



International Institute of Humanitarian Law
Institut International de Droit Humanitaire
Istituto Internazionale di Diritto Umanitario

41st ROUND TABLE ON CURRENT ISSUES OF INTERNATIONAL HUMANITARIAN LAW

“Deprivation of liberty and armed conflicts: exploring realities and remedies”

Sanremo, 6-8 September 2018

Strengthening specific knowledge of and compliance with applicable international law by armed forces: which role for training?

Grant DAVIES

Lt. Colonel, Army Legal Branch Operational Support, UK Army

I begin with the caveat that whilst I appear here as a representative of the British Army, any views expressed here are my own and not necessarily those of the British Army, the Ministry of Defence or the UK Government.

I would like to start with one of my favourite quotes, from a man of great courage and character, Lord Moran (awarded the Military Cross in World War 1 as medical officer during the battle of the Somme in 1916) and author of the seminal book “Anatomy of Courage” (1945)

Character, as Aristotle taught, is a habit, the daily choice of right and wrong; it is a moral quality which grows to maturity in peace and is not suddenly developed on the outbreak of war. For war, in spite of what we have heard to the contrary, has no power to transform, it merely exaggerates the good and evil that are in us, till it is plain for all to read; it cannot change; it exposes.”

Lord Moran, in *The Anatomy of Courage* (1945)

Whilst Lord Moran was talking of courage and morality the clear lessons with regard to training can be seen. “Moral courage”, the choice to do the difficult, but morally right thing in extreme circumstances is something which must be habitually practiced and tested in peace, in preparation for war. As Lord Moran says, war cannot change, it exposes flaws. The tricky question of “how” such character is trained remains the Gordian knot for military lawyers and trainers of armed forces world-wide. More of that later!

Within the very limited time of 15 minutes and the scope of the paper I hope to address the very pertinent question of “what is the role (for) training in ensuring compliance”? I do not profess to have the complete answer but I hope to stimulate some debate and offer a few views of my own.

This issue seems axiomatic, a statement of the obvious, “of course there is a role for training in the compliance of IHL and Human Rights (as they are often in play concurrently)”. Indeed, the obligation for states to disseminate the Conventions and integrate IHL study into programmes of military instruction is rooted in the earliest Conventions and are well known, and survives today in the 1949 Conventions and additional Protocols (where ratified).¹ The Protocol, of course, requires a ‘train the trainer’ (“T3”) model, and requires specific qualified personnel to facilitate the application of the Conventions (Art. 6(1)), and famously in Art. 82 specifies the role of legal advisors, and the Art. 87 obligation of commanders to ensure personnel under their command are aware of the obligations under IHL. Other references to training are found in other treaties and indeed the ICRC customary study reflects the general nature of IHL training (in NIAC and IAC) in Customary Rule 142.²

These rules dictate what, not how this is to be achieved, that being delegated to national entities, and “suited to national circumstances”³. As I am sure you will agree, dissemination and instruction on the laws of war is insufficient – the wording should read “effective instruction and dissemination.

Speaking with a mere 20-year military experience of being trained and as a trainer in IHL– I contend that training is of course an essential element of

¹ GC I, Art. 47; GC II, Art. 48; GC III, Art. 127; GC IV, Art. 144.

² Of note, my state, the UK, has criticized the use of Military Manuals as state practice as too simplistic. *ibid.*, p. 801; David Turns, “Implementation and Compliance”, Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2007, p. 362.

³ Diplomatic Conference of Geneva of 1947–1977, Resolution 21, Dissemination of Knowledge of International Humanitarian Law Applicable in Armed Conflicts, para. 2(a).

