar. 1988 at 17. Lieutenant-Colonel Coleman's definition is somewhat more restricted since it only refers to military operations conducted overseas (outside the continental United States). This more restrictive definition is largely a result of a legislative (Posse Comitatus Act) and historical reluctance in the United States to employ Federal troops on internal operations. Due to the Canadian practice of employing military forces on domestic operations any definition of operational law for the Canadian Forces must include domestic as well as international deployments of forces.

This rather broad definition is demonstrative of the scope of legal considerations relating to operations and crosses both domestic and international legal disciplines. Operational law also impacts on all types of military operations whether they are land, sea or air based, or involve traditional notions of armed conflict, special operations or peacekeeping. In this article operational law will be assessed in terms of international and domestic operations.

## **International Operations**

It has been said that the laws of war governing international armed conflicts "reflect the evolutionary development of warfare as well as the slow but steady definition of the rights of individuals not engaged in battle."<sup>2</sup> Often referred to as "international humanitarian law" this body of law reflects a global recognition of the importance of protecting individuals who become victims of armed conflict. The law of armed conflict has also been referred to as being, in some respects, "an extension of national criminal law into the international sphere".<sup>3</sup>

Starting with the Geneva Convention of 1864 for the Amelioration of the Conditions of the Wounded in Armies in the Field, and the United States Lieber Code of 1863 there has been a steady development of international treaties, conventions and legal custom directed towards regulating armed conflict. Much of the law of armed conflict has been developed by the international community directly in response to major wars. For example the Hague Conventions of 1907 dealing with armed conflict on land stemmed from the Franco-Prussian and Russo-Japanese War. The Geneva Gas Protocol of 1925 and the two Geneva Conventions of 1929 were a direct result of the First World War. Similarly, the Geneva Conventions of 1949 evolved directly from the abuses of the Second World War.<sup>4</sup> For much of this century the law of armed conflict has developed along two paths. The Hague law attempted to regulate the conduct of hostilities, while

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<sup>2</sup> W.H. Parks, "Law of War Advisor" (1980) *The JAG Journal* 1 at 2.

<sup>3</sup> L.C. Green. "The Role of Legal Advisers in the Armed Forces" *Essays on the Modern Law of War* (New York: Transnational Publishers, Inc., 1985) at 73.

<sup>4</sup> Parks. "Law of War Advisor", *supra*, note 2 at 2-3.

the laws of Geneva were developed to protect the sick and wounded, prisoners of war {POWs) and civilians.

Since the Second World War the law of armed conflict has attempted to deal not just with traditional inter-state conflicts, but also conflict with non-state actors, wars of national liberation and some internal armed conflicts. Two protocols additional to the Geneva Convention of 12 August 1949 were signed in Geneva in 1977, with Canadian ratification being provided on November 20, 1990.<sup>5</sup> The Additional Protocols represent a marked departure from previous conventions, not only because of the type of conflicts to which they apply, but also the degree to which the Protocols attempt to provide guidance regarding the acceptable means of conducting military operations. Protocol I addresses such issues as the identification of combatants, "precautions in the attack", the protection of civilian population and "objects", the prohibition of indiscriminate attacks, and the protection of works containing dangerous forces (dams, dykes, nuclear generating stations). The provisions of that Protocol impact directly on questions of targeting and rules of engagement.<sup>6</sup>

In ratifying Protocol I, Canada, and therefore the Canadian Forces, have undertaken:

...in time of peace as in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries and in particular, to include the study thereof in their programmes of military instruction....<sup>7</sup>

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<sup>5</sup> Protocol I deals with international armed conflicts including those conflicts "in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self determination...". Protocol II applies to non-international armed conflicts "which take place between its armed forces and dissident armed forces or other organized armed groups which, under responsible command exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations...".

<sup>6</sup> Interestingly, while the United States has not adopted the Additional Protocols, the Final Report to Congress, "Conduct of the Persian Gulf War". Apr 1992, Appendices A-S makes repeated references to the provisions of Protocol I in justifying targeting decisions such, as the infamous attack: on the Al-Firdus Bunker. The report itself acknowledges that portions of Protocol I are generally regarded as a codification of the customary practice of nations and therefore binding on all. " This reliance on Additional Protocol I standards regarding targeting continued in the Kosovo air campaign as well as the ongoing conflict in Afghanistan. These AP I provisions regarding targeting have come to be considered largely reflective of customary international law.

<sup>7</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art 83.

