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The *War & Peace Journal* addresses issues across the whole spectrum human relations from Utopian peace to nuclear war. Its goal is to promote understanding of underlying issues of war in order to support peace. Academics, post-graduate students and operators of peace studies and of military arts and sciences are welcome to submit articles, notes, book reviews or comments on any subject related to these issues. The journal has three sections:

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EDITORIAL

Welcome to the War and Peace Journal, a print and electronic journal aiming at promoting ans sustaining peace through peace and strategic studies in order to foster understanding of human dynamics pertaining to conflict management.

The War and Peace Journal is an instrument by which academics dealing with nation building, peace studies, military and strategic studies, logisitics, tactics, peacekeeping, peacemaking, diplomacy and political sciences are welcome to share their research and publish their findings, theories, articles, notes or comments.

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THE CRIME OF GENOCIDE IN THEORY AND PRACTICE OF CRIMINAL LAW IN THE REPUBLIC OF SERBIA

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ABSTRACT : International criminal law, as a system of legal regulations found in acts of the international community and criminal legislations of individual states, establishes criminal liability and punishments for crimes against international law. These acts represent breaches of the laws and customs of war (international humanitarian law) that violate or threaten peace among nations and the security of mankind. Penalties prescribed for these criminal offences stand for the most severe penalties in contemporary criminal legislation. In some cases, international judiciary (supranational) institutions such as The Nurnberg and The Tokyo Tribunal, The Hague Tribunal, The Rome Court etc. have primary jurisdiction over perpetrators of these criminal offences.

This criminal offence means the killing of a nation or a tribe. Genocide was proclaimed as "a crime under international law, which is in contradiction with the spirit and the aims of the OUN and condemned by the entire civilized world" by UN General Assembly Resolution 96/I from 11 December 1946. Although it emerged as a "subspecies of crime against humanity", genocide rapidly obtained an autonomous status and contents as one of the most serious crimes of today. As a crime against international law, genocide is determined by three elements: a) the objective component- actus reaus b) the subjective component- мens rea c) the subject of the act-the group-the victim. The source of this incrimination is found in Convention on the Prevention and Punishment of the Crime of Genocide from 1948, which, in paragraph 2, defines the term and the elements of this crime against international law. In legislation, theory and practice, this term can be interpreted in the broader sense, as well. In this papet the author has analysed theoretical and practical aspects of genocide in international criminal law and criminal law of Republic of Serbia (former FR Yougoslavia).

KEY WORDS : international law, humanity, crime, genocide, court, responsibility, penalty

CRIMES AGAINST INTERNATIONAL LAW

1. The notion and characteristics of international crimes

In the legal system of the Republic of Serbia, crimes against international law are enumerated in the Chapter Thirty Four of The Criminal Code[1] from 2005., entitled "Criminal Offences against Humanity and Other Rights Guaranteed by International Law". These criminal offences actually represent acts that constitute violations of international treaties, agreements and conventions and threaten and entrench on peace among nations, the security of mankind and other values protected by the international law or are in breach of the rules of war related to the treatment of war prisoners, wounded, sick and civilians by the parties to the conflict.

[1] Official journal of the Republic of Serbia No. : 85/2005, 88/2005, 107/2005, 72/2009 i 111/2009. More : D.Jovašević, Krivični zakonik Republike Srbije sa uvodnim komentarom, Beograd, 2007.

The origination of these criminal offences is related to the establishment of international rules organizing relations between states in time of war and relations between the parties to the conflict in view of commencement and conduction of armed conflict. International law of war emerged as the consequence of cruel and inhumane comportment throughout the long history of wars and armed conflicts between nations and states, with the intention to humanize this most inhumane means of resolving international and inter-state disputes[2].

Along with the expansion of the international law of war, started the process of gradual limitation of the rights belonging to the parties to the conflict, and of controlling not only the acts committed against non-combatants, but those related to the commencement and conduction of war as well. State's right of absolute freedom to commence and conduct a war will gradually be reduced by prohibiting certain acts that include unnecessary devastation, killing and torture. Breaches of the laws and customs of war constitute crimes under the laws of war. Having accepted international obligations by signing and ratifying numerous international conventions, certain states included several criminal offences against humanity and other rights guaranteed by international law in their criminal legislation. Such criminal offences are committed by violating rules contained in international conventions. Their source lays in the prohibitions proclaimed in international legal documents (acts)[3].

Subject of protection under international criminal law consists of humanity and other universally recognized and generally accepted values protected by international law. The protection of humanity pertains to the protection of essential human rights such as: life, physical integrity, honor, reputation and personal dignity and other fundamental human rights and freedoms. Additional rights belonging to natural persons, individual states and the entire international community are also of general, universal significance and therefore protected and guaranteed by international law.

The majority of crimes against the international law can be committed only in a certain period of time determined by the law: during war, armed conflict or occupation. These criminal offences are most commonly committed in an organized manner with the aim to implement certain governing group's or party's politics. Being considered as an aspect of organized, planned criminality, these offences are most frequently committed by the order of superior military or political leaders. Due to that, it is required to determine individual criminal responsibility of organizer, order-giver and offender[4].

These criminal offences can be committed only by premeditation. Some of the criminal offences contained in this group are not subject to limitations on criminal prosecution and limitations on enforcement of penalty: genocide, crime against humanity, war crimes and other criminal offences that pursuant to ratified international treaties cannot be subject to limitations.

2. The system of international crimes

The theory of international criminal law recognizes several sorts of crimes against international law. They are most commonly divided into two categories: a) crimes against international law in the narrow sense (genuine or pure crimes against international law) and b) crimes against international law in the broader sense, or transnational crimes (counterfeit or mixed). This classification was adopted for the first time at the 14th Congress of The International Criminal Law Association that took part in Vienna in 1989. The criterion of the division is the jurisdiction of international criminal courts, which is

[2] V.Đurđić, D.Jovašević, Krivično pravo, Posebni deo, Beograd, 2006. pp.305-311.
[3] S.Zadnik, Kaznena djela protiv vrijednosti zaštićenih međunarodnim pravom i novine u zakonodavstvu u svezi sa tim djelima, Hrvatska pravna revija, Zagreb, No.12, 2003.pp.83-86.
[4] D.Jovašević, Leksikon krivičnog prava, Beograd, 2006. p.345.

established only in the case of crimes against international law in the narrow sense[5].

Crimes against international law in the narrow sense belong to the first group of these criminal acts. These crimes against international law represent violations of laws and customs of war (meaning the rules of international law of war and international humanitarian law). They are incorporated in the Judgments of the Nürnberg and the Tokyo Tribunal, and are also known as criminal offences under general international law (or crimina iuris gentium).

The following criminal offences can be placed in this category[6]:

1) crime against peace,

2) war crimes,

3) genocide and

4) crime against humanity.

In legal theory, there are opinions suggesting that these criminal offences should be referred to as international crimes stricto sensu that are prohibited by cogent rules of international law such as The Hague or The Geneva Conventions. The following features of crimes against humanity in the broader sense (core crimes) are pointed out in legal theory[7]:

1) these international crimes have double-layered nature. Their commission draws the following consequences:

a) individual criminal liability either of a perpetrator or of an accomplice, or of a superior (on the grounds of superior liability) on one hand and

b) the responsibility of a state under international law, on the other,

2) international crimes violate essential (fundamental) human rights and they are, therefore prohibited as repression against the same crimes committed by the opposite party,

3) international crimes are not subject to limitations on criminal prosecution and limitations on enforcement of penalty and

4) general international law imposes as an erga omnes obligation on the states not to breach the basic rules that prohibit these acts.

THE GENOCIDE ACCORDING TO THE STATUTE OF THE HAGUE TRIBUNAL

Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. (ICTY) was adopted upon Security Council Resolution S/RES/827 from 25 May 1993. The Statute

[5] B.Petrović, D.Jovašević, Krivično (kazneno) pravo II, Posebni dio, Sarajevo, 2005. pp.39-40.
[6] D.Jovašević, Međunarodna krivična dela – odgovornost i kažnjivost, Niš, 2010. pp.251-255.
[7] D.Radulović, Međunarodno krivično pravo, Podgorica, 1999.p.103.

(known as The Hague Statute) recognizes four types of crimes against international law[8]. These are:

1) grave breaches of the Geneva Conventions of 1949.,

2) violations of the laws or customs of war,

3) genocide and

4) crimes against humanity[9].

Imprisonment is the only penalty that can be imposed by the Tribunal, and in determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia, taking at the same time into consideration the gravity of the offence (objective circumstances) and the individual characteristics of the convicted person (subjective circumstances).

In addition to imprisonment, the following sanctions may be also imposed:

1) return of any property to the rightful owners (restitution) and

2) confiscation of any proceeds acquired by criminal acts.

Genocide[10], also known as the gravest criminal offence of today or the "crime above all crimes", is described in paragraph 4.of The Hague Statute. This offence is comprised of intentional destruction, in whole or in part, of a national, ethnical, racial or religious group. The practice of the Hague Tribunal has not accepted the extensive interpretation of genocide, which would include the intention to destroy national, linguistic, religious, cultural or any other identity of a group without its physical extermination.

Completion of this crime against international law requires one of the following alternatively numbered acts to be committed with the abovementioned intention[11]:

1) killing members of a certain group,

2) causing serious bodily or mental harm to members of the group,

3) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part,

4) imposing measures intended to prevent births within the group and

5) forcibly transferring children from one group to another.

[8] D.Jovašević, Komentar Krivičnog zakona SR Jugoslavije, Beograd, 2002. pp. 11-17.
[9] V.Đurđić, D.Jovašević, Međunarodno krivično pravo, Beograd, 2003. pp.89-93.
[10] S.Fabijanić Gagro, M.Škorić, Zločin genocida u praksi međunarodnih ad hoc tribunala, Zbornik Pravnog fakulteta u Zagrebu, Zagreb, No.6, 2008. pp.1387-1419.
[11] I.Zvonarek, Kršenje međunarodnog ratnog i humanitarnog prava od strane agresora tijekom domovinskog rata, Pravni vjesnik, Osijek, No. 3-4, 1997. pp. 151-169.

Genocidal intent is the most characteristic feature of genocide as a crime. It has to refer to the destruction of a significantly large part of the group. The so-called significant part should be important enough to be able to influence the entire group. This quantitative criterion has been supplemented by the possibility that the perpetrator of this act was given, which resulted in the need to prove genocidal intent even when it was demonstrated only towards a group located within the borders of a certain geographical area. To conclude, genocidal intent takes into consideration qualitative characteristics of the attacked part of the group, allowing the option to single out the part that represents the symbol of the group or is crucial for its continued existence[12].

Apart from direct perpetration (direct perpetrator), the following acts are also considered as genocide[13]:

1) taking part in a conspiracy to commit genocide,

2) direct and public incitement to commit genocide,

3) attempt to commit genocide and

4) complicity in any form of genocide.

However, the Hague Statute is familiar with another grave criminal offence whose characteristics and attributes make it similar to the crime of genocide. It is crime against humanity[14]. This criminal offence is found in paragraph 5.of the Hague Statute. The description of this crime against international law clearly states that it can be committed only within an armed conflict (either international or internal in character) and directed only against civilian population, if including[15]:

1) murder,

2) extermination,

3) enslavement,

4) deportation,

5) imprisonment,

6) torture,

7) rape,

8) persecutions on political, racial and religious grounds and

9) committing other inhumane acts.

