

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

EXECUTIVE SUMMARY

This article explores the concept of operational law and the role of the operational lawyer. After defining military law as 'all international and domestic law relating to the Canadian Forces, including its governance, administration, and activities' and operational law as 'the domestic and international law applicable to all domestic and international Canadian Forces operations', operational law as it applies both internationally and domestically is examined. Noting that both international and domestic law is at times intricate, complex and highly nuanced, the article asserts that a legal officer is ideally situated as a key member of the command team to provide advice on the myriad of legal issues that face the chain of command.

The article then turns to address certain operational law realities, beginning with the relationship of the legal adviser and the chain of command. It notes that to preserve the solicitor-client relationship and the ability of the legal officer to provide independent and effective advice, the Judge Advocate General retains command at all times while ensuring that these legal officers remain responsive to commanders and their staffs.

Further discussions on the issues of targeting, accountability and integration in the Operational Planning Process follow, centred on the legal principle that the right to use military force is not unlimited. The article points out that legal input in the targeting and planning processes – besides being mandated by international law

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and recommended by a Commission of Inquiry domestically – make sense not only from a legal perspective, but from an efficiency point of view as well.

In short, the operational lawyer provides the commander and staff with an essential and flexible resource for commanders at all levels within the chain of command.

INTRODUCTION

Legal considerations have become an essential part of the conduct of military operations. As reflected in General Powell's statement, the laws applicable to military operations impact at every level of command. The commander must have a knowledge of, and appreciation for, the legal aspects of the conduct of operations.

At the same time, contemporary military operations are becoming ever-more challenging and complex, bringing with them a commensurate increase in their legal intricacy. The net result of these factors is that legal resources are being made directly available to commanders at ever-lower levels not because of convenience, but of necessity.

This article will explore the wide spectrum of legal activities captured by the concept of 'operational law' and provide insight into the assistance available to the commander in the form of the operational lawyer. It begins with the definition of the overarching concept of 'military law', setting the stage for a discussion of the definition, scope and purpose of operational law. This discussion will begin by examining operational law in the context of international operations. A key focus of this section will be on the interplay between the deployed military lawyer and their command and support structure, reaching as it does from the theatre of operations back to Canada. The discussion will then shift to domestic operations, addressing the particular challenges when dealing with domestic law within the reality that the Canadian Forces will almost always find itself in a supporting role to another government department. Finally, specific issues involving military lawyers will be examined, with particular emphasis on the significant contribution these essential and flexible members of the command team can make at all levels within the chain of command.

Military Law

Before developing a definition of operational law, it is necessary to understand the context within which such an area of practice is situated. As already mentioned, modern military operations are highly complex affairs that often span a

spectrum from peace to conflict. In fact, a single operation can occupy a wide span of this spectrum simultaneously.³

Further complicating the situation for the typical military commander is the increasingly combined, joint and integrated nature of operations. Almost all major military operations in recent history have been conducted not by a single nation acting alone, but rather by a combination of states acting together. These operations have also required that land, air and maritime military forces act jointly to deal with the problem at hand. A final complicating factor has been the realization that more than just military resources must be used – the Canadian Forces must increasingly integrate itself with other government departments and even non-governmental organizations to arrive at coordinated and cohesive solutions.⁴

In addition to the complexities of military operations, the Canadian Forces – as with all modern contemporary militaries – requires both a means of ensuring discipline and an administrative framework within which such operations may take place. In short, military lawyers are not only required to directly support military operations, but they function within the two other major areas: military justice and military administration.

Indeed, these three pillars taken together – operations, justice and administration – outline the scope and purpose of military law, which is defined as “...all international and domestic law relating to the Canadian Forces, including its governance, administration, and activities.”⁵ A conceptual visualization of military law and its relationship to both international and domestic law is found below at Figure 1.

