

Law of war training within armed forces

Twenty years experience

by Frédéric de Mulinen

1. Introduction

The States which have accepted international treaties on the law of war are bound "to respect and to ensure respect for these treaties in all circumstances".¹

This general principle, stated in the 1949 Geneva Conventions, has to be put into practice. For that reason, the States "undertake, in time of peace as in time of war, to disseminate the text of the treaties as widely as possible and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population, in particular to the armed forces".²

Proper instruction in the law of war must take place in peace time, but must take account of the realities of armed conflict: "each Party to the conflict, acting through its commanders-in-chief, shall ensure the detailed execution of the treaties and provide for unforeseen cases, in conformity with the general principles of the law of war".³

¹ Art. I common to the four Geneva Conventions of 12 August 1949 for the protection of war victims.

² Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field of 12 August 1949 (First Convention), Art. 47.

³ *Ibid.*, Art. 45.

Nobody can disagree with the above statements and requirements. But the growing complexity of modern warfare and of the law governing it renders it more and more difficult to ensure effective training in the law of war which will ensure that it is in fact respected under war conditions.

Two types of law must be distinguished. The *Hague-type law* (essentially The Hague Conventions) deals with the conduct of hostilities and conduct of combat. It is intended for commanders and staff teams dealing with operations. The *Geneva-type law* (basically the Geneva Conventions) has been set up and steadily developed for the benefit of victims of war: wounded and shipwrecked persons, prisoners of war, civilians under enemy authority. It addresses those who are in charge of or have to care for such victims. In other terms, The Hague-type law is predominantly preventive and the Geneva-type law remedial.⁴

2. Traditional dissemination

Until about 1970, training of the military in the law of war was easier. The Hague-type law consisted of a few general principles:

- prohibition of weapons of a type to cause unnecessary suffering, of poison or poisoned weapons, of destruction exceeding the necessities of war, of attack or bombardment of undefended localities (the latter two prohibitions being the nucleus of the wide protection of civilian populations and objects developed from 1971 on);
- duty to spare and respect medical establishments, cultural objects (historic monuments and similar), buildings dedicated to religion.

The provisions of the Geneva-type law concerning combatants were not more numerous: respect for enemies surrendering or captured, care for the wounded whether friend or foe, protection (immunity) of medical personnel, transports and establishments and of religious personnel, protection for cultural objects and those in charge of their safeguard.

These few general principles were phrased in short and simple sentences using the language of the time, and were thus imme-

⁴ The distinction between these two types of law is essential for the understanding and the practical application of the modern law of war (see hereafter chapter 3).

diately understandable. Their correct application resulted from the education received before joining the armed forces, from order and discipline in the unit and, last but not least, from common sense. Special law-of-war training sessions were not necessary: command responsibility and discipline led automatically to correct action and behaviour.

The very detailed provisions of the Geneva-type law were, and still are, the concern of those with special responsibilities in the relevant fields: prisoner-of-war administration and camps, leading functions within medical (and where appropriate also religious) services, civil affairs, cultural objects.

With the growing volume of law texts it became increasingly difficult to distinguish general principles from detailed provisions, many treaties or conventions containing both categories. It was thus easier to speak of one convention after the other and to deal at once with all problems of prisoners of war, sick and shipwrecked persons, civilians or cultural objects. Often it was not the normal trainer, the superior, but an outsider who, being considered as more expert, was given this task. As a consequence, much of the so-called training in the law of war took the form of the lecturer talking about what he knew instead of adapting his speech to the real needs of his audience. For example, an infantry company was given details of prisoner-of-war camps, their administration and the life in them, whereas what the company needed to know, namely behaviour towards surrendering enemies and the treatment of such persons on the spot (different according to whether they were healthy or sick) was not mentioned. The lecturer had formally fulfilled his duty, but in reality he had sowed grain regardless of the adequacy and receptivity of ground.

Too often, such dissemination has resulted in ignorance of indispensable knowledge and in doubts about the sense and credibility of the law of war. It should be borne in mind that what matters is the need to know.

3. Problems resulting from the modern law of war

Contrary to the previous law based on European or predominantly European wars involving opposing States with comparable social structures, armed forces and combat methods, the armed conflicts which occurred after the Second World War made evident

the need for the modernization of The Hague-type law and of Geneva-type law. Updating started in 1971 and ended in 1977 with the adoption of two Protocols described as additional to the Geneva Conventions of 1949 but in fact also supplementing The Hague Conventions of 1907.