The abovementioned acts ought to be committed under the following circumstances in order to

[12] V.Đ.Degan, Zločin genocida pred međunarodnim krivičnim sudištima, Zbornik Pravnog fakulteta u Zagrebu, Zagreb, No.1-2, 2008.pp.77-95.
[13] D.Jovašević, Međunarodna krivična dela – odgovornost i kažnjivost, Niš, 2010.pp.229-231.
[14] Dž.Džouns, S.Pauls, Međunarodna sudska praksa, Beograd, 2005.pp.143-147.
[15] V.Đurđić, D. Jovašević, Krivično pravo, Posebni deo, Beograd, 2006.pp.317-318.

constitute crime against humanity[16]:

1) an attack has to be committed–an attack can take place even when armed force has not been used, as long as it includes maltreatment of the civilian population or preparations for such acts,

2) criminal offences committed by the accused have to be a part of that attack,

3) the attack has to be directed against any category of the civilian population,

4) the attack has to be either extensive or systematic. An attack is considered as extensive when being of a wide-spread nature or when being directed against a large number of persons. An attack is described as systematic if the violent acts are committed in an organized manner or with slight probability of being committed accidentally and

5) the perpetrator has to be familiar with (aware of) the fact that his acts are committed within an extensive or systematic attack against civilian population.

GENOCIDE ACCORDING TO THE CRIMINAL LAW OF THE REPUBLIC OF SERBIA

1. System of international crimes

Chapter 34 of the Criminal Code of The Republic of Serbia contains the following "genuine" crimes against international law[17]:

1) genocide (paragraph 373),

2) crime against humanity (paragraph 371),

3) war crime against civilian population (paragraph 372),

4) war crime against the wounded and sick (paragraph 373),

5) war crime against prisoners of war (paragraph 374) and

6) organizing and incitement to Genocide and War Crimes (paragraph 375).

2. The notion and basic characteristics of genocide

The crime of genocide[18], from paragraph 370. of The Criminal Code of The Republic of Serbia, consists of ordering or committing the following acts: killing or causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the

[16] B.Ivanišević, G.Ilić, T.Višnjić, V.Janjić, Vodič kroz Haški tribunal, Beograd, 2007.pp.83-108.
[17] V.Đurđić, D.Jovašević, Krivično pravo, Posebni deo, Beograd, 2006. pp.322-325.
[18] D.Jovašević, Karakteristike krivičnog dela genocida, Vojno delo, Beograd, No.2-3, 2002.pp.80-92.

group, forcibly transferring children of the group to another group, with intent to destroy, in whole or in part, a national, ethnical, racial or religious group of people.

The word "genocide" is a compound, created from a Greek word *genos*, meaning nation or tribe, and a Latin word *caedes,* which means killing or slaughter (massacre). When translated literally this word stands for the extermination of an entire nation or tribe. Genocide was proclaimed as "a crime against international law, which is in contradiction with the spirit and the aims of the OUN and condemned by the entire civilized world" by OUN General Assembly Resolution 96/1 from 11 December 1946.

In spite of the fact that it initially emerged as a "subspecies of crime against humanity", genocide rapidly obtained autonomous status and contents as one of the most serious crimes of today. Nowadays, it is also called "the crime above all crimes". As a crime against international law, genocide is determined by three elements[19]:

1) the objective component - *actus reaus*,

2) the subjective component - *мens rea* and

3) the subject of the act - the victim (the group).

The source of this incrimination is found in Convention on the Prevention and Punishment of the Crime of Genocide [20] from 1948, which defines the contents and the elements of this crime against international law.

In legislation, theory and practice this term has a more extensive interpretation. Namely, this expression includes not only killing but also extermination, committed in any other way, of a particular group that forms a consistent entity based upon national, ethnical, racial or religious foundation. The subject of protection includes humanity and international law.

The subject of attack is a national, ethnical, racial or religious group[21].

A national group is comprised of people who have the feeling of sharing the legal bond of the same citizenship accompanied by reciprocal rights and obligations.

An ethnical group consists of the members who are bound by the same language and culture, whereas a racial group is a group based upon hereditary physical characteristics, which is often associated to a particular geographical area regardless of linguistic, cultural, national, or religious factors.

A religious group includes members who share the same religious convictions, the same name of the confession or the same means of conducting religious ceremonies.

In fact, the terms such as national, ethnical, racial or religious group are still being studied widely and precise definitions that would be universally and internationally accepted have not been found yet. Thus, each of these terms has to be assessed in the light of an actual political, social and cultural milieu.

Although the act is committed by destroying individuals, it is not intended to eliminate those individuals as separate persons, but as the members of the group. Depending on the actual subject, genocide can appear as national or ethnical genocide or ethnocide if the subject is a national or an

[19] B.Petrović, D.Jovašević, Krivično (kazneno) pravo II, Posebni dio, sarajevo, 2005. pp.39-41.
[20] Official journal SFR Yougoslavia No.56/1950.
[21] B.Lukšić, Genocide and the command responsibility, Zbornik Pravnog fakulteta u Splitu, Split, No. 4, 2001. pp.283-291.

ethnical group.

In the case of racial genocide, the criminal act is directed against a particular racial group or against several groups of that kind. Religious genocide is directed against the members of one or more religious groups. The group is not to be determined in accordance with an objective or static criterion. Instead, the way the perpetrator perceives the members of the group is of fundamental importance for the definition of this term, which is also the standpoint of the ad hoc tribunals[22].

The lack of definitions of genocide that would include cultural genocide comprised of destroying the language or the culture of a particular group is often stressed in legal theory.

Therefore, the aim of the act is to destroy a group, in whole or in part, whereas the elimination of an individual simply represents a means of its accomplishment. The size of the group is of no significance for the completion of the criminal offence. It is essential that the group is present as an entity carrying specific characteristics, and that it is intended to be destroyed as such. The objective of the incrimination is to guarantee the right to life, i.e. existence and development for each group carrying specific national, ethnical, racial or religious features, regardless of the spatial cohesion of its members[23].

The act consists of several acts that can be classified in a number of groups. These are the following acts[24]:

1) killing or causing serious bodily or mental harm to members of a specific national ethnical, racial or religious group,

2) inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part,

3) imposing measures intended to prevent births within the group (the so-called biological genocide) and

4) forcible transfer of children from one group to another intended to cause the loss of their group identity.

All these acts contribute to physical and biological completion of genocide. To complete this act, it is enough to commit any of the acts precisely pointed out in the law, with the intent to exterminate (destroy), in whole or in part, a group as a social entity. Genocide represents a typical example of criminal offences that rest upon the „depersonalization of the victim", which means that the victim does not represent the objective (aim) of the act due its individual qualities or features, but solemnly for being a member of a certain group[25].

The perpetration can be completed in two ways:

1) by ordering and

2) by directly conducting certain acts[26].

[22] B.Pavišić, V.Grozdanić, P.Veić, Komentar Kaznenog zakona, Zagreb, 2007.p.419.
[23] A.Kaseze, Međunarodno krivično pravo, Beograd, 2005.pp.115-117.
[24] D.Jovašević, Pojam i karakteristike krivičnog dela genocida, Sudska praksa, Beograd, No.9-10, 2001. pp.59-65.
[25] S.Horović, Genocid, ratni zločini i zločin protiv čovečnosti, Zbornik Pravnog fakulteta u Mostaru, Mostar, 2004.pp.99-113.
[26] A.Schonke, H.Schroder, Strafgezetsbuch, Kommentar, Munchen, 1997.pp.1597-1601.

Giving orders to commit the abovementioned acts represents a special and autonomous act of genocide. In fact, ordering is a form of incitement. However, in this case ordering is not characterized as complicity, but as a special way to perpetrate this criminal offence. The crime of genocide is usually committed in an organized manner and in accordance with a previously arranged plan giving particular authority to the order of a superior, which causes the autonomous nature of his responsibility. Therefore, the superior will be responsible only for having given the order to commit genocide, even if the subordinate refuses to obey or in any other way manages to avoid executing such order.

The consequence of the act is manifested as threatening the survival of a certain national, ethnical, racial or religious group. It can be accomplished through causing a smaller or a larger number of individual consequences comprised of injuries (of life, of physical integrity, of a fetus) and threats (by inflicting on the group unbearable living conditions). The number of individual acts committed is of no significance for the completion of this criminal offence. This means that only one act of genocide will be committed when one, as well as when several relevant acts have been conducted. The fact that a larger number of acts causing various individual consequences were committed has an impact on the determination of sentence. This indicates that planned and systematic extermination of human groups constitutes the essence of the crime of genocide[27].

Any person can be the perpetrator of this act, and, when guilt is concerned, direct premeditation (*dolus coloratus*), including genocidal intent, is required. Instead of applying the theory of intent, the assessment of such intent is based upon experience. The punishment prescribed for this act is minimum five years' imprisonment or thirty to forty years' imprisonment. The Criminal Code explicitly points out that this criminal act cannot be subject to limitation for criminal prosecution and enforcement of penalty.

3. Genocide and other related criminal offences

The definition of this term, under international as well as under national criminal law, has generated a request to draw distinction in legal theory between the crime of genocide and other similar (related) criminal acts, primarily acts such as[28]:

1) persecution,

2) extermination,

3) ethnical cleansing and

4) crime against humanity.

3.1. Persecution

Resemblance between genocide and persecution is based on the presence of discriminatory intent of the perpetrator in the moment of perpetration. Namely, both of these punishable acts are committed against members of other national, racial, religious or ethnical group[29].

[27] Lj. Lazarević, B.Vučković, V.Vučković, Komentar Krivičnog zakonika Crne Gore, Cetinje, 2004. pp.1021-1024.
[28] D.Jovašević, Međunarodna krivična dela – odgovornost i kažnjivost, Niš, 2010. pp.260-262.
[29] M.Marković, Međunarodna krivična dela, Jugoslovenska revija za međunarodno pravo, Beograd, No.1, 1965. pp.39-44.

There are two major differences between these criminal acts. These are:

1) persecution covers persecution based upon political racial or religious grounds and

2) the ultimate victim of genocide is the entire group-national, racial, religious and ethnical, whereas the victims of prosecution are individuals themselves, as members of certain "prosecuted" groups.

3.2. Extermination

Similarity between genocide and extermination consists of the fact that in both cases the criminal act is intended to cause massive killing. The differences between these two punishable acts consist of the following:

1) the act of genocide is committed with the intent to destroy, in whole or in part, the group itself, whereas the same intent (giving the quality of *dolus coloratus* to perpetrator's premeditation) is not present in case of extermination,

2) in case of genocide, members of the target group share the same national, racial, religious or ethnical characteristics, whereas the victims of extermination are identified by political preferences, physical characteristics or by the very fact that they found themselves on a particular geographical area,

3) the act of extermination is committed within an expansive or a systematic attack, which the perpetrator is aware of, whereas in case of genocide such attack is not required and

4) only civilians can appear as victims of extermination, while genocide can be committed against the non-civilian population as well (such as captured combatants who have the status of the prisoners of war).

3.3. Ethnic cleansing

Although The UN General Assembly Resolution on the Situation in Bosnia and Herzegovina from 1992 treats genocide and ethnical cleansing as two equal terms, a qualitative distinction can be drawn between these two criminal offences. Namely, forced displacement itself does not represent a genocidal act, but, together with killing a larger number of certain group's members, it can result in ethnical cleansing of the pointed group of people. That is when persecution, in the sense of "cleansing", can be considered as a proof (an indicator) of the presence of the intention to exterminate the entire group.