³ Charles C. Krulak, “The Strategic Corporal: Leadership in the Three Block War”, [1999] *Marines Magazine*, online: http://www.au.af.mil/au/awc/awcgate/usmc/strategic_corporal.htm. This seminal article described the concept of the ‘Three Block War’, where a single military unit could conceivably find itself engaging in normal combat operations on one city block, traditional peacekeeping activities on the next block over, and be conducting humanitarian relief operations on the third block. See also Kenneth Watkin, “Humanitarian Law and 21st-Century Conflict: Three Block Wars, Terrorism, and Complex Security Situations” in Susan Carolyn Breau and Agnieszka Jachec-Neale, eds., *Testing the Boundaries of international humanitarian law*, (London: British Institute of International and Comparative Law, 2006).

⁴ The Canadian mission in Afghanistan is an excellent example of this complexity. The mission consists of approximately 40 troop-contributing nations, including naval forces operating in nearby waters and air forces directly supporting land operations. It also features an integrated operation plan which coordinates the actions of various governmental entities from a host of contributing nations and provides a forum for the participation of non-governmental organizations.

⁵ *Special Committee on the Canadian Mission in Afghanistan, Meeting No. 14*, 40th Parliament 2nd Session, Evidence No. 14 (4 November 2009). See also the Office of the Judge Advocate General website online: <http://jag.mil.ca/law-loi/index-eng.asp>.