Their main purpose was to improve the protection granted to the civilian population. Some additions were made to the Geneva-type law, *e.g.*, medical service, civil defence, rules on human rights.

The most difficult field was that of The Hague-type law. The few general principles of 1907 had to be restated and/or developed in more detail. To obtain agreement by the whole international community, it was necessary to find compromises that would be accepted by the representatives and supporters of classical warfare waged by regular armed forces and by those speaking for the forces of guerrilla-type fighting, often with the weapons and methods of the poor. Some of these unavoidable compromises resulted in a lack of clarity, allowing different and even contrary interpretations, provisions affecting the conduct of military operations being worded as follows: "to do everything feasible", "to take all feasible precautions" or "to the maximum extent feasible".⁵

Such imprecise wording is not immediately understandable. Before the new provisions are promulgated to members of the armed forces, they must be in effect "translated" into precise wording which everyone understands automatically in the same way. What the international legislator could not achieve when drafting the Protocols must be done at least at national level. It is part of the responsibility of authorities at top national level "to ensure the detailed execution" of the provisions.⁶

Consequently, the situation is now that: The Hague-type law is more detailed, but needs national clarification and explanation before its use in training the armed forces. The Geneva-type law, on the other hand, has been developed but has kept its own character: a few essential general principles and many detailed provisions which are of direct interest only for precise categories of specialists. The provisions can be read paragraph after paragraph, usually without the need for additional explanation; appropriate executive measures, often of an administrative nature, are all that is required.

⁵ Protocol I additional to the Geneva Conventions of 1949, Art. 57 and 58.

⁶ First Geneva Convention, 1949, Art. 45.

4. The need for a strategic approach to the law of war

The challenge is to fill the gaps left by the international legislator. This must be the starting point of any effective law-of-war training. Clarification can and must be adjusted to the particular situation and needs of each State.

Thus, within each State, the modern law of war must be approached from a strategic standpoint. The strategic situation (geographic, demographic, economic, political and military) of the State determines its national security policy which leads to the national concepts, clarifications, explanations and instructions about the law of war and its teaching.

As a consequence, the law of war appears from the outset as a matter of general interest, already in time of peace, for the various bodies and their agents within the State.

States in comparable strategic situations (e.g., landlocked or archipelagic, in the same region and thus with similar data, within an alliance or completely independent) will have similar needs and, as a consequence, similar approaches and solutions to problems connected with the law of war.

However, even with a strategic approach, it will not always be possible to solve all problems immediately. Some gaps will remain, particularly for forces fighting under unusual conditions, such as a hostile natural environment, the possibly very different tactics and means of combat used by opposing forces, fighting in the enemy's rear or in encircled areas, long and/or difficult transportation, supply and evacuation routes. It is part of the responsibility of the commanders concerned to fill such remaining gaps by "providing for unforeseen cases, in conformity with the general principles of the law of war".⁷

Even if all States were to clarify and give more precision to the flexible provisions of The Hague-type law, there might be too many different solutions which in an armed conflict could have negative consequences: misunderstandings between opposing belligerents leading to mutual accusations of violations of the law of war, bad effect on discipline within the armed forces, etc.

There is thus an evident need for co-ordinated and as far as possible harmonized clarification before starting to teach the law of war relating to the conduct of operations and to combat.

⁷ Ditto.

5. International search for solutions

The complexity of the modern law of war, in which older and more recent treaties coexist, in which rules are found not in one but in several conventions, and the need for national clarification and the filling of gaps have led international organizations and bodies to search for workable solutions and to make them available to the various States and to their armed forces.

Several meetings were organized for the purpose. Some of them dealt principally with clarification and with the filling of gaps in the law of war, whereas others were mainly concerned with training.

In 1977 the *International Committee of the Red Cross* and the *Polish Red Cross* convened a training-oriented Red Cross Seminar in Warsaw. There a group of military experts aimed at extracting the essential from the numerous legal provisions, and drafted *The soldier's rules* as a set of twelve elementary principles to be followed by all members of the armed forces. Since it is impossible to teach everything to everybody, certain subjects were suggested as priorities for specific levels within the military organization: privates, non-commissioned officers, junior officers, senior officers up to brigadier, commanders of divisions and above, up to the level of commander-in-chief.⁸

The *International Society of Military Law and Law of War* for its part undertook comparative studies between different law-of-war treaties (e.g. the 1977 Additional Protocols, and the 1980 Convention on certain conventional weapons with annexed protocols on mines and on incendiary weapons) and on the relationship between law-of-war treaties and other laws with some relevance to warfare (e.g. the Law of the Sea Convention). Emphasis was, and still is, on the conduct of operations and on penal affairs, always with the final purpose of providing clarification and suggesting solutions.⁹

⁸ Experts' report published in *Revue internationale des Services de Santé des Armées de Terre, de Mer et de l'Air/International Review of the Army, Navy and Air Force Medical Services*, Liège (Belgium), Nos. 9-10 (1977), pp. 737 ff.