compliance (if soldiers don't know the law how can they comply with it?). However, it is far from the panacea to ensure compliance alone. I would argue that other factors such as effective informed leadership, deterrence and enforcement also have large roles to play in ensuring as far as possible the compliance of armed forces with the rules of war. In my experience, and in agreement with studies, a lawful command culture is much more effective than, say, hours of sanctimonious PowerPoint presentations. That is not to demean or underplay the role of formal training – far from it – rather, such training should be in conjunction with other developmental areas such as legally grounded leadership⁴, in combination with properly resourced campaigns, effective oversight (another limb of leadership), together with rigorous, well publicized enforcement and punishment of transgressors. What we know as collective training (exercises, etc) should routinely be conducted with legal advisors and issues embedded in them – a view reflected in the ICRCs “Integrating the law” initiative of 2007 and an issue I have personally pursued in the last two years overseeing such training in exercises up to Corp level. In disagreement with the otherwise sterling work of the UKs Lloyd Roberts⁵, however, in 2018 I can report that in the UK, legal involvement in training is now seen by many in the chain of command as “vital ground”. Having very recently reviewed the content of the UKs Mandatory Annual Training Tests (MATTs) I can report that the content and importance of the IHL module remains very much intact - the lessons of Baha Musa have been hard learned.

That training alone is insufficient to ensure compliance has been reflected in other studies far more detailed and empirical than my own – for that I would commend to you the submission by Elizabeth Stubbins Bates in the ICRC review of 2015⁶, which inter alia draws on the conclusions of Françoise Hampson⁷ and the latter work of Marco Sassòli later in 2007. Whilst I do not

⁴ In the UK, the Army Legal Services Operational Law Branch has championed and taught ‘responsible command’ in addition to the well-known legal doctrine of ‘command responsibility’. This is based more on a sense of legal, but also moral and ethical obligations to adhere to the law, but enhancing a *command culture* that respects such values.

⁵ David Lloyd Roberts, “Teaching the Law of Armed Conflict to Armed Forces: Personal Reflections”, in Anthony M. Helm (ed.), *International Law Studies*, Vol. 82, Naval War College, Newport, Rhode Island, 2006, pp. 121–134

⁶ International Review of the Red Cross, (2014) Vol.96 (Generating respect for the law “Towards effective training in IHL”, pp. 795-816.

⁷ Françoise Hampson “Fighting by the rules: Instructing the Armed Forces in Humanitarian Law” International Review of the Red Cross, Vol. 29, No. 269, 1989, pp. 111–124.

point to any empirical study of my own, my views are not formed in a vacuum either. The British Army has certainly seen its fair share of challenges in the last twenty years of my service. Whilst the vast majority of soldiers have acted within the law, and under the most testing of circumstances, there have been notable and highly publicized instances where they have not. The two cases of resonance are the killing of Baha Mousa in 2004, and the conviction of Royal Marine Sgt Blackman for the homicide of an hors de combat insurgent in Afghanistan in 2011.

Could better training have prevented these examples of non-compliance? Whilst I am unable to definitively answer that question, I do know that the training received by UK soldiers prior to the invasion of Iraq in 2003, was not as sophisticated or thorough as it was in 2011 – yet – despite receiving concentrated IHL training prior to deployment and in-theatre legal briefs – Sgt Blackman unlawfully shot dead a detainee on the battlefield,⁸ contrary to all the instruction aforementioned. Of course, this is but one case, and does not form the basis of a full empirical study (such as the informative but now aging 2004 “Roots of Behaviour in War” study⁹) but it does seem to bear out, at the most basic level, the view that IHL training is vitally important but insufficient on its own to ensure compliance with the law.

We have heard during this round table from many speakers far more authoritative than I on the subject of (non-)compliance, but the post-facto inquiries into both the Baha Mousa and Blackman cases point to several factors which make such behavior more likely; such as moral disengagement and many other elements which can and continue to override even the best training – and I would argue that the training received by the UK forces prior to Afghanistan in 2011 (albeit with a due sense of patriotic and personal bias!) was amongst the best available. Training was mentioned in recommendations of both but many other factors were also present in both cases. The 2004 “Roots of Behaviour” study showed many transgressors were well aware of

⁸ Initially convicted of murder, this was later commuted to manslaughter on appeal by virtue of ‘diminished responsibility’, namely Post traumatic Stress Disorder (PTSD) at the time of the offence.

⁹ Muñoz-Rojas, Daniel and Frésard, Jean-Jacques, “The Roots of Behaviour in War: Understanding and Preventing IHL Violations”, *International Review of the Red Cross*, Vol. 86, No. 853, 2004, pp. 189–206. Sassòli, Marco, “The Implementation of International Humanitarian Law: Current and Inherent Challenges”, *Yearbook of International Humanitarian Law*, Vol. 10, 2007, pp. 45–73

their legal obligations but transgressed nonetheless. The study's conclusion regarding 2 dimensions of moral disengagement appear to be well borne out. Namely that IHL deviance occurs where 1) the justification of violations exists within the fighter's own group and 2) the enemy is dehumanized. Both of these factors were present in the 2 UK cases previously mentioned – the “6-million-dollar question” is how do you train such behavior out of people (if at all)?