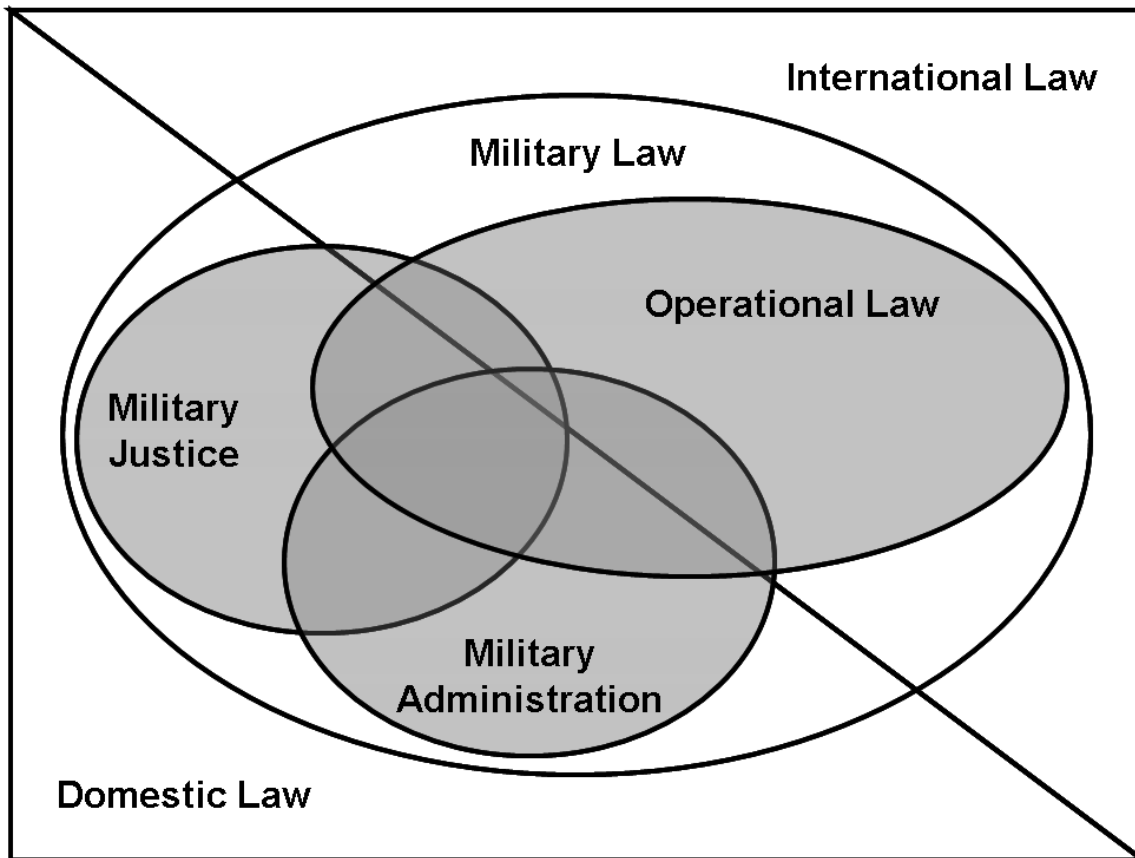


Figure 1: Conceptual Framework of Military Law

Operational Law

It is within this broad context that operational law is situated. Nevertheless, it should be borne in mind that the three pillars are not isolated stovepipes; all significantly overlap one another. This is necessitated by the fact that a Canadian Forces operation "...is a military action or the carrying out of a strategic, operational, tactical, training or an administrative military mission...."⁶

The breadth of such operations is brought out in stark relief when the Canadian Forces' involvement in Afghanistan is considered. Here, the mission includes (but is not limited to) the following tasks:

- Conduct operations in support of the Afghan National Army and the Afghan National Police;
- Help the Government of Afghanistan and its institutions strengthen and enhance their capacity for good governance;

⁶ B-GJ-005-300/FP-000, Canadian Forces Operations, Ch 2 2005-08-15 at p. 1-6.

- Help the Government of Afghanistan extend its authority in the southern provinces;
- Facilitate the delivery of programs and projects that support national economic recovery and rehabilitation; and
- Support Canadian governmental and non-governmental organizations that help Afghans meet their personal and family needs.⁷

Given the broad spectrum of activity encompassed by this definition of Canadian Forces operations, it follows that the definition of operational law must be equally expansive. In fact, operational law has been defined as "...the domestic and international law applicable to all domestic and international Canadian Forces operations."⁸ Thus its ambit crosses over and combines the traditional areas of general legal practice – both domestic and international – with the military justice and military administration branches.

INTERNATIONAL OPERATIONS

The International Legal Environment

It has been said that the laws 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."⁹ Often referred to as international humanitarian law, this body of law reflects the increasing global recognition of the importance of protecting individuals who become victims of armed conflict as well as the overall goal of regulating armed conflict itself.

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 and protecting its victims. In a large measure, the driving force behind these developments has been the international community's response to major conflicts.¹⁰ 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.

⁷ Canadian Expeditionary Force Command Fact Sheet: Our Mission in Afghanistan, online: <http://www.comfec-cefcom.forces.gc.ca/pa-ap/ops/fs-fr/afg-eng.asp>

⁸ *Special Committee on the Canadian Mission in Afghanistan, Meeting No. 14*, 40th Parliament 2nd Session, Evidence No. 14 (4 November 2009).

⁹ W.H. Parks, "Law of War Advisor" (1980), *The JAG Journal* 1 at 2.

¹⁰ W.H. Parks, "Law of War Advisor" (1980), *The JAG Journal* 1 at 2-3.

Undoubtedly the most well-known of these treaties are the four *Geneva Conventions of 12 August 1949*. Originally conceived as a response to the abuses of the Second World War, they provide protection to the victims of armed conflict be they civilians or military personnel placed *hors de combat*. In fact, they have been augmented by the creation of three *Additional Protocols*.¹¹

In terms of international armed conflicts, *Additional Protocol I* represents a marked departure from previous conventions, not only because of the type of conflicts to which it applies, but also the degree to which it attempts to regulate the acceptable means of conducting military operations. Rather than restricting its ambit to either protecting the victims of conflict or regulating its conduct, *Additional Protocol I* combines both functions into one treaty.¹²

From an international law perspective, the most significant issue impacting on operational law is the decreasing number of state versus state conflicts and the predominance of non-international armed conflicts. Indeed, it has been noted that in 2006 there were no inter-state conflicts.¹³ This lack of state on state conflict has caused the focus to shift to complex security situations ranging from civil wars to transnational terrorism. Many operational law questions centre on the application of Common Article 3 to the *Geneva Conventions of 1949* as well as customary international law. In addition, the interface between international humanitarian law,

¹¹ Canadian ratification was provided on 20 November 1990. *Additional 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...." *Additional Protocol II* applies to non-international armed conflicts "which take place between [a State's] 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...." *Additional Protocol III* is largely an administrative instrument, introducing the 'Red Crystal' as a fourth authorized protected symbol, joining the Red Cross, Red Crescent and Red Lion.