3.4. Crimes against humanity

At last, genocide and crimes against humanity (that are often treated as equal by legal theory as well as by certain international legal acts such as the Statute of the International Military Tribunal in Nürnberg) have several similar features including the following[30]:

[30] Z.Pajić, Tumačenje zločina protiv čovečnosti u nirnberškom procesu, Godišnjak Pravnog fakulteta u Sarajevu, 1991, pp.123-133.

1) in both cases, the acts are aimed to cause massive killing of other persons,

2) both acts include severe violations that insult humanity and

3) neither of the acts represents an isolated case, but is usually a part of a broader conception.

However, one can perceive evident dissimilarities between them, including the following[31]:

1) genocide contains genocidal intent, whereas crime against humanity does not,

2) the target population of genocide is a group that has to possess shared group characteristics, while the victims of crime against humanity are determined by political preferences, physical characteristics or by the very fact that they found themselves on a certain area in a certain period of time,

3) crime against humanity represents a broader term since it is committed within an extensive and systematic attack the perpetrator is aware of, which is not requested as an essential and constitutive element of the crime of genocide and

4) crime against humanity can be committed by conducting a wider range of diverse acts, not all of which are covered by the term of genocide.

CONCLUSION

International criminal law, as a system of legal regulations found in acts of the international community and criminal legislations of individual states, establishes criminal liability and punishments for crimes against international law. These acts represent breaches of the laws and customs of war (international humanitarian law) that violate or threaten peace among nations and the security of mankind. Penalties prescribed for these criminal offences stand for the most severe penalties in contemporary criminal legislation. In some cases, international judiciary (supranational) institutions such as The Nurnberg and The Tokyo Tribunal, The Hague Tribunal, The Rome Court etc. have primary jurisdiction over perpetrators of these criminal offences.

Due to its significance, nature and character, the crime above all crimes stands out among all the crimes against international law. It is the crime of genocide. The act of genocide consists of ordering or committing: killing, causing serious bodily or mental harm to members of a human group or deliberately inflicting on the group conditions of life calculated to bring about its extinction in whole or in part or imposing measures intended to prevent births within the group or forcibly transferring children to another group, with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group of people.

This criminal offence means the killing of a nation or a tribe. Genocide was proclaimed as “a crime under international law, which is in contradiction with the spirit and the aims of the OUN and condemned by the entire civilized world” by UN General Assembly Resolution 96/I from 11 December 1946. Although it emerged as a “subspecies of crime against humanity”, genocide rapidly obtained an autonomous status and contents as one of the most serious crimes of today.

As a crime against international law, genocide is determined by three elements: a) the objective

[31] M.Simović, M.Blagojević, Međunarodno krivično pravo, Banja Luka, 2007. pp.130-135.

component- actus reaus b) the subjective component- мens rea c) the subject of the act-the group-the victim. The source of this incrimination is found in Convention on the Prevention and Punishment of the Crime of Genocide from 1948, which, in paragraph 2, defines the term and the elements of this crime against international law. In legislation, theory and practice, this term can be interpreted in the broader sense, as well. Namely, this term does not include only killing but also destruction, committed in any other way, of a particular group that forms a consistent entity on national, ethnical, racial or religious grounds.

ETHICS, HUMAN RIGHTS AND THE LAW OF ARMED CONFLICT

Dr. Louis-Philippe Rouillard

Introduction

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

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

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

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

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

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

Professionalism, Ethics and the LOAC

At issue when establishing the foundation and the structure of military members is always to know what they consist of, as well as to what they do obey. In the case of the Canadian Forces, these armed forces of Canada are the tri-service military is established under the authority of Parliament through the *National Defence Act*[1]. All members of the Canadian Forces, irrespective of component (Navy, Army and Air Force), are subject to the authority of their chain of command, up to and including the Chief of the Defence Staff[2].

Since Canada does not have conscription[3], it falls under the definition of a "professional army", that is a volunteer army serving in accordance with terms of service out of which an individual can elect to continue or not, and the institution can decide to re-enrol the individual, or not. Serving under terms of services, this means that the continuous training and employment in garrison or on deployment gives them a continuous professional development.
While the terms of service of the Reserve force is separated by classes of service, whether on part-time service, full-time for a determined period or for specific operations, the idea of a continuous professional development remains applicable to all service personnel.

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

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

> "… the defence of Canada and its interests remain the primary focus of the Canadian military profession and the volunteer professionals who serve in uniform. Indeed, the fundamental purpose of the Canadian profession of arms is the ordered, lawful application of military force pursuant to governmental direction. This simple fact defines an extraordinary relationship of trust among the people of Canada, the Canadian Forces as an institution and those members of the Forces who have accepted the "unlimited liability" inherent in the profession of arms."[4]

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[1] *National Defence Act,* R.S.C. 1985, c. N-5. at article 14: "The Canadian Forces are the armed forces of Her Majesty raised by Canada and consist of one Service called the Canadian Armed Forces." These are constituted of two established components named the Regular Force and the Reserve Force (see NDA at article 15) and in an emergency, or if considered necessary in consequence of any action undertaken by Canada under the United Nations Charter or the North Atlantic Treaty, the North American Aerospace Defence Command Agreement or any other similar instrument to which Canada is a party, upon establishment by the Governor in Council, a third component called the Special Force.
[2] *Ibid.*. at article 18.
[3] Even under the *Emergencies Act*, R.S. C. 1985, c. 22 (4th Supp.) which includes at its Part IV the War Emergency situation, Canada cannot enact conscription by means of a regulation or order from the Governor General in Council. It must be made by an act of Parliament.
[4] A-PA-005-000/AP-001, Canadian Forces Leadership Institute, *Duty with Honour: The Profession of Arms in Canada*, Kingston: Canadian Defence Academy (2009) , at 4. It defines the concept of unlimited liability which is understood at page 26 of *Duty with Honour* as being: "Unlimited liability is a concept derived strictly from a professional understanding of the military function. As such, all members accept and understand that they are subject to being lawfully ordered into harm's way under conditions that could lead to the loss of their lives. It is this concept that underpins the professional precept of mission, own troops and self, in that order, and without which the military professional's commitment to mission accomplishment would be fatally undermined. It also modifies the notion of service before self, extending its meaning beyond merely enduring inconvenience or great hardship. It is an attitude associated with the military professional's philosophy of service. The concept of unlimited liability is integral to the military ethos and lies at the heart of the military professional's understanding of duty."

Duty with Honour answers these questions by affirming that all officers and non-commissioned members, and all Regular force and Reserve force personnel become members of the profession of arms by swearing the Oath of Allegiance.[5] While a debate rages in the academic world as to whether this inclusiveness is warranted[6], it will suffice for our purposes to adopt *Duty with Honour*'s all-encompassing view and to accept its criteria for determining what constitutes a profession.[7] The criteria stated are:

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

In many ways, this reflects the historical and sociological criteria stated by many theorists regarding the nature of the military profession. Depending on which armed forces are concerned and the political regime in place, these criteria are generally understood at the individual level, with some differences depending on the theorist, as being manifested by specialized knowledge and skills, as well as an adherence to professional norms[8].

These professional norms are understood in the Canadian context as being the values and beliefs found in the military ethos. This military ethos is understood as "the foundation upon which the legitimacy, effectiveness and honour of the Canadian Forces depend"[9] and consist of:[10]

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[5] *Ibid.*, at 11: "In Canada, an individual becomes a member of the profession of arms by swearing the Oath of Allegiance and adopting the military uniform, thus establishing an essential distinctiveness in Canadian society. Thereafter, members demonstrate their professionalism by
● embracing the military ethos;
● reaching and maintaining the point at which a member has achieved the requirements for first employment in an occupation and maintaining this qualification;
● pursuing the highest standards of the required expertise; and
● understanding, accepting and fulfilling all the commitments and responsibilities inherent in the profession of arms.
In the Canadian Forces, all non-commissioned members (NCMs), especially non-commissioned officers (NCOs), warrant officers (WOs), chief petty officers and petty officers (CPOs and POs), share leadership responsibilities and are required to master complex skills and gain extensive knowledge of the theory of conflict. Therefore, and in accordance with the criteria listed, all regular force members of the CF, regardless of rank, are members of the profession of arms. Although not necessarily on full-time service, primary reserve members are an essential component of the nation's military capability and meet the criteria, and thus are accorded professional status. On active duty, they assume the status and identity of full-time military professionals."

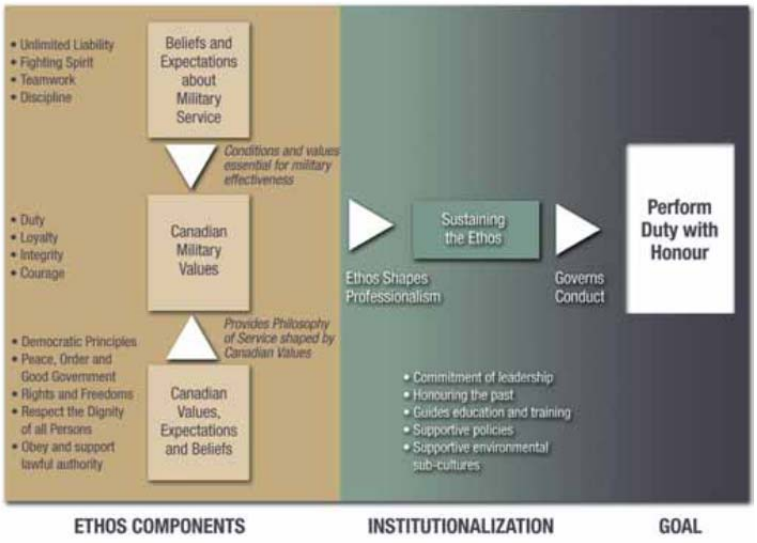
[6] See A. English, A., *Professionalism and the Military - Past, Present, and Future: A Canadian Perspective* , paper prepared for the Canadian Forces Leadership Institute, May 2002, confronting the notions of Huntington, Jarowitz and Abrahamsson with the historical development of professions and the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

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

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

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

[10] *Ibid*. at 33.



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

As stated in *Duty with Honour*, this military ethos reflecting national values and beliefs leads to a unique Canadian style of military operations — one in which CF members perform their mission and tasks to the highest professional standards, meeting the expectations of Canadians at large.[11]

And here is where the Canadian Forces differ from many other armed forces: they are not only expected to abide by its military ethos, but also to apply a common set of values it shares with another institution responsible for all matters related to the national defence of Canada: the Department of National Defence.
Established under Article 4 of the *National Defence Act*[12], the Department is under the responsibility of the Minister of National Defence who is vested with power over the management and direction of the Canadian Forces and all matters relating to national defence.[13] Thus, the interaction between the two necessitates a common set of values under which to act.

However, since the Department is composed of civilian public servants who fall under the rules of the *Public Service Employment Act* [14](PSEA), they are held to the values of the public service of Canada as affirmed in the *Values and Ethics Code for the Public Service*[15].
In order to reconcile the two, the Deputy Minister of the DND and the CDS jointly established the

[11] *Ibid.* at 34.
[12] *National Defence Act*,*supra,* note 1 at article 3 : "There is hereby established a department of the Government of Canada called the Department of National Defence over which the Minister of National Defence appointed by commission under the Great Seal shall preside."
[13] *Ibid.* at article 4.: "The Minister holds office during pleasure, has the management and direction of the Canadian Forces and of all matters relating to national defence and is responsible for: (a) the construction and maintenance of all defence establishments and works for the defence of Canada; and (b) research relating to the defence of Canada and to the development of and improvements in materiel. "
[14] *Public Service Employment Act*, R.S.C 2003, c. 22, ss. 12, 13.
[15] *Values and Ethics Code for the Public Service*, available at: < http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/tb_851/vec-cve-eng.asp> accessed 25 January 2011.