The commitment undertaken by the government of Canada is not limited to the dissemination of the law of armed conflict. It is not enough to simply know such laws exist. The military commander must also be provided an accurate and effective interpretation of the meaning of the laws governing military operations. To that end article 82 of Protocol I provides:

The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.

The advice on the law of armed conflict that the military lawyer can provide to a commander includes:

- Rules of Engagement
- Targeting
- Review of Operational Plans for Compliance with the Law of Armed Conflict
- Legality of Weapons and Their Use
- Investigation of War Crimes<sup>8</sup>
- Setting up POW Status Determination Tribunals<sup>9</sup>
- Handling of POWs/detainees
- Treatment of the Wounded and Sick
- Treatment of Civilians and Refugees
- Instruction in the Law of Armed Conflict

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<sup>8</sup> An outline of the involvement of Canadian Forces legal officers in the investigation of war crimes in the former Yugoslavia can be found in K Carter, "Proof Beyond a Reasonable Doubt?: Collecting Evidence for the International Criminal Tribunal for the Former Yugoslavia" (1993) 31 C.Y.I.L. 253. During the Gulf Conflict: the American Army JAG mobilized two Reserve Component Judge Advocate international law detachments to deal with allegations of Iraqi war crimes. One detachment collected information in the theatre of operations while the other detachment set up the War Crimes Documentation Center in the United States. "Conduct of the Persian Gulf War", *supra*, note 6 at 0-23, 0-24

<sup>9</sup> During the Gulf Conflict, Prisoner of War Status Determination Regulations, SOR/91-10-01, were enacted pursuant to the Geneva Conventions Act, R.S.C 1985, G-3 s. 8, allowing tribunals to be set up to identify persons entitled to POW status. No Canadian tribunal was required to sit during the conflict.

- Negotiation of Status of Forces Agreements and Memoranda of Understanding with Host Nations<sup>10</sup>
- Law of the Sea

The support that the military lawyer can provide to military operations is not limited to issues of international law. The deployment of military forces outside of Canada does not end the requirement for a commander to receive legal advice on a myriad of "domestic" legal issues such as:

- The Code of Service Discipline
- Access to information/Freedom of the Press/Censorship
- Claims by or against the Crown
- Human Rights
- Material Acquisition
- Pensions and Estates
- Legal Aid

The fact that a military lawyer can provide advice on such a diverse number of topics makes that officer a particularly flexible resource for the Commander.

Since the Gulf Conflict legal advice has been provided at all levels of command on a wide variety of operations. At National Defence Headquarters legal advice is coordinated through "J5 Legal" located in the Office of the Judge Advocate General. The Operations Division consists of the international law directorate, the operational law directorate, all of the Assistant Judge Advocate General regional offices and deployed legal officers. Each level of command has its own legal advisor. During the Gulf Conflict a total of five legal officers were deployed at various times to the theatre of

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<sup>10</sup> Status of Forces Agreements (SOFAs) are often entered into with host nations where military forces are stationed. Such agreements can govern criminal and disciplinary jurisdiction, customs, claims for damages, the carrying of arms, cultural restrictions on military forces, etc. During the Gulf Conflict a SOFA was completed with Bahrain. Negotiations were still ongoing with Qatar and Saudi Arabia at the end of the conflict.

operations<sup>11</sup>. Each major deployment since then has seen legal officers deployed to a wide variety of locations including Somalia, Bosnia, Croatia, Kosovo, Italy, East Timor, Rwanda and Ethiopia. In the post 11 September 2001 period legal officers across the country provided legal advice to commanders in respect of the defence of North America. During the Afghanistan Conflict legal officers have been deployed to advise naval task groups, air detachments, land and special forces. The subject areas on which legal advice has been provided covers the complete spectrum of international and domestic legal issues associated with operational law.