⁹ See in particular Proceedings of the Ninth International Congress of the International Society of Military Law and Law of War (Lausanne 1982) in *Revue de droit pénal militaire et de droit de la guerre/The military law and law of war review*, Brussels, Vol. XXI-1-2-3-4 (1982).

From its inception, the *International Institute of Humanitarian Law* (San Remo, Italy) decided to be active in making the law of war known and respected within the armed forces. It started in 1971 by *organizing meetings to discuss the subject*. However, the Institute soon realized that it should itself play a leading role, rather than merely telling other people what they should do. That is the origin and purpose of the *International courses on the law of armed conflicts for officers* which the Institute has organized on a regular basis since 1976 under its exclusive responsibility and with the particular support of the International Committee of the Red Cross.¹⁰

Last but not least, the *International Committee of the Red Cross* is becoming increasingly active in supporting States and their armed forces in law-of-war training. On the one hand clarification and training documents are prepared, such as the *Handbook on the law of war for armed forces*. On the other hand, direct training activities are performed at its headquarters in Geneva and in various parts of the world.

All these activities have led to a modern concept for presenting the law of war to the armed forces.

6. Military presentation of the law of war

The purpose of the military presentation of the law of war is to have a common concept for teaching the law of war and for practical manuals on the subject to be used for guidance in action.

Stress is laid on The Hague-type law and its relevance at strategic level for the conduct of operations and for action in combat. The spirit of the presentation is that of a code of conduct. Consequently those respecting order and discipline and behaving according to the military presentation will always be in conformity with the law of war.

The military presentation is divided into ten parts. After reference to basic notions, it begins at the strategic level with the control or management of armed conflict.

It then follows the normal command structure and decision-making process from the strategic level down to the battle area

¹⁰ Complete course files published in *Revue de droit pénal militaire et de droit de la guerre/The military law and law of war review*, Brussels: 1st course (French) in Vol. XVI-1 (1977) and 5th course (English) in Vol. XVIII-3 (1979).

where the last tactical decisions are taken on the spot. It goes on to deal with the predominantly protective measures (Geneva-type law) from the battle area to the remotest rear areas where all the problems of the law of war are to be solved.

The presentation ends with the two specific situations of occupation and neutrality.

Thus, the ten parts of the military presentation of the law of war are the following:

1. Terms of reference:

Essential notions for understanding the law of war

2. Control of armed conflict:

Predominantly strategic approach for the prevention and control of conflict

3. Command responsibility:

General responsibility with emphasis of law-of-war training and organization

4. Exercise of command:

Incorporation of the law of war into the normal decision-making process

5. Conduct of operations:

Essentially the conduct of attack and the conduct of defence

6. Behaviour in action:

Tactical action on the spot and first measures in favour of victims

7. Transportation:

All movements between fighting areas and rear areas, with emphasis on evacuation

8. Rear areas:

Logistic bases, treatment of victims in the rear, civil affairs, penal affairs

9. Occupation:

Responsibilities and rights of occupants and occupied, control, combat actions

10. *Neutrality:*

Responsibilities and rights of belligerent and neutral States, control, combat actions

7. International courses on the law of armed conflicts

By organizing the *International courses on the law of armed conflicts for officers*, held in San Remo, the *International Institute of Humanitarian Law* intends to help governments to come to terms with their obligation of ensuring respect for the law of armed conflicts or the law of war within their armed forces.

The courses are therefore conceived as military courses. The general aim of the courses is to enable and encourage participants to act within their sphere of responsibility in accordance with the principles and rules of the law of war. The courses are meant especially for persons holding or about to hold a position in their national military organization in which they can ensure training resulting in effective respect for the law of war.