Defence Ethics Programme in 1997. In short order, the DEP produced a *Statement of Defence Ethics*[16] which combined both Canadian Military Values and Public Service Values in a set of principles and obligations to which both military members and public servants must adhere. While the terminology may be different, this alters in no way the fundamental values by which military members must abide by in their official role. For example, if the concept of duty encompasses as much the obligation of responsibility of the *Statement of Defence Ethics*, the concept of unlimited liability that underlines this obligation for serving personnel continues to exist. It is only because responsibility does not imply this concept for public servants that the concept of responsibility is accepted as the common shared valued of the two institutions. Still, in no way does this abrogate the military values to which serving personnel are expected to conform.

The issue it brings to the fore, however, is that there is a perception by some that military morale and its values have been eroded by the "transference of civilian values and management techniques to the Forces".[17] However, even proponent of having a different set of values in the 1980s recognised that "an ethos which resulted in alienation of the Forces from the Canadian public or the civil service is regarded as highly undesirable".[18]

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

This is not a minor detail but a fundamental aspect of the bond of trust that must exist between all citizens forming civil society and those citizens in uniform that serve in the defence of all. The concept for an armed force within a liberal democracy is not new. Indeed, everyone and everything, from individual to corporations to states, have a trust account, much like a bank account. Some critics state that this trust "is a function of two things: character and competence. Character includes your integrity, your motive, your intent with people. Competence includes your capabilities, your skills, your results, your track record. And both are vital."[19] Trust means confidence. And we have a limited amount of it available in our account. Each time that our competence and skills, or our character and moral rectitude is tainted by an event, we withdraw some of our capital of confidence. When we reach a point where there is none to withdraw anymore, it can mean moral bankruptcy and an armed forces devoid of the trust of fellow citizens.

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

Let's take for example, the military covenant between civil society and the military. The terminology originates from the United Kingdom, where the British *Army Doctrine Publication 5* entitled

[16] The three ethical principles are: respect the dignity of all persons; serve Canada before self; and obey and support lawful authority. Its six ethical obligations are: Integrity, Loyalty, Courage, Honesty, Fairness and Responsibility. Available at; < http://www.dep-ped.forces.gc.ca/dep-ped/about-ausujet/stmt-enc-eng.aspx> accessed January 25, 2011.
[17] Kasurak, P., "Civilianization and the military ethos: civil-military relations in Canada", *Canadian Public Administration*, 25.1 (1982): 108.
[18] *Ibid*., at 108.
[19] Huackabee, G., "The Politicizing of Military Law- Fruit of the Poisonous Tree", Gonzalez Law Review 45 (2009-2010) 611, citing Stephen M.R Covey, *The Speed of Trust*, 2006, print at 30.

'*Soldiering: the Military Covenant*' was published in 2000[20]. In short, the military covenant is described as the moral basis of the Army's output. It describes how the concept of unlimited liability makes soldiering unique and what a (British) soldier should expect in return for surrendering some civil liberties while under the uniform[21]. It is important to mention that this is in essence an Army doctrine: it does not, by itself, apply to the Royal Navy or the Royal Air Force. However, it is understood that its principles do apply to all three services of the United Kingdom.

The Canadian Forces have adopted a concept very similar to that of the military covenant, but calls it instead the 'social contract'. In the CF context, this is understood in *Duty with Honour* as being a "national commitment — *in essence a moral commitment.*"[22] This view is interesting since, as in the case of the UK's military covenant where it is viewed as a '*psychological contract*', the social contract is viewed not as a legally binding contract, but as a '*moral commitment*'.

In the Canadian context, it is understood as resting on the foundations of elements brought into the public eye by the *Standing Committee on National Defence and Veterans Affairs* (SCONDVA), which stated that this moral commitment to the Canadian Forces must be based on concrete principles[23], including: being fairly and equitably compensated for their services, all members and their families being provided with ready access to suitable and affordable accommodations, as well as be provided with access to a full and adequate range of support services, receiving suitable recognition, care and compensation be provided to veterans and those injured, assuring reasonable career progression, being treated with dignity and respect and be provided with the appropriate equipment. The Canadian Government, in its response, took note of the SCONDVA recommendations and reiterated its commitment to the Canadian Forces as an institution[24].

This clearly states the expectation of the institution of the Canadian Forces on behalf of its service personnel. It is an arrangement that is not dissimilar to that of the British military covenant or of most Western armed forces serving in liberal democracies. As a result, the Canadian who becomes a member of the profession of arms upon swearing of his or her Oath of Allegiance can expect fair and respectful treatment that extends as much to his or her terms of service as to having the means attributed by civil society in order to accomplish the task given by the government. Therefore, there is an expectation of fairness from service personnel, for which civil society expects an output, one that may include sending its uniformed citizens deliberately in harm's way in order to support the policies of its government. Service personnel expect that this will be done very carefully on a costs and benefits evaluation, without

[20] Tipping, Christianne, "Understanding the Military Covenant", *The RUSI Journal*, 153. 3 (2011): 12-15 at 12.
[21] *Idem*.
[22], *Duty with Honour, supra*, note 4 at 44.
[23]Standing Committee on National Defence and Veterans Affairs, *Moving Forward: A Strategic Plan for Quality of Life Improvements in the Canadian Forces*, October 1998, www.parl.gc.ca/InfoComDoc/36/1/NDVA/Studies/Reports/ndvarp03-e.htm#toc on August 3, 2003. The recommendations in full are: "That the members of the Canadian Forces are fairly and equitably compensated for the services they perform and the skills they exercise in performance of their many duties. And that such compensation properly take into account the unique nature of military service.", "That all members and their families are provided with ready access to suitable and affordable accommodation. Accommodation provided must conform to modern standards and the reasonable expectations of those living in today's society.", "That military personnel and their families be provided with access to a full and adequate range of support services, offered in both official languages, that will ensure their financial, physical and spiritual well-being.", "That suitable recognition, care and compensation be provided to veterans and those injured in the service of Canada. Here the guiding principle must always be compassion.", "That members be assured reasonable career progression and that in their service they be treated with dignity and respect. In addition, they must be provided with the appropriate equipment and kit commensurate with their tasking." The Government's response to the report took note of the committee's recommendations and reaffirmed its "commitment to the Canadian Forces as a national institution." It went on to say, "The men and women of the Canadian Forces have made a tremendous contribution to their country. They deserve the respect and appreciation of their government and their fellow citizens."
[24] *Government Response to the Report of the Standing Committee on National Defence and Veterans Affairs (SCONDVA) on Quality of Life in the Canadian Forces*, 25 March 1999, www.dnd.ca/hr/scondva/engraph/response1_e.asp?cat=1 on August 3, 2003.

better solutions being available or having no other way out[25]. It does stand to reason that if one is liable in an unlimited manner up to and including forfeiting one's right to life, one would not want it to be done for trifle or petty reasons. And if one has been injured during this task, one can reasonably expect to be cared for by the civil society that required this sacrifice.

Yet, many commentators mention an unravelling of the military covenant, or social contract. In the United Kingdom, the United States and in Canada, parties now sitting in government have claimed that service personnel are not provided with adequate equipment in adequate time; that wounded veterans and families of the fallen are not treated with care, respect and compassion; and that the mission amounts to a misuse of personnel and is an encroachment of their right to life or to the quality of life they are to expect. In short, service personnel are described as being used as commodities and veterans discarded and[26]. Some argue that because of the disconnect between the armed forces and civil society, especially since the numbers of service personnel have dwindled compared to the Second World War and Cold War eras, there is always less of a link between society as a whole and it military[27].

Yet, in the same breath it is argued that in western liberal democracies, civil society do not like the use of force as it is by nature antithetical to their own liberal outlook and that if they must enter a fight, that their armed forces do so in a manner that reflects their own core liberal values[28]. As such, civil societies increasingly question the legitimate use of force[29]. Furthermore, the very same civil societies have become ever more intolerant of casualties, especially when these are perceived as being unnecessary in light of misguided foreign policies[30].

In effect, while civil society supports the troops, that is the military members and the institutions they serve, they often disapprove of the missions in which they serve and of the foreign policies of the government that directed those missions. This is so because civil society has been forged by the end of the Cold War and the receding of the direct threats again its civil liberties, like the menace of Nazism during World War II or that of communism during the Cold War. If anything, civil society wants the best bang for the defence buck much like the case of Sweden and its military, one that has not had to fight a war for nearly two centuries[31] or, if they must fight, that they do so in conflicts where there are expectations of zero casualties, such as in the Kosovo campaign[32].

If anything, this new framework can be seen in a very positive light where civilian expectations do in fact conform to the fairness expectations of serving personnel. If this is the case, then why is there a multiplication of accusations that there is an erosion of our social capital due to an unravelling of the

[25] Giacomello, Giampiero, "In Harm's Way: Why and When a Modern Democracy Risks the Lives of Its Uniformed Citizens", *European Security*, 16. 2 (2007): 163-182.
[26] McCartney, H., "The military covenant and the civil–military contract in Britain", *International Affairs* 86: 2 (2010): 411–428 at 411.
[27] *Ibid*. at 421, citing Hew Strachan, "Liberalism and conscription: 1789–1919", in Hew Strachan, ed., *The British Army: manpower and society into the twenty-first century*, London: Frank Cass, 2000, print at 13 .
[28] *Ibid*. at 414 citing Lawrence Freedman, *The transformation of strategic affairs*, Abingdon: Routledge, 2006, print at 41.
[29] *Ibid*. at 413, citing Martha Finnemore, *The purpose of intervention*, Ithaca, NY: Cornell University Press, 2003 at 19; Theo Farrell, *Norms of war: cultural belief and modern conflict*, Boulder, CO: Lynne Rienner, 2005 at 178.
[30] *Ibid* at 419, citing Christopher Dandeker, "Recruiting the All-Volunteer Force: continuity and change in the British Army, 1963–2008", in Stuart A. Cohen, ed., *The new citizen armies: Israel's armed forces in comparative perspective*, London: Routledge, forthcoming 2010, for the British context, but which can certainly be accepted as applicable to most western liberal democracies.
[31] Catasu, Bino, and Gronlund, Anders, "More Peace for Less Money: Measurement and Accountability in the Swedish Armed Forces", *Financial Accountability & Management*, 21.4 (2005) at 469.
[32] Burke, "Just war or ethical peace? Moral discourses of strategic violence after 9/11, International Affairs" 80.2 (2004): 329-354 at 331, citing Micheal Ignatieff arguing that: 'from an ethical standpoint, it transforms the expectations that govern the morality of war … a war ceases to be just when it becomes a turkey-shoot … NATO could only preserve its sense of moral advantage by observing especially strict rules of engagement.'[10] Michael Ignatieff, *Virtual war*, London: Chatto & Windus, 2000 at 165.

moral contract? The answer is not simple. In part, the root cause might be for some the desire to score political capital, but it is also because real mistakes were made in the past and these mistakes ran much against the expectations of civil society and of service personnel. From the care provided to soldiers wounded in Iraq and Afghanistan at Bethesda to the criticism of the unsuitability of the Nimrod vehicles being for the protection of British soldiers in Iraq, errors made by governments in the treatment of their service personnel combined with a doubtful legitimacy of entering this conflict – in example the lack of weapons of mass destruction in Iraq or the doubts concerning the attachment of the Afghan government to western liberal democracy – have all create pressures and moral questions.
This state of affairs occurs precisely when western liberal democracies have never had such a well-educated population that internalizes civil society values and demands ethical conduct for the public sector, of which the armed forces constitute a large part[33]. Society's expectations have increased and now are on par with its knowledge. The education of the governing members of civil society and access to knowledge are now very much equivalent in and out of the public sector, rendering civil society apt at making its own judgement and justified in questioning the use of public resources.