It is in resolving the inherent dissonance between core military training (desensitization to violence, overcoming the reluctance to kill, loyalty to peers and commanders) with the principles of IHL (humanity, distinction, necessity and proportionality) where the holy grail of compliance can be found. I am in complete agreement with Elizabeth Stubbins Bates and of Dr. Terry that the solution is multi-disciplinary. That is to say, it is not entirely a legal issue – more law is not necessarily the answer – but the answer lies, in part, with training yes, but *effective* training based on pedagogical, psychological and sociological principles taking into account the extreme physical, social and psychological pressures faced by individuals and groups in warfare. When these disciplines are fused perhaps we can better understand and ensure as far as possible that our leaders and soldiers are mentally equipped to carry out their unenviable duty without placing themselves in moral and legal peril.

Of course, this is no easy task and further research to fuse these disciplines to perhaps produce more effective training is required. In my view, how we train is as important as what and who we train. Some studies have been carried out previously and it is beyond the remit of this paper to paraphrase them all, and many tips exist as to best practice. If I may be self-indulgent for a moment, and speaking purely as a practitioner/instructor, my own personal 'burnt offerings'¹⁰ of top tips in terms of cultural training advice would be:

- 1) Get the law right and keep it current (the UK failed to do this prior to Iraq in 2003 most notably by failing to effectively outlaw the prohibited 5 techniques banned in the UK since the early 1970s);
- 2) As David Lloyd-Roberts rightly states, trainers must be experienced in operations, credible and above all, believe in their subject;
- 3) Know your audience, think “What do they need to know” not “how much of what I know can I tell them in 45 minutes”;

¹⁰ A good synopsis is found in Stubbins, *ibid*, pp. 803-809.

- 4) Remember Benjamin Franklin (and Francoise Hampson!¹¹) when he says: “Tell me and I forget, teach me and I may remember, involve me and I learn”. Practical exercises always work better than didactic teaching at all levels (but the issue of how to simulate battlefield stress and IHL compliance realistically evades. PowerPoint/chalk boards are seldom the best vehicle to teach IHL to soldiers;
- 5) Command culture is critical. Peer group pressure on the battlefield is an extremely powerful component of compliance and deviance – “a fish rots from the head down”
- 6) Moral behaviour is a habit (see Lord Moran above), and it can be reinforced by training but more importantly the behaviour of leaders and peers in peacetime is critical, not just in conflict;
- 7) For soldiers “Keep It Simple Stupid”, (KISS) still applies. Soldiers are not stupid, but they are not (all!) rocket scientists, therefore, tailor your instruction appropriately;
- 8) Use practical examples, every time. Soldiers love a story. If you don’t have experience, “borrow it” or “steal” it from somebody else or study historical examples;
- 9) Legal training should be a golden thread through initial recruit training to General Staff courses. The combined actions of soldiers and attitudes of officers which help achieve compliance, and finally:
- 10) Empathy, empathy, empathy.

In summary, there is and always will be a role for training to ensure the fullest compliance with IHL as possible – but it in my submission training is but “one head of the hydra” that is non-compliance. A comprehensive and cross disciplinary study of non-compliance, training successes as well as failures should be properly conducted and best practice shared. The ICRC Strengthening Compliance Initiative is perhaps a decent start – but it is not without its criticisms. Such an initiative, however, can only enhance the noble aim of spreading the law of war and strengthening its central aims, and deserving of support. On a tactical level, how IHL is taught is perhaps as important as the teaching of the rules themselves (when we can agree on

¹¹ *Ibid*, pp.173-174.

them!), and humanity can only profit by states sharing the best ways of doing this.

In closing, I started with a quote by someone far more eloquent than I am, and I would like to end with one, this time by the Greek poet Archilochus:

«We don't rise to the level of our expectations, we fall to the level of our training».