¹² *Additional 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 and nuclear generating stations) during international armed conflict. Further, the provisions of *Additional Protocol I* impact directly on questions of targeting and rules of engagement. 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 make repeated references to the provisions of *Additional Protocol I* in justifying targeting decisions such as the infamous attack on the Al-Firdus Bunker. The report itself acknowledges that portions of *Additional 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 [*Additional Protocol I*] provisions regarding targeting have come to be considered largely reflective of customary international law." See also J.M. Henckaerts and L. Doswald-Beck, *Customary international humanitarian law*, (Cambridge: Cambridge University Press, 2007) at 3-76.

¹³ See Daniel Smith, "World at War", (2007) 36/1 *The Defence Monitor* 1 at p. 1, online: http://www.cdi.org/PDFs/DM_JanFeb07.pdf.

international human rights law and even domestic human rights is often a consideration.¹⁴

Taken together, the entire body of treaty law, custom and convention has produced a legal landscape at the international level that is at times intricate, complex and highly nuanced. Add to this the reality of the increasing role being played by non-state actors on the international stage, and it is clear that lawyers on the contemporary battlespace are more than just 'nice-to-haves'. They have become, in a very real way, an indispensable and essential resource for the military commander to draw upon.

The Legal Adviser on International Operations

In addition to the practical considerations mitigating for the inclusion of military lawyers as advisers to commanders, *Additional Protocol I* also creates a legal requirement whereby:

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.¹⁵

These practical and legal imperatives have resulted in the fact that each major Canadian Forces deployment since the 1992 Persian Gulf War¹⁶ has seen legal officers deployed to a wide variety of locations including Somalia, Bosnia, Croatia, Kosovo, Italy, East Timor, Rwanda, Ethiopia, Sudan and the Congo. Most recently, legal officers have been deployed to Afghanistan and the Middle East to advise naval

¹⁴ See Commission on Human Rights, *Report of the Independent Expert on the Situation of Human Rights in Afghanistan*, UN ESCOR, 61st Sess., UN Doc. E/CN.4/2005/122 (2005), and Commission on Human Rights, *Report of the Chairperson of the Working Group on Arbitrary Detention*, UN ESCOR, 62nd Sess., UN Doc. E/CN.4/2006/120 (2006), Commission on Human Rights, *Report of the High Commissioner for Human Rights on the Situation of Human Rights in Afghanistan and on the Achievements of Technical Assistance in the Field of Human Rights*, UN ESCOR, 62nd Sess., UN Doc. E/CN.4/2006/108 (2006), and Kenneth Watkin, "Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict", (2004) 98 Am. J. of Int'l Law 1. See also Adam Roberts, "Transformative Military Occupation: Applying the Laws of War and Human Rights", (2006) 100 Am. J. of Int'l Law 580 for a discussion of the balance of international humanitarian law norms versus those of international human rights law within the specific context of military occupations.

¹⁵ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, Article 82.

¹⁶ See 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. During the Gulf Conflict a total of five legal officers were deployed at various times to the theatre of operations.

task groups, air detachments, land and special forces.¹⁷ The advice that the military lawyer can provide includes, but is not limited to:

- Rules of engagement;
- Targeting;
- Intelligence;
- Review of operational plans for compliance with international humanitarian law;
- Legality of weapons and their use;
- Investigation of war crimes;¹⁸
- Prisoner of war status determination tribunals;¹⁹
- Handling of prisoners of war and detainees;
- Treatment of the wounded and sick;
- Treatment of civilians and refugees;
- Instruction in the law of armed conflict;
- Negotiation of Status of Forces Agreements and Memoranda of Understanding with host nations;²⁰

¹⁷ During her deployment to Afghanistan in 2007, Lieutenant-Commander April Inglis noted that her duties included "...counselling her military commander on operational law issues and overseeing contract issues at the camp [as well as assessing] the justice system in Kandahar." (Mitch Potter, "A Military Lawyer's Life in Afghanistan" *The Toronto Star* (20 December 2007) online: <http://www.thestar.com/printArticle/287297>). Lieutenant-Commander Gina Connor, commenting about her own deployment to Afghanistan, noted that she "...was required to know Canadian common law, military law, military regulations, Afghan national law, unwritten tribal law, and Sharia law." (Richard Cleroux, "There's No Life Like It" (2008), 32(3) *Canadian Lawyer Magazine* 3).