The following account of the duties of a United States Army lawyer in Grenada highlights the wide range of advice that can be provided to the operational military commander:

...the staff judge advocate of the 82nd Airborne Division kept a notebook identifying the issues he confronted. Reflected in these notes are typical concerns that illustrate the issues that a judge advocate could encounter in future conflicts. They include: administration of the prisoner of war and detainee camp, to include segregation and classification of prisoners, detainees, and civilians; proper use of captured medical personnel; disposal of bodies and graves registration; legal assistance to service members; division policy regarding protection of private property and looting; destruction of private property, such as livestock; arrangements for deployment of defense counsel; seizure and use of private vehicles for military purposes; disposition of captured weapons and equipment; combat bombing of a hospital; and establishment of rules of engagement.<sup>12</sup>

The need for legal advice to be provided to the military commander is not limited to large-scale conflicts. The unique nature of special operations also results in a need for legal support.<sup>13</sup> For example, the United States Army special operations forces receive operational law support at the command and group level. Each of the Special Forces groups (brigade equivalent), the Psychological Operations group and the Ranger regiment

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<sup>11</sup> W.J. Fenrick, "International Legal Aspects of Canadian Forces Experience in the Recent Gulf Conflict" Proceedings of the 1991 Conference of the Canadian Council on International Law (Ottawa: 1991) 11 at 12-13.

<sup>12</sup> T.B. Borek, "Legal Services During War" (1988), 120 Mil. Law Rev. 19 at 45.

<sup>13</sup> R.C. Barnes, Jr., "Legitimacy and the Lawyer in Low-Intensity Conflict (LIC): Civil Affairs Legal Support" The Army Lawyer Oct. 1988, 5.

has their own military lawyer.<sup>14</sup> Similarly, in Canada legal officers are assigned to provide legal advice to Joint Task Force 2.

The changing nature of United Nations military deployments from peacekeeping to a more interventionist role has increased the need for operational law support. The problems of resolving combatant status issues, the development of rules of engagement, dealing with refugees and the obligations associated with supervising POW/detainee and internment activities raise complex legal issues falling within the area of expertise of the operational lawyer. Legal officers have also been deployed with the Disaster Assistance Response Team to Honduras and Turkey.

### **Domestic Operations**

As is indicated in Desmond Morton's article "Bayonets in the Streets: The Canadian Experience of Aid of the Civil Power 1867-1990"<sup>15</sup> the use of troops to support public order is a long-standing tradition. Domestic operations can involve "aid of the civil power" operations as contemplated in Part VI of the *National Defence Act*<sup>16</sup> (eg. riots, public disturbances, etc.), armed assistance to law enforcement agencies<sup>17</sup> assistance to penitentiaries, public order emergencies<sup>18</sup> and general assistance to other government departments. The assistance to other government departments includes counter-drug operations and fisheries law enforcement. In addition, the Canadian Forces provides a unit, Joint Task Force 2, which is specifically tasked with a domestic counter-terrorism role.

The deployment of military forces on domestic operations raise numerous and complicated legal issues. The complexity of those issues is directly related to the

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<sup>14</sup> G.L. Walsh, "Role of the Judge Advocate in Special Operations" *The Army Lawyer*, Aug. 1989, 4 and R.C. Barnes, Jr. "Operational Law, Special Operations, and Reserve Support" *The Army Lawyer*, Dec. 1984, 1.

<sup>15</sup> *Canadian Defence Quarterly*, Apr. 1991, 30.

<sup>16</sup> R.S.C. 1985, c. N-5.

<sup>17</sup> See s. 276.3, *National Defence Act*, the *Canadian Forces Armed Assistance Directions* P.C. 1993-624 and the *Canadian Forces Assistance to Provincial Police Force Directions*, P.C. 1996-833.

<sup>18</sup> *Emergencies Act*, R.S.C. 1985, c. 22 (4th.Supp.) Part II.

circumstances under which the Canadian Forces are deployed. Often, the military is called to serve as a "force of last resort" in aid of civil authorities when the normal means of maintaining public order are no longer adequate or effective. While operating on domestic operations military personnel remain liable to both civilian and military law.

Military personnel may have the status of "peace officers" while employed on domestic operations. While peace officer status provides important legal protections under the *Criminal Code*<sup>19</sup> it also sets out a number of legal obligations and powers that are not traditionally part of the training of military forces. Military forces employed on domestic operations are tasked with assisting civilian authorities in maintaining the rule of law. That rule mandates that personnel deployed to preserve public order obey the very laws they are attempting to maintain.<sup>20</sup> Therefore, in order for a commander to successfully carry out a domestic operation it is essential that the legal authority for, and restrictions on, such operations are fully understood.