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

Such values must form part of the armed forces' values and cannot depart from them; they must be aligned or the social contract would further be completely severed. The application of these values for armed forces therefore becomes military ethics: the right and wrong actions of an armed force and its very real consequences on the lives of men and women in uniform[34].

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

In the past, society has always expected its service personnel to behave with absolute honour at all times, but nonetheless has often turned a blind eye to less than honourable behaviour[35]. But, as we have seen, society's expectations have grown, and perhaps outpaced what armed forces can truly produce as an output answering this standard of behaviour.

Hence the emergence of military ethics, which is in part a species of the genus of professional ethics[36]. As in any other profession's ethics, one criterion for its existence is that it answer to a specific conceptual framework, including a legal and regulatory framework. In the case of military ethics, this legal framework is formed by the LOAC.

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

This is where there is a case to examine whether the LOAC respect military ethics and to demonstrate

[33] Erakovich, "A Normative Approach to Ethics Training in Central and Eastern Europe", *International Journal of Public Administration* 29, (2006): 1229–1257 at 1231.
[34] Bonadonna, Reed R., "Doing Military Ethics with War Literature", *Journal of Military Ethics*, 7: 3 (2008) : 231- 242 at 231.
[35] Mackmin, S, "Why Do Professional Soldiers Commit Acts of Personal Violence that Contravene the Law of Armed Conflict?", *Defence Studies*, 7.1 (2007): 65–89 at 66.
[36] Cook, Martin L. and Syse, Henrik , "What Should We Mean by 'Military Ethics'?", *Journal of Military Ethics*, 9.2 (2010): 119-122 at 119.

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

Military Ethics, the LOAC and Human Rights

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

For example, the Jewish tradition of combat is encapsulated in a large part in the Bible and the Torah, even though commentators did not exactly agree on all the prerequisites prior to entering a conflict; some arguing that there is a requirement to favour peace up to the last possible moment and others affirming that this is not in any way a requirement[37]. But even in the customary approach to law that is taken through religious text, one aspect arises: the morality – or the ethics – to apply to battlefield situations[38].

Many jurists, by professional deviancy, tend to adopt the view that the law is the law and that morality has nothing to do with it. In the same vein, some soldiers profess that morality has nothing to do on the battlefield. Since lives of comrades and compatriots are at stake, and since political goals of the State are at play, winning with the fewest casualties on one's side is all that matters. Indeed, this view is an old one: Thucydides' work *The History of the Peloponnesian War* is often used to show the Melian Dialogues and is often taught in military colleges and academies around the world as the principle for realism in the theories of war and that, as such, morality has nothing to do with international relations, including its practical application through the use of armed force[39].

However, a careful reading of Thucydides contradicts this view. In fact, all implication of the ethics of strategic choices and their impacts on both the Athenians and allies are looked upon and questioned by the very participants. Nicias' leading of the Syracuse expedition, despite his own firm belief that it over-stretches Athenian forces and does not align with the aim of the war, puts into question the very moral question of the initiation of hostility and the manner in which an armed conflict is carried out. Here, the question is whether Nicias had exhausted all his ethical obligations toward his civilian leadership (the Athenian assembly) to head off the expedition[40]. This very question is asked obliquely in command and staff courses around the world to field grade and superior officers; yet, most come to the conclusion that it is not theirs to question why, but theirs to do and hopefully have the most of their command survive and win the fight.

As we can see, tradition seems to have warranted two types of requirement: firstly, the question of whether entering a conflict is justified and secondly that of the manner in which the hostilities are waged. Through time, and (mostly, but not limited to) Christianity, a tradition of 'Just War' evolved, comprised of two sets of principles: the first governing the resort to armed force (*jus ad bellum*) and the second governing conduct in the hostilities created (*jus in bello*)[41].

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[37] Broyde, Michael J., "Battlefield Ethics in the Jewish Tradition", American Society International Law Proceedings 95 (2001): 82-99, at 94 and 95, opposing the Bible to the Sifri, one of oldest of the midrashic source books of Jewish law.
[38] *Ibid.* at 93.
[39] Cook, M., "Thucydides as a Resource for Teaching Ethics and Leadership in Military Education Environments", *Journal of Military Ethics*, 5.4 (2006): 353-362 at 353.
[40] *Ibid* at 358.
[41] McMahan, Jeff, "The Ethics of Killing in War", *Ethics* 114 (2004): 693–733, at 114.

However, the tradition of just war is just that: a tradition. It is not a code of law that can be answered to in an interpretative manner by a judge and brought to appeal for further discussion. It is a amalgamation of concepts, not a legal prescription, even though one could make an arguable link between the precepts of canon law and the concepts of the just war tradition. This is even more the case when one considers that in Christianity many legal commentators and philosophers have attempted to describe the provisions of this tradition[42].

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

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

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

Attempts were therefore done to actualise these laws and to regulate treatment of prisoners on the battlefield. The Third *Geneva Convention* in 1929 attempted just this and resulted in the biggest fiasco in World War Two, with Allied prisoners of war being literally worked as slaves by their Japanese captors and Russian prisoners of war starved to death by the millions in German captivity. Still, what atrocities went beyond the imagination of most was the treatment of civilians, with estimates calculating that over 6 million Jews and 1 million Roma were exterminated through means of rounding up, mopping up, transporting and mass executing by various means - not counting civilians of all sorts and 'undesirables' as well as civilian casualties from the conflict itself, evaluated at a minimum of 20 millions for the U.S.S.R. alone.

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

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

Indeed, what must be understood that the LOAC is a state obligation. In order to impose an international legal constraint against an agent of that state, for example a sergeant or even a general

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

officer, this state's obligation must be internalised by the country ratifying the treaty creating the international obligation for the state to, for example, respect prisoners of war under its control. It is for that state to provide education and training to its agents, such as its service members, and to punish violators of these obligations. With Nuremberg, following the Postdam Agreement, this regime that was before the province of the victor's justice evolved into a body of law now recognised and enforceable[43].

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

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

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

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

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

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

The President of the United States, Franklin D. Roosevelt, had, announced in his Annual Message to Congress on January 6, 1941, his concept of "Four Freedoms": freedom of speech and expression everywhere in the world; freedom to worship God in his own way everywhere in the world; freedom from want, meaning economic security and healthy peacetime life for all inhabitants everywhere in the

world; and freedom from fear, translating into world-wide reduction of armaments so that no nation should be capable of physical aggression [44]. This message was precursor to the *Lend-Lease Act* of March 11, 1941, which would buoyed the United Kingdom under the Nazi onslaught until the U.S. could be pulled in, as clearly wished Roosevelt[45].

While this would be an excellent moment for realists to exercise their cynicism, this statement and its translation into an act of support for the United Kingdom clearly states a policy that the American president intended to pursue – and which he did. Furthermore, it did not stay as a message to Americans. On August 10, 1941, Roosevelt met with Prime Minister Winston Churchill off the coast of Newfoundland. From their meeting at sea emerged a document that became, for all intents and purposes, the policy statement of the entrance into war of the United States as an ally of the United Kingdom. A joint declaration followed, the *Atlantic Charter*, on August 12, 1941. Its clear statement of alliance of the Anglo-Saxon world is undeniably made against "aggression" and the "Hitlerite Government of Germany" calling "after the final destruction of Nazi tyranny (…) assurance that all men in all lands may live out their lives in freedom from fear and want" and that respect for "the right of all peoples to choose the form of government under which they live"[46]. This might seem just a principled declaration, but as the aptly title article of Elizabeth Borgwardt states: when you state a moral principle, you are stuck with it. And here, the United States and United Kingdom did not just state the kind of right they desired to see after the conclusion of the war in order to avoid the mistake of 1919. The *Atlantic Charter* affirmed the rights as they apply not to States but also to "peoples" and to "all men in all the lands".

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

The problem with having just cause for entering a conflict is that it does not necessarily equate with justly conducting the hostilities once entered. And the tradition of justness is to be understood as being rightly conducted as opposed to wrongly conducted. Within the Just War theory Michael Walzer argues that the two sets of principles of the just war tradition are "logically independent. Therefore, it is perfectly possible for a just war to be fought unjustly and for an unjust war to be fought in strict accordance with the rules."[47]

As a result, an unjust combatant is one that legally is a combatant but who fights on the side of a state not having met the criteria of *jus ad bellum* – therefore fighting for an unjust cause - while a just combatant is one that fights on the side of a state having met these criteria and therefore fighting for a just cause. Since *jus in bello* is independent of *jus ad bellum*, it therefore makes no difference as to the permissibility of an "unjust combatant" to fight; it is then the conduct in the fight that matters. This is a view criticised by some, certain authors deeming the conclusion untenable, but which is nonetheless largely accepted by armed forces and governments across the world[48].

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

[46] *The Atlantic Charter*, 14 August 1941.
[47] Walzer, Michael, *Just and Unjust Wars,* Harmondsworth: Penguin, 1977 at 21.
[48] McMahan, Jeff, "The Ethics of Killing in War", *Ethics* 114 (2004): 693-733 at 693.

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

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

The accepted benchmark is the LOAC and provides a set of rules as to the manner in which one may cause harm to physical integrity, including the arbitrary denial of the right to life, as well as harm to property, both private and public. Its whole premise rests on the principle of humanity and this is enacted by something seen as "a triumvirate equation under which military necessity is framed by the prohibition of unnecessary suffering during the proportionate application of military force, in an effort to 'humanize' a reality"[49].

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

The *Atlantic Charter* not only incorporated Roosevelt's 'Four Freedoms', but also provided for a statement of political rights as core values of the reason why the war would be fought, a vision of individuals in a new system of collective security as opposed to the previous one composed solely of the interests of states and emphasising the application of these principles domestically as much as internationally. All these elements "continue to inform our conception of the term 'human rights'"[50]. Simply said, the Allies defined its war in terms of a fight for human rights. The Axis did not.

At its roots, the principle of humanity rests precisely on the very first right of "all men in all lands": the right to life. And the application of this very principle is fundamental to apply towards those who are *innocents*, in the Latin sense of the words 'not *nocentes*'. *Nocentes* means "those who injure or are harmful". By contrast, *innocents* are: those who do not injure or are harmless. In the just war tradition, the innocents are therefore "morally immune" to attacks. Their status in the just war tradition is translated in the LOAC in the distinction between combatants, who are *nocentes*, as they do pose a threat and therefore lose their immunity and are liable to attacks, and 'not *nocentes*', the *innocents* who are noncombatants because they do not pose a threat[51].