¹⁸ 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.

¹⁹ During the 1992 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 prisoner of war status. Although no Canadian tribunals have been required to sit since their enactment, these regulations remain extant.

²⁰ Formal agreements 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 Afghanistan Conflict a *Military Technical Agreement* was concluded with the newly-formed government of Afghanistan following the

- Law of the sea;
- Piracy; and
- The rule of law.

Establishing and maintaining the rule of law in failed or failing states has become a defining aspect of stability operations. Rule of law tasks inherent to such operations require knowledge of both international humanitarian law and international human rights law. In Afghanistan, Canadian Forces legal officers work with other officers from the United States and other Allies to mentor their Afghan counterparts. For example, the Strategic Advisory Team provided advice to Afghan government ministers in Kabul, while the Provincial Reconstruction Team continues to work with their Whole of Government colleagues in Khandahar. Legal officers have also served in the MONUC Rule of Law Unit in the Congo – both in Kinshasa and Goma – to provide assistance to Congolese military justice personnel.

It is also noteworthy that the support provided by a military lawyer is not limited to issues of international law. Even when deployed outside of Canada, legal advice is still required on a myriad of 'domestic' legal issues such as the *Code of Service Discipline*, privacy issues (including *Access to Information Act* requests), claims by or against the Crown, human rights issues, procurement, pensions, estates and legal aid.

As was noted in the introduction, the wide horizontal breadth of operational law means that the military lawyer must provide advice on a diverse number of topics. It further requires a robust and diverse support system in place to assist these deployed lawyers in executing their mandate.

The Operations Division

To enable and support legal officers in their role as legal advisers to Commanders and their staffs, the Judge Advocate General has formed the Operations Division. Located at National Defence Headquarters in Ottawa, the Division consists of the Directorate of International and Operational Law, the Directorate of Intelligence and Information Operations, as well as permanent legal advisers to the Strategic Joint Staff and the Operational Commands. As such, the Division not only oversees and supports deployed legal officers, but collectively provides first-line legal advice to the strategic level of the Canadian Forces on matters of operational law. Figure 2 below illustrates the current organization of the Operations Division.

fall of the Taliban. This *Agreement* provided, in part, for special provisions regarding Canadian Forces members and the civilian personnel that accompany them in terms of criminal jurisdiction, customs and documentation requirements.