From 1976 to 1986, twenty courses were organized, usually two a year. From 1987, three courses per year are planned: one in French and Spanish in May and two in English in October.¹¹

The courses initially lasted a week. Increasing interest caused them to be extended gradually to ten full days (two five-day weeks). The basic aim and concept remained unchanged, but the course structure evolved with the practical experience gained during the years. For some time, one whole day was devoted to sea warfare and another to air warfare, and although this allowed a study in depth of these two subjects it made a false separation of land, sea and air warfare. The need for continuous joint presentation of land, sea and air aspects therefore prevailed.

The concept and structure of the ten-day courses follow the military presentation of the law of war, which itself resulted from practical experience gained in the courses.

The work is carried out as far as appropriate on a realistic military basis (organization, command structure, tactics) with fic-

¹¹ Ditto.

tional geographical data. There are few lectures and general presentations, most of the time being devoted to activity in small teams, whenever feasible in staff-type work.

While the courses organized by the International Institute of Humanitarian Law are *general or basic courses* for generalists and persons needing general knowledge, there could and should also be *special courses* set up for specialists. A special course was initiated in 1979 by the *International Committee of Military Medicine and Pharmacy* which organizes *Courses on the law of armed conflicts for senior officers of the armed forces medical services*. These courses take place every year in November, at the Henry Dunant Institute in Geneva, and are given alternately in English and French. They last for ten days and follow the military presentation of the law of war, with emphasis and practical work adapted to the specific aspects of the medical service.¹²

There could be other special courses suitable, e.g., for commanders of particular levels and/or arms, for members of specific staff sections: personnel, intelligence, operations, logistics, civil affairs, etc.

8. Handbook on the law of war for armed forces

The *Handbook on the law of war for armed forces* prepared at the *International Committee of the Red Cross* aims to make the military presentation of the law of war generally available. As the Handbook is conceived like the usual military manuals, the military reader should immediately find what is relevant to him according to his position in the command chain and to the situation given.

As each of the ten parts of the Handbook has to be complete, overlapping is unavoidable and necessary. But the approach always corresponds to the main subject considered, and the subjects which overlap are seen each time from a different angle.

The Handbook is meant primarily for higher commands with a staff at their disposal. It refers to the provisions of treaty law and

¹² Report on 4th course published in *Revue internationale des Services de Santé des Armées de Terre, de Mer et de l'Air/International Review of the Army, Navy and Air Force Medical Services*, Liège (Belgium), No. 4 (1985), pp. 245 ff.

indicates where the full details can be found whenever necessary. The Handbook is completed by a *Summary for commanders* (without any references to law) and *Rules for behaviour in action* (to be used as a guideline for training within the company).¹³

9. The law-of-war instructor

Whatever the teaching concepts, systems and methods, it is the instructor who holds the key for effective law-of-war training.

No trainer or instructor can be too highly qualified. As a rule, the instructor should always have had, as a minimum, the level and amount of training and practical experience of his trainees. The immediate superior is thus the ideal and normal instructor.

The person who has to lead men in action is also the one who knows best what they have to be taught and how they must be trained. Thus, every commander must be acquainted with those parts of the law of war that are relevant for him and for those under his command.

For persons outside the chain of command who must provide training, the qualification criteria are similar: officers with comparable command practice will train commanders, experienced general staff officers will instruct general staff officers and students in staff colleges, specialists will train specialists of their branch.

To teach privates, non-commissioned officers, platoon leaders and similar ranks, no specific legal background is needed. The principles of order and discipline, common sense and economy of means all lead to the appropriate method of teaching to reach correct decision-making, action and behaviour.

The training of company commanders, senior officers, staff members and other specialists requires adequate knowledge of the law of war. The superior should have been trained in the law of war before acting as an instructor.

To solve specific law-related problems, the superior may ask for legal advice. He may also ask for a legal adviser to take part in the theoretical training and even in normal staff work (e.g., to review orders and instructions or with regard to the immunity of cultural objects).

¹³ The Handbook will be available in English in summer 1987, in French and in Spanish in winter 1987-88.

10. Conclusions

Much can and should be done at international level to clarify the law of war and to fill existing gaps, to suggest methods and means for teaching the law of war, and to instruct persons holding national responsibilities concerned with the law of war and training within the armed forces.

Decisive action that results in effective respect for the law of war can, however, be taken, and must be taken, only by each State and its armed forces.

There must be one aim at all levels, in all arms and branches of the armed forces: always to link the requirements of the law of war with the military reality and to integrate all problems and aspects of the law of war into normal military activity. It is a question of order and discipline.

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