As with international operations the operational lawyer is uniquely situated to provide the military commander with legal advice concerning the conduct of domestic operations. The legal issues on which advice can be provided are not unlike those that arise in relation to armed conflict. Such issues include: rules of engagement, levels of force, use of certain weapons, intelligence gathering, investigation of alleged legal violations, treatment of detainees, review of operational plans, training, resolution of damage claims and liaison with other security forces and civilian authorities. In addition, the routine legal matters associated with military forces "accompany" the units on the deployment. Operational lawyers have been an integral part of the deployment of military forces on domestic operations from the planning to the execution stages. During the Oka and Kahnawake dispute in 1990 military lawyers provided advice at all levels from National Defence Headquarters down to the brigade and unit level. They have deployed on other operations such as the Manitoba Flood, the Ice Storm in Quebec and Ontario and for Op

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<sup>19</sup> R.S.C. 1985, c. C-46.

<sup>20</sup> For a more detailed review of the legal issues associated with employing military forces on domestic operations in Canada see K.W. Watkin, "Legal Aspects of Internal Security: A Soldier's Protection and Obligations" (1985) 1 C.F. JAG J 51, (1987) 2 C.F. JAG J. 5.



Abacus at the turn of the Century.

## **Misconceptions and Realities**

While it is clear legal considerations are becoming an increasingly important factor in the deployment of military forces in both international and domestic operations there was often in the early 1990s a reluctance by military commanders to use the services provided by the operational lawyer. Two areas where there was a initial resistance to the involvement of lawyers were targeting and rules of engagement.

The problems that some commanders had with allowing lawyers into the "war room" were based largely on misconceptions as to the role of the legal adviser. During the Vietnam War restrictive rules of engagement were largely believed to have been based on legal constraints. However, those constraints were often largely political. Rules of engagement do not solely involve legal considerations. Such rules must incorporate operational (capabilities of military forces and weapons systems, etc.) and policy/political considerations. Indeed the misconceptions surrounding the nature of rules of engagement sometimes places the operational lawyer in the position of advising the commander the law allows activities often mistakenly believed to be illegal.<sup>21</sup> In most circumstances it is the tactical/operational or policy/political constraints that limit the authority to use force.

The reluctance to have operational lawyers have input into the drafting of rules of engagement was not universal. During the Gulf Conflict Canadian military lawyers devoted:

...a substantial amount of time to such tasks as elaborating the criteria for the use of force in self defence, emphasizing the legal differences between use of force before and after the commencement of hostilities, ensuring logical consistency in the ROE [rules of engagement], and establishing procedures for ROE changes. The analytical and drafting skills, and the procedural sensitivity of the trained lawyer, were extremely useful in connection with the ROE.<sup>22</sup>

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<sup>21</sup> S. Keeva, "Lawyers In The War Room" American Bar Association Journal, Dec. 1991, 52 at 56- 57.

Rules of engagement were developed for operations such as ship boarding parties, combat air patrols and airfield perimeter security. Among the lessons learned from the Gulf Conflict was the need for a more integrated approach to rules of engagement for the navy, army and air force, and the requirement to develop rules for use once sustained hostilities occur.

In the Canadian Forces any problem with integrating legal officers into the drafting process for rules of engagement has largely disappeared. Legal officers at the strategic, operational and sometimes the tactical level headquarters have become involved in drafting and interpreting rules of engagement since the Gulf Conflict.<sup>23</sup>

The impact of the law on "targeting" is also often misunderstood. Simply stated a commander's authority to use military force is not unlimited. However, that does not mean the legal restrictions that do apply stand in the way of an effective attack or defensive operation. In terms of targeting law generally is most concerned with the reasons for the application of the force (military necessity) and any resulting collateral damage (effect on civilian personnel and objects).

The legality of targeting is not divorced from practical military concerns. Given the logistical constraints confronting most commanders the question of the most efficient application of force dovetails nicely into the legal issues respecting targeting. Both factors are focused on successfully completing the military mission with a minimum expenditure of resources. In addition, operational law, and by extension the operational lawyer, is directed towards assessing the broader effect of decisions made by operational commanders. A commander at a relatively low level in the chain of command may want to destroy a certain objective in order to achieve a limited military objective, however, that destruction could result in a backlash far outweighing the military advantage gained.

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<sup>22</sup> W.J. Fenrick., "International Legal Aspects of Canadian Forces Experience in the Recent Gulf Conflict", *supra*, note 11, at 15.

<sup>23</sup> . For a discussion of some of attitudinal challenges regarding the application of rules of engagement see Colonel K.W. Watkin, "Warriors, Obedience and the Rule of Law" Winter 2000/Spring 2001 The Army Doctrine and Training Bulletin Vol. 3, No. 4/Vol. 4, No.1.