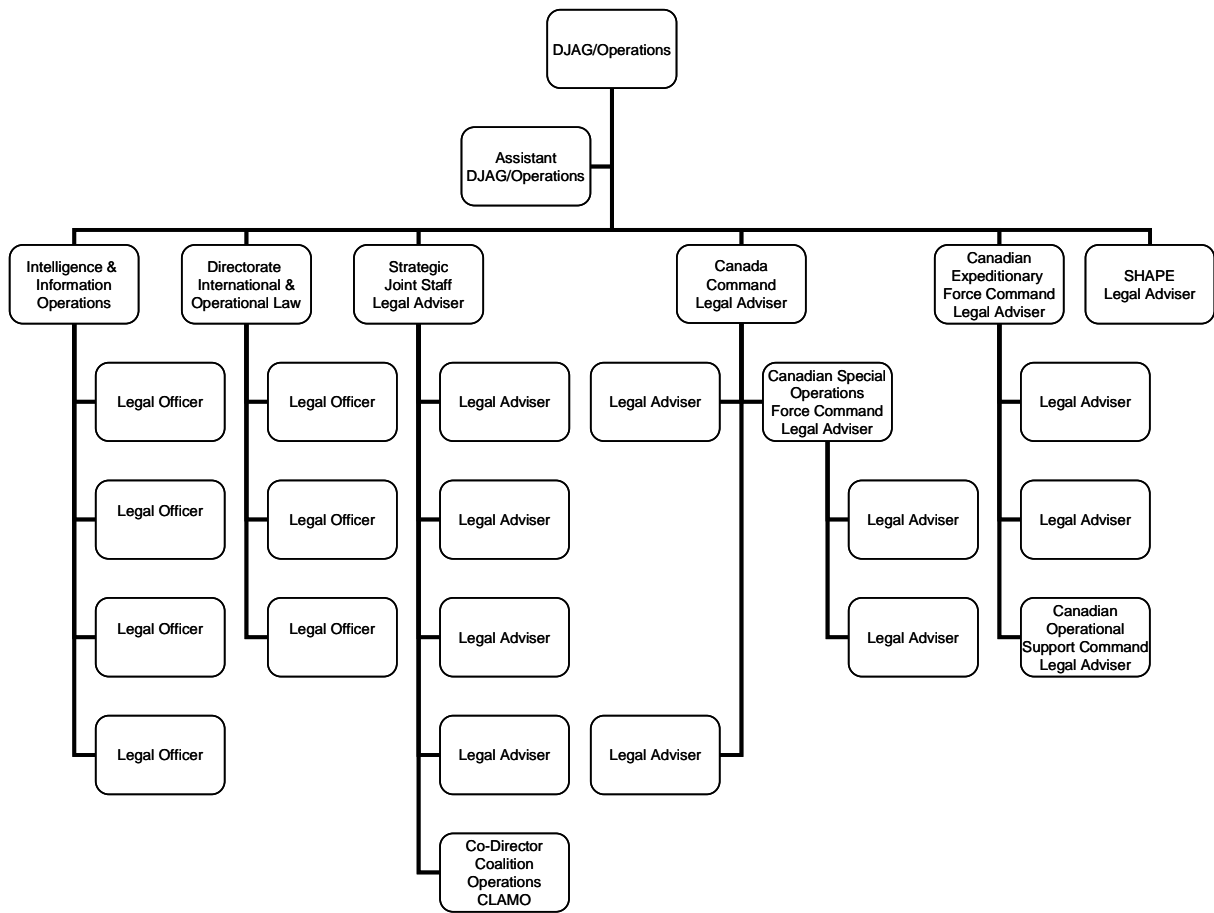


Figure 2: Operations Division Organization

DOMESTIC OPERATIONS

The Domestic Legal Environment

As indicated by Desmond Morton in his article "Bayonets in the Streets: The Canadian Experience of Aid of the Civil Power 1867-1990",²¹ the use of troops to support public order is a long-standing tradition in Canada. Domestic operations have and can involve Aid of the Civil Power operations as contemplated in Part VI of the *National Defence Act*²² (riots and public disturbances, for example), armed assistance to law enforcement agencies,²³ assistance to federal penitentiaries,²⁴

²¹ Canadian Defence Quarterly, Apr. 1991, 30

²² R.S.C. 1985, c. N-5

²³ See Section 273.6 of the *National Defence Act*, as well as the *Canadian Forces Armed Assistance Directions*, P.C. 1993-624 and the *Canadian Forces Assistance to Provincial Police Force Directions*, P.C. 1996-833.

²⁴ *Canadian Forces Assistance to Federal Penitentiaries*, P.C. 1975-131.

public order emergencies²⁵ and general assistance to other government departments (including counter-drug operations and fisheries law enforcement).

The deployment of military forces on domestic operations raise numerous and complicated legal issues. The complexity of those issues is directly related to the circumstances under which the Canadian Forces are deployed domestically. 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. Generally speaking, military forces employed on domestic operations are tasked with assisting civilian authorities in maintaining the rule of law, with providing humanitarian assistance and on routine tasks. During any domestic operation, it is trite to say that personnel deployed to preserve public order obey the very laws they are attempting to maintain.²⁶ Therefore, in order for a commander to successfully carry out such operations it is essential that the legal authority for, and restrictions on, the forces being so employed are fully understood.