Yet, as opposed to contemporary international human rights where the right to life cannot be arbitrarily

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

denied[52], the LOAC does provide for arbitrary deprivation of this right – for combatants and noncombatants alike. The proposition is not contrary to the existing LOAC: indeed, the LOAC provides clearly for the criteria of proportionality, whereby an attack on combatants that is deemed a military necessity becomes justifiable if it provides for economy of force even if collateral damage in terms of noncombatants is expected. The criteria of proportionality demands that the military advantage gained from the attack is superior to the expected noncombatant casualties. The facts that miscalculation occurs and that collateral damages are much greater than anticipated are not at issue: it is the expectations prior to the attack being executed that matter (including during the attack if knowledge of disproportional noncombatant casualties become available). As long as noncombatants were not directly targeted and the expectation of proportionality was respected, it is permissible to deny arbitrarily noncombatants of their right to life[53].

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

For Canadian military members deployed abroad, the LOAC certainly applies. But so does the *International Covenant on Civil and Political Rights*, which is binding on states and therefore necessitates its agents to conform to its application that clearly states that certain rights continue to apply even in times of public emergencies threatening the existence of the nation. Among these, the right to life, as we have seen, is paramount. Some positivist jurists will immediately signal that the *Covenant* only applies to "State Party to the present Covenant [and thereby has them] undertakes to respect and to ensure to all individuals *within its territory* ***and*** *subject to its jurisdiction* the rights recognized in the present Covenant"[54]. Their interpretation of this sentence is that both conditions must be in force for the provision of the *Covenant* to be applicable. In this manner of thinking, the result would be that even though the United States has Taliban fighters thought to also be Al-Qaida operatives under its jurisdiction in Guantanamo Bay, its Attorney General argued that it was not on its territory and therefore these provisions did not apply[55].

In true Alberto Gonzalez fashion (the very same author of the infamous "torture memo" justifying the use of techniques in clear breach of international prohibition of torture under both international human rights law and the LOAC, as well as under U.S. laws and which have since been debunked[56]) this

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

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

[54] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368, at article 2.

[55] "Reply of the Government of the United States of America to the Report of the Five UNHCR Special Rapporteurs on Detainees in Guantanamo Bay, Cuba", *International Legal Material* 45 (2006): 742-767 at 743.

[56] See Rouillard, Louis-Philippe F., "Misinterpreting the Prohibition of Torture under International Law: The Office of Legal Counsel Memorandum", *American University International Law Review*, 21 1 (2005):. 9-42.

argument conveniently ignores previous precisions by the United Nations Human Rights Committee, which is the international body responsible for the implementation of the *Covenant*. The Committee clarified the sentence and affirmed: ""a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party" and that the International Court of Justice in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* recognized that the jurisdiction of States is primarily territorial, but concluded that the *Covenant* extends to "acts done by a State in the exercise of its jurisdiction outside of its own territory"[57].

The International Court of Justice's decisions are binding and of the highest possible level of legal expertise. As a result, one is to accept the concept that the *Covenant* is indeed binding on states, even outside of their territory, where they have anyone within their power or under their effective control – even if not situated within the territory of the state at concern[58]. This includes counter-insurgency operations after an invasion or when operating by invitation of a state, such as in Iraq or in Afghanistan. Having established that there is an interdependence between the LOAC and international human rights law, we come to the conclusion that a state's agent member of its armed forces must abide by the provisions set by international instruments such as the *Covenant* and apply non-derogable human rights at all times, subject only to the *lex specialis* that is the LAOC, since as a general rule of law the specialised law will take precedence of the general (or more generally applicable) law. Therefore, the right to life cannot be arbitrarily denied to an individual by an agent of a state under international human rights law, unless superseded by the imperative of a specialised law which permits such denial. The LOAC permits this explicitly, but only under the constraints of its over-arching principle of humanity, through the application of the principles of military necessity, proportionality and discrimination between combatants and noncombatants.

But the right to life is not the only right protected by international human rights law. Other rights which cannot be suspended from being exercised are[59]: the protection against torture, cruel, inhuman and degrading treatments[60], the protection against slavery and servitude[61], the imprisonment on the ground of inability to meet contractual engagement[62], the protection against not being condemned for crimes that did not exist at the time of commission whether under national or international law[63], recognition before the law[64] and freedom of thought and of religion[65].

But, if a final doubt existed as to the application of human rights during armed conflicts, including universal[66] and regional human rights[67], one only needs to read the International Court of Justice

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[57] Human Rights Committee, *General Comment No. 31* (2004), CCPR/C/21/Rev.1/Add.13,para. 10 and the International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, I.C.J. Reports 2004 (9 July 2004), where the ICJ reached the same conclusion with regard to the applicability of the Convention on the Rights of the Child (para. 113). As far as the Convention against Torture is concerned, articles 2 (1) and 16 (1) refer to each State party's obligation to prevent acts of torture "in any territory under its jurisdiction". Accordingly, the territorial applicability of the Convention to United States activities at Guantánamo Bay is even less disputable than the territorial applicability of ICCPR, which refers (art. 2 (1)) to "all individuals within its territory and subject to its jurisdiction".

[58] Commission on Human Rights, *Situation of detainees at Guantánamo Bay*, E/CN.4/2006/120, 27 February 2006, , Sixty-second session, Items 10 and 11 of the provisional agenda, at p. 6, para 11.

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

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

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

[62] *Ibid.* at article 11.

[63] *Ibid.* at article 15.

[64] *Ibid.* at article 16.

[65] *Ibid.* at article 18.

[66] Understood as the International Bill of Human Rights from the United Nations: *Universal Declaration of Human Rights*, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948); *International Covenant on Economic, Social and Cultural Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976;

decision in its Advisory Opinion on the *Legality of the threat or Use of Nuclear Weapons*[68].

Further, application of precise concepts of human rights law is recognised through the developing field of international criminal law. Canada has accepted the jurisdiction of the International Criminal Court and that of the *Rome Statute*, which it has internalised and rendered opposable to its agents by means of the *Crimes Against Humanity and War Crimes Act*[69]. For Canada's agents, as well as for any person subject to its jurisdiction, including government civilian employees, police personnel and service personnel, the act recognises three types of crimes under international law for which its agents might be prosecuted: genocide; crime against humanity; and war crimes. Although the crime of aggression is include in the *Rome Statute*, as it has yet to be defined it is not integrated into the national order at this time but remains a matter of international law under customary law.

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

The final element that allows for the interaction of the LOAC with international human rights law is the LOAC itself. Through its adoption of the *Marten's clause*, which is a statement of humanity attributed to Fyodor F. Martens, the Russian representative at the *Hague Convention* of 1899, and which was slightly modified in the *Hague Convention* of 1907 and reprised in another modified form in the *Geneva Conventions* of 1949[70]. In this last form, its states: "(...) Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience." While there remains a debate as to whether this is to be interpreted liberally or restrictively, the final part of

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

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

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

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

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

the statement clearly links international law applicable in armed conflict with the precepts of public conscience – therefore of morally acceptable conduct, regardless of the LOAC being applicable by and of itself. As a result, it is clear that as agents of the state, military members must know the requirement for them to apply the very minimal norms contained in such international instruments. Training pertaining to the LOAC is provided in most armed forces, but very little is said of human rights obligations.

Yet, this is important. As explained above, entrance in an operational theatre – whether in a peacekeeping role, a peacemaking one, a nation-building coalition, a "war against terrorism", an international armed conflict or in support operations by invitation of a foreign government – is, for liberal democracies, most often justify on the very premise that armed forces are sent to stop gross and widespread violations of human rights and to guarantee the future exercise of these very human rights though the establishment and support of a democratic government. In short, the justification is provided on a moral – not solely a legal – basis.

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

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

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

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

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

The reasons why service personnel may commit acts of unnecessary violence, thereby violating positive

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

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

Context and authority intrinsic to the chain of command are other factors. The Milgram experiments have clearly shown the propensity of persons put in position of authority – even in a fictional context – to become brutal even without outside pressures – apart from boredom[71]. While this lends credence to a military truism about soldiers having nothing to do, it would hardly seem sufficient to explain disgraceful conducts such as those of Bagram and Abu Ghraib. And yet, this is exactly the context of the Milgram experiment.

And sub-culture can certainly be a factor. Psychologists contend that humans are 'herd animals' and that in groups, such as in armed forces, the individual "is submerged in group acts in which" they have little investment, creating a 'group mind'. In a less fancy phrasing: peer pressure is intense[72]. And in the case of 'specialist units' – the elites – it is argued that "externally directed aggressive behaviour, which enjoyed a maximum of group condonence, tended to relieve the individual of any feeling of vulnerability"[73].

I addressed some of these psychological and sociological sources, as well as others, in previous writings[74], and their validity appears to be supported by experience. Many authors have commented on the cause of inglorious behaviour, and most are more than likely right in some way or another as to the convergence of factors that can lead to unethical actions being committed or decisions being taken. The question is to know what preventative measures can be implemented to diminish the odds of occurrence of actions that would contradict the established set of defence values.

This can be couched in theoretical terms, whereby the solution would be to adopt as a frame of reference either utilitarianism, having civilian employees of defence departments and service personnel of armed forces focus on achieving good consequences from a conflict or by adopting the deontological approach of Kant, by which it is one's duty to ensure ethical conduct in an armed conflict[75]. In the first, ethical actions brings out good results and uses individual to secure good consequences. In the second, the concept of duty demands ethical action for their own sake and people are to be treated as always with respect, not as means to an end, as a primary moral imperative.

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

[71] Mackmin, *supra,* note 35 at 81.
[72] *Idem*.
[73] *Idem*.
[74] Rouillard, Louis-Philippe, *Precise of the Laws of Armed Conflicts: With Essays Concerning the Combatant Status of the Guantanamo Detainees and the Statute of the Iraqi Special Tribunal*, Lincoln NE: iUniverse (2004) at Chapter 13.
[75] McMaster, H.R., "Remaining True to Our Values - Reflections on Military Ethics in Trying Times", *Journal of Military Ethics* 9.3, (2010): 183-194 at 187 and 188.

of theoretical framework, but rather adopts a larger values-based and distributed on-going programme of indoctrination.

And this is perhaps one of the better methods of bringing service personnel and civilian employees to adopt an ethical stance in their actions and decisions. If anything, according to Brigadier-General H.R. MacMaster who wrote as ISAF HQ Staff very recently, it does correlate with proposed theories such as that of Jim Frederick in his book *Black Hearts* (Frederick, 2010), where he presents the following four factors as leading to unethical conduct[76]: ignorance; uncertainty; fear; and combat trauma.

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

To inoculate soldiers against this, Brigadier-General MacMaster proposes a concerted effort in four areas: applied ethics or values-based instructions; training that replicates as closely as possible situations that soldiers are likely to encounter; education about culture and historical experience of the people among whom a conflict is being waged; and lastly leadership that strives to set the example, keep soldiers informed and manages combat stress[77].

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

As with the example of the *Atlantic Charter* during the Second World War and its insertion in the moral and legal continuum that frame the conflict, certainty as to the moral foundations of a conflict has its part to play and transcends the concept of humanity found in the just war tradition. And this humanity is transposed not only in dealings with the general population and with enemy forces, but also the humanity for a state's own armed forces.
One of the responsibilities of persons vested with authority, from a private first class or a lance-corporal to a marshal, is to preserve his or her own troops. This means of course the application of the military concept of economy of force, whereby one does not sacrifice unnecessarily personnel and materiel. But it is also means to preserve the individuals forming this troop; the preservation of their own humanity.