The legal criteria reflected in the law of armed conflict for international conflicts, and the domestic criminal law governing domestic operations, also outline the limits which society places on certain conduct. For example, the decision by coalition forces not to destroy two Iraqi fighter aircraft positioned adjacent to the ancient temple of Ur was directly result of a proportionality assessment of the military advantage to be gained versus the negative impact of destroying cultural property.<sup>24</sup>

During the Gulf Conflict each branch of the United States forces had its own targeting committee that included operational lawyers as members. After receiving a list of priority targets the committees developed strategies for attacking them. A target list was then drawn up for the following day. The list included "a legal annex written by the staff lawyer, pointing out any potential violations of the Law of War."<sup>25</sup> The commander then made a final determination of the next day's targets.<sup>26</sup> The advice given by Canadian military lawyers during the Gulf Conflict concerning targeting was much more modest, largely in keeping with the limited degree to which Canadian air units were committed to air to ground attacks. After February 20, 1992, when Canadian planes began bombing attacks on Iraqi forces, Canadian military lawyers gave advice that retreating Iraqi forces, other than medical and religious personnel, were lawful combatants and therefore subject to attack.<sup>27</sup>

The targeting process has become increasingly sophisticated during the past decade with military lawyers being integrally involved in targeting decisions. More recently Canadian legal officers were integrated directly into the targeting process for the NATO air campaign in Kosovo. The provision of legal advice respecting targeting is now a regular role performed by legal advisors at all levels of operations.

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<sup>24</sup> Conduct of the Persian Gulf War, *supra*, note 6 at 0-24.

<sup>25</sup> Keeva, "Lawyers in the War Room", *supra*, note 20 at 57.

<sup>26</sup> *Ibid.* at 57-58.

<sup>27</sup> W.J. Fenrick, "International Legal Aspects of Canadian Forces Experience in the Recent Gulf Conflict", *supra*, note 11, at 17.

## Accountability

Breaches of the law during operations at even the lowest level have the potential to be placed under public scrutiny. Although there has been some restriction on media access to the battlefield when the conflict has occurred in isolated locations (eg. the Falklands, Grenada and Iraq/Kuwait) advances in modern technology make it extremely difficult to control outside monitoring of military operations. In addition, as the Israelis found out during the invasion of Lebanon in 1982, the imposition of censorship and media controls can rebound badly when the opposing side allows open access to the front thereby creating a system of "one-sided censorship".<sup>28</sup> The My Lai massacre during the Vietnam War stands out as a profound example of the effect the reporting in the media of the non-compliance with the law of armed conflict can have on the ability of a nation to conduct military operations. The modern commander must comply with the international and domestic laws affecting military operations.

The reality of modern warfare is such that commanders at every level cannot afford to either ignore or forget about the legal aspects of military operations. The tragic beating death of a Somali national by members of the Canadian Airborne Regiment in March 1993 not only overshadowed the impressive successes of that mission, but also contributed directly to the disbandment of the Regiment in 1995. Legal officers assisted the Canadian Forces in all aspects of the Somalia affair. This included the dispatching of legal officers to Somalia to advise on the conduct of the military police investigations, the provision of defence counsel in theatre and the conduct of a combined military/civilian Board of Inquiry in part during the ongoing operation<sup>29</sup>. Legal officers subsequently served both as prosecutors and defence counsel at courts martial and assisted in presenting the Government of Canada position before the Somalia Commission of Inquiry.

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<sup>28</sup> G. Mungham, "Israel: Fog Over Lebanon" *The Fog of War* (London: William Heinemann Ltd., 1987) at 249. The danger that incidents might be misunderstood or misrepresented by the Press underlines the importance of ensuring alleged war crimes are investigated promptly and thoroughly.

<sup>29</sup> See the Report of the Somalia Board of Inquiry, July 1993 (the "de Faye" Board).

The Commission of Inquiry itself acknowledged the important role performed by operational legal advisors when it recommended in a series of recommendations that legal officers be available to advise operational commanders:

40.42 Legal officers providing advisory services be deployed on training missions as well as actual operations.

40.43 Legal officers providing advisory services guide commanding officers and troops on legal issues arising from all aspects of operations, including Rules of Engagement, the Law of Armed Conflict, Canadian Forces Organization Orders and Ministerial Organization Orders.