The Legal Adviser on Domestic Operations

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 can 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.

²⁵ *Emergencies Act*, R.S.C. 1985, c. 22 (4th.Supp.) Part II.

²⁶ 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.

Operational lawyers have been and continue to be 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 Year 2000 Operations under Operation ABACUS. Most recently, legal advisers have provided support to the Vancouver 2010 Olympic Games, and continue to do so at present – support which is expected to involve more than eighteen military lawyers at its peak.

OPERATIONAL LAW REALITIES

Responsiveness and Responsibility

It is clear from the foregoing that legal considerations are becoming an increasingly important factor in the deployment of military forces in both international and domestic contexts. Although a legal adviser is a member of the command team in a given headquarters, it is not as a staff officer in the same sense as J3 Operations, J5 Plans or the other members of the commander's staff. Rather, the legal officer is an adviser responsive directly to the commander and available for consultation by the staff. At the same time, the legal officer is directly responsible through the Operations Division to the Judge Advocate General, who maintains command of that legal officer at all times.²⁷

This arrangement preserves the fundamental independence required for the Judge Advocate General to provide professional legal advice to the chain of command. It also reinforces the solicitor/client relationship that is of prime importance and central to the provision of legal advice. The classic statement of both the importance and rationale for this relationship and the privileges that arise from it was made over 150 years ago and stated that:

If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case.²⁸

Commanders and their staff must feel perfectly free to seek legal advice from their legal officer in complete confidentiality. To ensure that these communications do enjoy such privilege, it is critical that a clear solicitor/client relationship exist.

²⁷ *Queens Regulations and Orders for the Canadian Forces*, Article 4.01 and Article 4.081.

²⁸ *Greenough v. Gaskell* (1833), 39 E.R. 618 at 620-21, Brougham L.C. The Supreme Court of Canada has expressed similar views of the importance and rationale for the privilege in *Smith v. Jones*, [1999] 1 S.C.R. 455, at para. 46 and *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809, at para. 14.

Although mandated by international law,²⁹ there is no clear-cut rule as to what level in the chain of command the operational lawyer should serve. However it follows that, in order for legal advice to be effective, it must be provided at the right time and to the right person in a position to use that advice to make the appropriate operational decisions. Therefore legal advice cannot just be provided from the National or Command level, and operational lawyers must be deployed to the field with the forces they support. In essence, 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; and
- 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 that is often half a world away.

This is not to say that every deployment of military forces will require a full-time legal adviser in location. Generally speaking, factors such as autonomy, force size and composition, and the complexity of the operation itself will determine whether timely and meaningful operational legal advice should be made available to the commander and staff through the physical presence of an operational lawyer.

The Use of Force and Targeting

One area where legal advice is increasingly being sought is with respect to 'targeting'.³⁰ Simply stated, the authority to use military force is not unlimited.³¹ However, that does not mean the legal restrictions that do apply stand in the way of an effective offensive or defensive operation. In terms of targeting, the applicable law is most concerned with the reasons for the application of the force – known as the 'military necessity' for the use of force – and any resulting collateral damage that may be inflicted on protected persons and objects. This concern arises from the fact

²⁹ *Additional Protocol I* Article 82.

³⁰ Targeting is the process of selecting targets and matching to them the appropriate response. It considers strategic and operational requirements and capabilities and the threat to friendly forces [as well as legal considerations]. Targeting occurs at all levels of command and is performed by forces capable of attacking targets with both lethal and non-lethal disruptive and destructive means. (B-GJ-005-300/FP-000, Canadian Forces Operations, Ch 2 2005-08-15 at p. 5-9).