As I wrote previously[78], admittedly without empirical data, and which is also said by other authors, there is a contention that whether justified or not under *jus ad bellum* and *jus in bello*, as well as being

[76] *Ibid.* at 187-188, as stated in MacMaster : First - ignorance. Ignorance concerning the mission, the environment or a failure to understand or internalize the warrior ethos or professional military ethic. This results in the breaking of the covenant or sacred trust that binds soldiers to our society and to each other; Second - uncertainty. Ignorance causes uncertainty and uncertainty can lead to mistakes, mistakes that can harm civilians unnecessarily. Warfare will always remain firmly in the realm of uncertainty, but leaders must strive to reduce uncertainty for their troopers and units;
Third - fear. Uncertainty combines with the persistent danger inherent in combat to incite fear in individuals and units. Leaders must strive not only to reduce uncertainty for their troopers, but also to build confident units. Confidence serves as a bulwark against fear and fear's corrosive effect on morale, discipline, and combat effectiveness; Fourth - combat trauma. Rage is often a result of combat trauma. Fear experienced over time or a traumatic experience can lead to combat trauma. And combat trauma often manifests itself in rage and actions that compromise the mission.
[77] *Ibid.* at 188.
[78] Rouillard, *Precise, supra*, note 74 at Chapter 13. My phrasing is that it imposes a scar on the individual who commits the action, even when fully justified.

morally justified, the act of killing damages one's humanity[79].

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

It is not a coincidence that many an unethical act in an operation or an unethical decision are first create because orders where unclear. From My Lai, where ambiguity about whether Lt. Calley was 'ordered' or not to kill all he sees in the village since they were expected to be hostile, to a Sergeant in Somalia saying to Master-Corporal Matchee to do what he wants with his prisoner short of killing him, it is the imprecision of the commands given – the poor leadership shown – that resulted in unethical actions at the tactical level that undermined the strategic objectives of the mission[80].

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

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

Conclusion

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

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

[79] French, S., "Sergeant Davis's Stern Charge: The Obligation of Officers to Preserve the Humanity of Their Troops", *Journal of Military Ethics* 8.2 (2009): 116-126 at 118.
[80] McMaster, *supra*, note 75 at 189.

An incoherent mission contradicting this aim will create uncertainty and a faulty ethical command climate, where mission success means acquiring a piece of ground or destroying enemy forces, but does not met the concerns of the political and strategic aims of the use of force.

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

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

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

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

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

THE PEACE CORPS AS A SUCCESSFUL UNITED STATES FOREIGN POLICY: A PHENOMENOLOGICAL ACCOUNT OF MY EXPERIENCES WITH AMERICAN PEACE CORPS VOLUNTEERS WHO SERVED IN GHANA BETWEEN 1971 AND 1978

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Introduction

One of the most success stories of American foreign policy has been the Peace Corps. Volunteers of the corps have provided technical assistance to schools, hospitals, agricultural organizations/institutes, and vocational institutes, among others, and have by that projected United States' humanitarian image. The Peace Corps Program has also helped people outside the United States to understand United States' culture, and also helped Americans to understand the cultures of the countries in which the volunteers serve.

Earlier studies on the Peace Corps centered on identifying problems and looking for ways to make the Program work. For example, in his work on *Predicting the Success of Peace Corps Volunteers in Nigeria,* Walter (1965) discovered that whereas global ratings (by training faculty, assessment board, and interviewer), grades and peer ratings of volunteers, were not appreciably related to functioning overseas, scores on self-report measures (e.g., Ego Strength) were. Walter recommended the use of the self-report measures for screening and selection decisions. For his part, Harris (1973) analyzed criteria of performance and adaptation of 52 Peace Corps volunteers in Tonga who had received high overall evaluation, moderate to marginal overall evaluation, or who had terminated early. He discovered that basic character traits were the single most important class of variables, followed by general technical competence, cultural interaction, and interpersonal relations. Harris posited that there was the need for pooled judgments by competent people and for basic research to justify professional psychological services for the volunteers.

In 2006, the Peace Corps Program itself put together a book that carried stories from past volunteers and which reflected the volunteers' adventure, their cross-cultural exchange, their personal growth, and the deep friendships they forged. The project emphasized the success and some problems of the Program and projected a successful and an efficient way forward.

Other researchers looked at the Peace Corps and its impact on American foreign policy and how that impacted the Soviet leadership during the cold war. For example, Legvold's work on American policy in the Congo, Cuba, and Vietnam (quoted in Grunwald, 1972) noted how embarrassing success of the Peace Corps policy was to the Soviet leadership and how bold or unrelenting the Soviet Union was in its efforts to win friends and allies in Africa.

It is true to say, however, that as far as studies on the Peace Corps volunteers in Africa are concerned, most of such studies have focused on disease infestation, prevention, and treatment. For example, in their study of travelers' diarrhea in Morocco, Sack Froehlich, Zulich, Hidi, Kapikian and Greenberg (1979) corroborated the effectiveness of doxycycline prophylaxis in treating travelers' diarrhea. Moran and Bernard (1989) monitored the incidence of drug-resistant *Plasmodium falciparum* malaria in highly exposed expatriates (Peace Corps volunteers in West Africa) with the view of providing data to guide recommendations for travelers. They discovered the spread of *Plasmodium falciparum* malaria resistant to chloroquine prophylaxis "as far west as Liberia by the beginning of January 1989, with only limited risk in Sierra Leone and to the north and west of Sierra Leone." Finally, Pearce, Gerber,

Gootnick, Khan, Li, Pino and Braverman (2002) discovered marked increases in serum total iodine concentrations, the prevalence of goiter, elevated serum TSH values, and elevated serum thyroid peroxidase antibody values in Peace Corps volunteers who were exposed to prolonged excess iodine. They also discovered that removal of excess iodine from the drinking water system led to a decrease in the prevalence of all abnormalities.

What is missing in all the above-mentioned studies and other studies on the Peace Corps is the perspective of Africans who benefitted from the Peace Corps. This study attempts to fill that dearth of knowledge. It is important to note that the first group of Peace Corps volunteers to go overseas trained in Berkeley in the summer of 1961 and served for two years as secondary school teachers in Ghana (Smith, 1966). As Smith notes, forty-four of the volunteers completed the two-year term. Given Ghana's role as the first country to receive Peace Corps volunteers (even if such role involved being a recipient/beneficiary of the Program only), providing a Ghanaian's perspective of this global political, diplomatic and educational policy phenomenon is in the right direction.

Method

Data for this paper involve personal recollections (based on participant observation) of my encounter with five American Peace Corps volunteers — Anderson, Booth, Glatey, Beeman, and Green-Leaf — who taught Mathematics, Chemistry, and English Literature in Asuom Secondary School in the 1970s (between 1971 and 1978). The content of my experiences and the way they are framed and narrated are thus based on past lived-experiences (Husserl and Merleau-Ponty, 2001). In particular, they are based on the awareness I had while living through or performing the lived experiences—my active participation in classes taught by the volunteers, my observation and participation in the on-campus and off-campus lives of the volunteers, and on my observation and participation in the social lives of people who interacted directly and/or indirectly with the volunteers. In a way, I am the source of, and hence, an active participant in the creation and enactment of the data.

Theoretical Underpinnings

The paper is done within the framework of phenomenology (Husserl, 1963; 1989) — *the study of structures of consciousness as experienced from the first-person point of view*. Framing the study within phenomenology implies studying my conscious experience, as experienced by me, and analyzing the structure of the experience (that is, analyzing the kinds of experiences, the intentional forms and meanings of such experiences, the dynamics, and enabling conditions under which the experiences were lived). It also involves analyzing the structure of the perception, of ideas, of imagination, emotion, of wish/desires and of action (Smith, 2003; 2008). Specifically, I synthesize and analyze the ways I 'experienced' the social and professional lives of the five American Peace Corps volunteers. I attend to both the passive (vision or hearing) and active (e.g., walking, repairing motorbikes, etc.) experiences and then attempt to explicate the meanings they had in my lived experience as a teenage high schooler by attempting to answer pertinent questions relating to the type of experiences I had as their student, and the impact the experiences had on me and my classmates (with regards to academia, social life, work ethic and morality). I address the meaning of the volunteers' actions including their teaching (content, form, and tone), social lives, sense of time, commitment to work, even their walking, their default means of transportation (motorbikes), and their observed love lives. I also focus on the significance of the above-mentioned actions on my life even if such experiences appear subjective. Furthermore, I examine the conditions that helped to create and shape my experiences. The experiences I elucidate thus range from "perception, thought, memory, imagination, emotion, desire, and volition to bodily awareness, embodied action, and social activity, especially linguistic activity"

(Smith, 2008).

Method of Analysis

I interpret my experiences from the point of view of cultural hermeneutics (Heidegger, 1962; Grondin, 1994; Willis & Jost, 2007; Lawrence, 2008) — that is, within social and linguistic contexts—and I analyze my experiences based on the type and conditions under which experience could be viewed as true, factual, or correct by paying attention to acts of behavior or observations that authenticate and confirm aspects of my experience, or acts of behavior or observations that refute them. Even though the basic premise of my study is phenomenological (how I experienced the volunteers), aspects of my experiences are ontological (a study of who the volunteers were), epistemological (the various kinds of knowledge I gained through my experience with them), logical (ways by which my reasoning was validated) and ethical (how I acted or should have acted based on my experiences with them.)

Results & Discussion

Four themes extracted from my lived experiences and analyzed below include: teaching, social lives, means of transportation, and linguistic activity. We begin by examining teaching.

1. Teaching

My first educational (pedagogical) encounter with an American Peace Corps volunteer was in September 1971. Our first day of Math class was fun but confusing. We came out of the classroom saying to one another *I wris-wris kontomire* 'We heard nothing but gibberish.' Our teacher's American English dialect was incomprehensible to most of us but fun to listen to. For most of us, it was our first time of hearing someone (in person) speaking with an American accent. Those days we hardly watched American movies; most of the movies we watched were Indian and were probably in Urdu or Hindi. Even though we loved our teacher's accent and style of delivering his lecture, his English accent got in the way of our understanding of the content. The subject content, *algebra*, was new to most of us who came to secondary school from upper primary and lower middle school (grade 5 to 8). What we liked about the teacher was how simple and straightforward his teaching was. By the third week of class, he had learned to speak *slowly* and *more deliberately* and we had begun to listen more attentively and intently instead of just listening to and admiring his American style of speaking. We began to understand him by the end of the second month and there were no complaints about the Americanisms in his speech; in deed, we thought of him as the best teacher in the school. We liked his 'casual' style of teaching which made it easy for us to ask questions and hence relatively easy to understand the content of the subject matter. We began to draw parallels and made comparisons between him and our Physics teacher (a Dutchman) and the other Ghanaian teachers whom we saw as conservative, strict disciplinarians, and whose classes were boring and of whom we were often scared. One could tell by the nicknames we gave to the teachers, our perception of them, the emotional valency created by their persona, and the degree of confidence we had in them. Mike Anderson and Douglas Booth were both called 'King-of-the-Youth' we saw them as youthful, as thinking like us, and as possessing the qualities to be youth organizers or youth leaders. The Dutchman, our Physics teacher, was called 'You-Measure-Measure-Measure' because of his insistence that we measured everything we saw. We found him to be too strict and overly demanding; in fact, we saw his demands as senseless. The Ghanaian teachers had several names two of which denoted:

(i) *Meanness* (*Kum-Nipa* 'Killer-of-Persons.') This teacher was a low-grade-awarding-happy individual who took great pride in giving low grades instead of helping us to understand the class; and

(ii) *Lack of preparation for class* (*Yemfa-Nhye-Yen-Ho* 'Let-Us-Take-It-As-Is'). He was never prepared for his classes and was never able to find answers to our questions; instead, he always brushed such questions aside.