40.44 Legal officers providing advisory services educate Canadian Forces members before and during deployment on local law, the Law of Armed Conflict, and Rules of Engagement.<sup>30</sup>

The effectiveness of an operational lawyer's advice is directly linked to the commitment by military commanders to the incorporation of the law of armed conflict and applicable domestic law directly into the planning, preparation and execution stages of a military operation. The operational lawyer can be integrated into military operations in three ways: instruction on the applicable law, participation in the operational planning process, review of operational plans and deployment of the military lawyer at the appropriate HQ level.

### **Legal Instruction**

By virtue of article 82 of Additional Protocol I nations such as Canada have undertaken to disseminate the Geneva Conventions and the Protocol, and more particularly "...to include the study thereof in their programmes of military instruction..." In the post Somalia period the Canadian Forces has developed a comprehensive training package. This package includes a set of rules for a basic level of training called "The Canadian Forces Code of Conduct". The Canadian Forces conducts a Law of Armed Conflict course as part of the Canadian Forces Staff College course (Majors/Lieutenant-Colonels) and operational law modules are provided at senior staff courses such as the Advanced

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Military Studies Course (Colonels) and the National Security Studies Course (Colonels/Brigadier Generals). Training is also provided at professional schools such as the Maritime Warfare Centre and other schools of instruction.

In addition, it is evident that in order for Canadian Forces personnel to properly complete duties on domestic operations there must be a comprehensive understanding of the legal environment in which they will be required to operate. Instruction on the legal aspects of domestic operations is an integral part of pre-deployment training. In the existing international and domestic political environment a military commander must, as an essential professional attribute, be sensitized to the legal issues impacting on operations. An operational lawyer provide a valuable, and in many cases the only, resource for disseminating information concerning the domestic and international law affecting operations.

### **Integration in the Operational Planning Process**

As early as 1983 the United States military recognized the importance of having operational lawyers involved in the planning of military operations. A Department of Defence Memorandum mandated the attendance of legal advisors at planning conferences for joint and combined operations and exercises when rules of engagement and related topics were to be discussed.<sup>31</sup> In the Canadian Forces operational legal advisers are now an integral part of the planning for, and conduct of operations. Legal officers serve on the Joint Staff (J Staff) at National Defence Headquarters, the Canadian Forces Joint Operations Group, the 1 Canadian Air Division, the Area Headquarters and with the Maritime Operational Command Headquarters. Every day operational lawyers provided legal advice to planning and operational staffs on deployed operations.

This proactive approach avoids the planning of operations that will breach international and domestic law. It also helps sensitize the line officers to the legal issues associated with their planned activities. Obviously, the successful integration of the operational

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<sup>31</sup> Barnes, "Operational Law, Special Operations and Reserve Support", supra, note 14 at 3.

lawyer into the planning process hinges on the ability of the lawyer to demonstrate in a practical way the relevance of operational law to the proposed operations. At the same time it also requires operations personnel to be receptive to a new member of planning team. Given the importance of legal issues to modern operations the involvement of the operational lawyer at the earliest stages of the planning process provides a most cost effective and efficient means of ensuring operations are conducted in a legally defensible fashion.

### **Reasons for an Operational Lawyer**

Article 82 of Protocol I mandates that legal advisors be made available to advise military commanders at the appropriate level on the application of the Geneva Conventions and the Protocol. As has already been noted this requirement was reinforced by the Somalia Commission of Inquiry. There is no clear-cut rule as to the level at which the operational lawyer should serve. In order for legal advice to be effective it must be provided in a timely fashion, and to the personnel who must use that advice to make the operational decisions. Legal advice cannot just be provided from the national or Command headquarters level. Operational lawyers must be deployed to the field with the military forces they support. The reasons for the field deployment of operational lawyers are threefold. First, in order for legal advice to be effective it must be based on accurate facts and a genuine appreciation of the environment in which the advice is going to be applied. Secondly, the types of legal issues confronting the commander vary at each level of command. Finally, the speed at which decisions have to be made during operations often mandates a faster response to operational law issues than can be provided by a higher headquarters. Not every deployment of military forces will require a full time legal adviser (i.e. small United Nations observer groups), however, the greater the autonomy given to a military commander the greater the requirement that timely and meaningful operational legal advice be made available through the presence of an operational lawyer.

## **Conclusions**

In the modern political and legal environment in which military forces are required to operate the military commander is confronted with an increasing number of legal issues that can impact on the successful completion of the military mission. The operational lawyer can make a significant contribution to the success of both international and domestic military operations by ensuring that the commander is informed of the legal factors that should be considered when making command decisions. The operational lawyer provides an essential and flexible resource for commanders at all levels within the chain of command.