³¹ *Additional Protocol I* Article 35(1).

that causing civilian casualties can have a significant negative impact on contemporary conflict, including when conducting counter-insurgency operations.³²

Looking at the targeting issue from another perspective, the legality of targeting is not divorced from practical military concerns. Tied in with the concept of military necessity is the idea of the efficient application of force. If only the force necessary to accomplish the military objective is used – and no more than that – it follows that excess expenditure of resources is avoided. In short, the efficient application of force dovetails nicely into the legal issues respecting targeting given the ever-present reality of logistical constraints in military operations.

The targeting process has become increasingly sophisticated during the past decade, with military lawyers now being integrally involved in targeting decisions. The provision of legal advice respecting targeting is now a regular role performed by legal advisors at all levels of operations. Indeed, this advice is regularly provided throughout the targeting process, from the deliberate planning that occurs in advance of the mission right through to the moment of the actual execution and beyond.³³

Accountability

Breaches of the law during operations – at even the lowest level – have the potential to be placed under public scrutiny. 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".³⁴

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

³² See Daniel Cooney, "Karzai Calls for an End to Major Foreign Military Operations in Afghanistan", *Associated Press*, 20 September 2005.

³³ For example, during the rotation that took place from September 2008 to April 2009, the Battle Group Legal Adviser in Afghanistan was seated next to the Battle Group Commanding Officer in the Tactical Operations Centre whenever a target was being attacked. He would provide the Commanding Officer with minute-to-minute advice during the execution of the mission, focusing on the interpretation of the applicable Rules of Engagement as well as providing a constant legal assessment of the balance between the necessity of the attack and the collateral damage expected from it.

³⁴ 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.

the impressive successes of that mission, but also contributed directly to the disbandment of the Regiment in 1995.

The Commission of Inquiry that followed this incident itself acknowledged the important role performed by operational legal advisors. The Commission was concerned with the issue of accountability when it advised in a series of recommendations that:

- 40.40 Adequate numbers of legal officers be deployed with units to allow them to perform their respective functions – prosecution, defence, advisory – without putting them in situations of conflict of interest.
- 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.³⁵

Legal Instruction

Nations such as Canada have undertaken to disseminate the *Geneva Conventions* and the *Additional Protocols*, and more particularly "...to include the study thereof in their programmes of military instruction..."³⁶ In the post-Somalia period, the Canadian Forces have developed a comprehensive training package which includes a set of rules for a basic level of training called "The Canadian Forces Code of Conduct". This training is delivered in many different ways, including:

- As part of the Canadian Forces Staff College course (Majors/Lieutenant-Colonels);
- In operational law modules provided at senior staff courses such as the National Security Programme (Colonels/Brigadier Generals);

³⁵ Canada, Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy, the Lessons of the Somalia Affair – Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Executive Summary (Ottawa: Public Works and Government Services Canada – Publishing, 1997) at pp. ES-80 to ES-81.

³⁶ *Additional Protocol I* Article 82.

- At professional schools such as the Maritime Warfare Centre and other schools of instruction; and
- In specific courses offered to all Canadian Forces members.

Integration in the Operational Planning Process

In the Canadian Forces, operational legal advisers are now an integral part of the planning and conduct of operations. These legal officers provide day-to-day and minute-to-minute legal advice in support of both planning and operational activities both during deployed operations and 'in garrison'.³⁷ This proactive approach avoids the planning of operations that will breach international and domestic law. It also helps sensitize the staff and line officers to the legal issues associated with their planned activities. Finally, it allows legal input to be made early in the process, when it is easier to influence outcomes.

Obviously, the successful integration of the operational 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 operation. At the same time, it also requires staff and line officers to be receptive to a new member of the 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 very cost effective and efficient means of ensuring that operations are conducted in a legal manner.

CONCLUSION

In the contemporary political, military and legal environment in which the Canadian Forces are required to operate, the military commander is confronted with an increasing number of legal issues that can directly and seriously 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. In the end, the operational lawyer provides the commander and staff with an essential and flexible resource for commanders at all levels within the chain of command.

³⁷ Legal officers advise the Joint Staff at National Defence Headquarters as well as the associated staffs of the Operational Commands. Furthermore, deployed elements of the Canadian Forces will have a dedicated legal officer with them in their theatre of operations.