As with Michael Anderson and Douglass Booth, we found Curtis Beeman, Green-Leaf, and Glatey to be conscientious, highly sensitive to time (for they always came to class on time), and very committed to their work and to us—they never missed work. For their hard work and dedication to duty, they 'earned' the nickname *Honam-Pe-Adwuma* 'Bodies/Persons-that-loved-work.' The volunteers, by their actions toward work, created the love for hard-work in us. We had no reason to be late to class because they were always on time; we could not complain about Math being difficult because they (Douglas and Michael) made it easy to understand. Despite Chemistry being seen at the time as complicated and the periodic table being seen as impossible to memorize, Curtis (1972-73) had come up with ways of making his class enjoyable rather than endurable. He created an atmosphere that involved us handling the lab equipment and taking part in the experiments instead of us being mere observers in the class — 'doing was knowing' and because we were active participants, we understood and knew Chemistry. Mr. Glatey was quiet, funny and approachable who, like Beemann, made Chemistry one of my best subjects. We knew he would be there for us and would always take his time to explain things to us so we were not afraid to ask questions despite our limited English vocabulary.

Prior to Green Leaf coming to Asuom, English Literature was feared and shunned. We saw it as a subject for the city people who knew more English than those of us in the village. Few months after Green Leaf arrived, we began hearing 'This Guy-man is the right guy. He makes Literature so easy. Now we know we shan't make Grade 9; we can make Grade One!' Grade one was the highest grade one could receive on the international exams and nine was the lowest grade. Green Leaf had, by his style of teaching, given us enough confidence and hope that we saw failure as not being an option. In particular, we saw ourselves as being capable of obtaining the highest grade in English Literature in the international exam. There was something obvious; students, who had Green Leaf, did much better in the international exams than those who did not. The volunteers, by their pedagogical styles, their creation of hope and confidence in us, and their hard work, helped us to love studying. Their actions paid off because they helped to raise academic standards in the school and the students and people in the village respected them for their contribution to society. If their mission was to educate, then the results spoke for themselves — *their mission was accomplished.*

2. Social Lives

My personal encounter with the Peace Corps volunteers went beyond the classroom. I met with them in the community, played Frisbee and the horn with some of them, and did the two-mile walk from Mr. Oduro's house to the school with them on several occasions.

I saw them as social beings who were down to earth and who were accepting of our culture (sometimes more than our Ghanaian teachers). They learned our politeness phenomena by making special effort to bow when greeting an elderly person, avoiding the use of the thumbs-up (which is the equivalent of using the middle finger in American culture) or greeting with the left hand (which is considered very disrespectful). Some of our Ghanaian teachers did the thumbs-up gesture to show how Western they had become to the irritation of the village elders some of who drew comparisons between the teachers and the volunteers who had acculturated and were thus highly respected.

I also experienced the love lives of some of the volunteers. One had a child with my cousin and another had a couple of girl friends who lived next to my house. In a culture that kept love a secret between a man and a woman, I observed a young woman being kissed on the lips in public. Initially I saw this as an embarrassment and an affront to our culture but as time went by some of us learned quickly to do the same (even if not in the glare view of the public) to the annoyance and irritation of our Ghanaian teachers. Some of the older people in town were quick to shame anyone who did that because it was (and still is) seen as a taboo to kiss a woman in public. Students who tried to kiss in public were punished by the teachers and some were suspended from the school.

The volunteers who 'committed this offense,' however, got away with it because kissing in public was seen as part of their American culture and as 'guests,' that offense was unobjectionable by the local people. By 1974, young men and women who were not from the town began to kiss in public with little scolding from the public. This behavior was still unacceptable on the campus of the secondary school. One thing was very clear, the volunteers managed to influence an aspect of the local culture.

Another aspect of the volunteers' culture that I experienced and which impacted us as students was the tempo/speed of walking. In the local culture, walking fast was (and still is) associated with being crazy or unwise. Several communicative maxims such as *onante gyoligyoligyoli* 'S/he walks crazily/insanely' and *oba nyansafo na yesoma no nye nammon tenten* ['it is a wise child who is sent on an errand not the one with long strides;' that is, being wise is preferable to having long strides'] support this cultural phenomenon. By the end of Anderson's tenure, not only had some students imitated his style of walking which involved walking in long strides, several of the male students also walked fast. This cultural phenomenon was easily accepted even by some in the town. The nickname it attracted was *ko ntem bra ntem* ['lit. go quickly; return quickly' meaning *being on time*.] The style of walking was associated with getting things done on time and was viewed as acceptable even if the fast walker was viewed as unwise. Note however, that the local people themselves did not practice this style of walking.

3. Means of Transportation

Douglas Booth rode a motorbike and was viewed by us and more especially by the local people as someone who took a risk. Specifically, we saw him as putting his life in danger because we believed he was at risk of falling off his bike or being run over by the careless bob trailer drivers in the district. He neither fell nor was run over by a vehicle and so our Agricultural Science tutor also bought a bike. There was the expectation that the Agricultural Science teacher would be involved in one form of accident or another and that would act as a deterrent to those who copied the American way of life blindly. He did not have any accident either and that emboldened the students (including me) to get a ride home some afternoons after class. Several older people warned us not to ride with the teacher because we could fall and die; some even reported us to our parents that we were living dangerously and that it was a matter of days that a funeral would be held for one of us. My father cautioned me to be careful; he had confidence in the Agricultural Science teacher because he lived in our house and we saw him as a very responsible man. Two other volunteers who came after Booth also used bikes and students rode with them to school, setting aside fears of possible involvement in an accident. Thus, the volunteers had by their actions taught us about motorbike safety and even though no one bought a motorbike, the fear that it was a reckless way of life no longer obtained.

4. Linguistic Activity

An important experience with the volunteers that impacted my life was language in social interaction. First, they spoke with an American accent which was considered cool by us (teenagers) at the time. We viewed the British dialect of English as being spoken with arrogance and students who attempted to approximate it were viewed by us (students and faculty) as arrogant but intelligent. The coming of the

volunteers to my village school brought an expression *hey man*, which became in-vogue. What was interesting was that this expression underwent a semantic shift and was used to mean *be careful* or *watch out*.

For most of us, American English sounded very fast and mumbling and so it was common for us (students) to speak fast and mumble our words to impress our listeners of the Americanization of our English dialect. In particular, for us (the boys), speaking English the American way to a girl was a sign of being 'civilized' and cool. For the girls, speaking American English was a sign of being spoilt or of knowing about men or having had sexual partner(s).

Another experience we had with respect to language in social interaction was an attempt by some of the local people, the older men, to speak some 'English' to the volunteers. This practice gave rise to the saying 'Go-Come-Go-Come English' meaning English incompetence or English that involved minimal to no English. For the older women, the volunteers did not speak 'any language;' they spoke English. Whereas some had pity on the volunteers for not speaking the local language, others spoke Akan with them since they saw them as their children who had to be helped to communicate in a 'language.' Most of the volunteers studied the local language and became competent; a practice that led to maximum acceptance. Speaking Akan bestowed on the volunteers 'citizenship' and kinship (an adoptive consanguine) status. They were no longer viewed as *obroni* 'someone who comes from abroad or from beyond the horizon,' they were legitimate Akanfo (Akans.)

The most important experience I had with the volunteers on language in social interaction was relevance of functional language learning to surviving in a new culture. One day, Douglas Booth had malaria; but despite his illness he came to school. Diagnosing his illness was easy for everyone because he knew the right Akan vocabulary for describing the symptoms associated with the disease. Thus, as soon as he described the symptoms of his illness, it was easy to tell what the problem was (each of us had had malaria before) and we all knew how to treat it at the time (with Chloroquine, a 4-aminoquinoline drug). He got well to the relief of all of us. Not only did the volunteers' use of appropriate language in the right discourse context help resolve a health problem, it earned them respect among the students and the local people. The other Ghanaian non-Akan teachers had no excuse not to learn Akan if the American volunteers had learned it and were using it appropriately. Indeed, such Ghanaian teachers were perceived as arrogant, snobs, and worthy of being spited.

Discussion and Conclusion

There is no doubt that the Peace Corps volunteers who taught in Asuom Secondary School from the early to late 1970s left a huge foot-print or mark in the school and in the community. As their student, the footprints they left behind have been permanent in my consciousness and have helped to shape my life. In particular, the volunteers were more than United States educational ambassadors; they left permanent impressions about United States social and cultural lives on me. The experience I had of them as dedicated selfless individuals was so deep rooted that to date despite being angry at times about race, ethnicity, and identity, I still view an American as an individual who works hard, who is not perturbed by difficult circumstances, and who is focused on achieving a targeted goal.

To date, I credit my success as an academic to the Peace Corps. The questions I often pose are: Had it not been for the Peace Corps volunteers, which graduate teacher would have accepted posting to my village to teach Math, Chemistry, Biology, and/or English Literature? Given the fact that Ghanaian graduate teachers posted to the school either did not accept such posting or accepted them but did not stay long enough to make any meaningful impact on the school's teaching mission, what would have happened to us with respect to the subjects that we so desperately needed help with?

With respect to cultural tolerance and acceptance, a footprint left by the volunteers was a lesson about not merely learning about unity but actually putting it into practice. Our culture became the volunteers' culture and what took place was close to what Cooper (1972) labeled *cultural crossing*. They became Akan by living and acting Akan. By so doing, they gained acceptance and respect as well as insight into our way of life. Their presence thus, taught me and my classmates about the need to do away with isms, xenophobia, and the unwholesome idea of *birds of a feather flocking together*. If these people who looked so different were accepting of us and us of them, then why can we not accept our own countrymen and women?

On the flip side, the Peace Corps volunteers indirectly left footprints of rebellion in us. Their casual style of teaching, of interaction, of love life, and of walking made us act contrary to our traditional norms. We spoke like them even though that was considered being a rascal by the Ghanaian teachers and the local people; we became open about having girlfriends or boyfriends even though our culture demanded such friendships be kept secret; and we walked like them even though walking fast was associated with not being wise. In the end, we changed society with them and through them.

Furthermore, a footprint left by the volunteers was that of invention, improvisation, and innovation. Looking at Douglas Booth improvise with dry cell batteries in order to start and operate his motorbike left a permanent impression on me; one can make do with what one has if one is willing to try. As far as I was concerned, the cultural maxim of *onyame de me dee beba* 'God will bring mine at the appropriate time' was replaced with *anomaa antu a obua da* ['if a bird does not fly, it starves]' meaning, 'inaction leads to poverty.']

Finally, the most important footprint discussed in this paper is that on work ethic; that of not giving excuses but performing one's duty in order to make positive change. When it rained, the volunteers came to work even if that meant being wet. Never were any of them late to class or absent from school. By their actions, we learned the joy and satisfaction that came from hard work.

In sum, the volunteers positively impacted our society massively not with guns and bombs but with dedication, selflessness, and love for their country and for us. They proved beyond reasonable doubt that 'it is little sticks that start, sustain, and maintain fire not big timber.' Five young American Peace Corps volunteers achieved so much in five years in a little town in Ghana's Eastern Region, what neither the British colonial administration nor the United States' deadly bombs and clandestine operations could achieve in half a century in Africa.

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