

OPINION NOTE

Contemplating the true nature of the notion of “responsibility” in responsible command

Geoffrey S. Corn

Lieutenant Colonel (Ret.) Geoffrey Corn is Presidential Research Professor of Law at South Texas College of Law and previously served in the US Army Judge Advocate General’s Corps. Prior to joining the faculty at South Texas, Professor Corn served in a variety of military assignments, including as the Army’s senior law of war adviser, supervisory defence counsel for the Western United States, Chief of International Law for US Army Europe, and as a tactical intelligence officer in Panama.

Abstract

Operating under responsible command is an essential requirement to qualify as a lawful combatant, and is also central to the doctrine of command responsibility. This reveals the inextricable link between the role of the commander and the effective implementation of the international humanitarian law (IHL). Understanding this linkage is vital to ensuring that commanders and other military leaders fulfil their obligation to prepare subordinates to navigate the chaos of mortal combat within the legal and by implication moral framework that IHL provides. Few commanders would question the proposition that responsible commanders prepare their military units to effectively perform their combat missions. However, operational effectiveness is only one aspect of developing a “responsible” command. Because this term is grounded in the expectation of IHL compliance, a truly responsible command exists only when the unit is prepared to execute its operational mission in a manner that fully complies

with IHL obligations. This broader conception of a disciplined and effective military unit reflects the true nature of the concept of responsible command, as only military units built on this conception of discipline advance the complementary objectives of military effectiveness and humanitarian respect. Accordingly, the requirement that lawful combatants operate under responsible command is an admonition to all military leaders that truly effective military units are those capable of executing their missions with maximum operational effect within the framework of humanitarian constraint that defines the limits of justifiable violence during armed conflict.

Keywords: responsible command, compliance with IHL, combatant, human dignity, armed forces, accountability, military discipline.

.....

United States Army Operating Concept

The nature of the military profession is such that it requires Soldiers to discharge their professional duties in a moral and ethical manner. Army leaders in particular are obligated to the American people to maintain professional competence and personal character. As members of the profession of arms, leaders must exhibit the qualities which mark service in the military as a truly professional endeavor. These qualities include a code of professional conduct, a high degree of competence based on established and well regulated examinations of skill, education, and performance, and self-regulation to purge those members who fail to meet standards or demonstrate required professional knowledge. Like other professions such as medicine and law, the military also requires institutional training to develop a broad range of skills and a commitment to continuous education.¹

The term “responsible command” is central to the treaty definition of “privileged belligerent” in the 1899 and 1907 Regulations Annexed to each respective Hague Convention,² and the related treaty definition of “prisoner of war” included in both the 1929 and 1949 prisoner-of-war conventions—definitions that are generally recognized as linking qualification as a prisoner of war with lawful combatant status.³ This linkage was made explicit in 1977, when Additional

- 1 See US Department of the Army, *The United States Army Operating Concept, 2016–2018*, TRADOC Pamphlet 525-3-1, 19 August 2010, p. 36, available at: <https://fas.org/irp/doddir/army/opcon.pdf> (all internet references were accessed in December 2014).
- 2 See Hague Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, 29 July 1899 (entered into force 4 September 1900), Art. 43. See also Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907 (entered into force 26 January 1910) (Hague Convention IV), Art. 43.
- 3 See Geneva Convention Relative to the Treatment of Prisoners of War, 27 July 1929, 118 LNTS 343 (entered into force 19 June 1931), Art. 1. See also Geneva Convention (III) Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), Art. 4 (defining the term “prisoner of war” and outlining categories into which prisoners of war fall, under this provision).

Protocol I (AP I) provided an explicit definition of combatant,⁴ a status reserved for those individuals entitled by law to participate in hostilities. Consistent with the prior treaties on which this definition was based, it also made operating under responsible command a precondition for entitlement to the status of lawful combatant. Thus, lawful combatant status requires a “responsible” command/subordinate relationship. Responsible command is also the foundation for the doctrine of command responsibility, a theory of criminal liability central to ensuring military commanders (and by extension civilian leaders responsible for military decision-making) fulfil their “responsibilities” in a manner that mitigates the risk of subordinates violating international humanitarian law (IHL).⁵

But what exactly renders command “responsible”? Considering the centrality of this concept to both the legal authority to engage in mortal combat, and the accountability of those entrusted with leading the business of armed violence, the treatment of this question in scholarship and literature on IHL⁶ is surprisingly sparse. What makes this even more perplexing is the importance of effective and responsible command as a genuine “force multiplier” for military units.⁷ It is probably not an overstatement to assert that the quality of command is the *sine qua non* of successful military units. Commanders shape the character of the collective force that is the military unit, and influence every aspect of the unit’s operational competence. It is therefore no surprise that the study of leadership is a central component of the professional education and training of officers and non-commissioned officers, and that the concept of mission command is considered a core war-fighting function.⁸

- 4 See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (AP I), Art. 43. (“Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.”)
- 5 For an excellent summary of the history of this doctrine and recent developments, see Michael L. Smidt, “*Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*”, *Military Law Review*, Vol. 164, 2000; see also Yuval Shany and Keren R. Michaeli, “The Case Against Ariel Sharon: Revisiting the Doctrine of Command Responsibility”, *New York University Journal of International Law and Politics*, Vol. 34, No. 4, 2002; Victor Hansen, “What’s Good for the Goose Is Good for the Gander – Lessons from Abu Ghraib: Time for the United States to Adopt a Standard of Command Responsibility Towards its Own”, *Gonzaga Law Review*, Vol. 42, No. 3, 2007.
- 6 “International humanitarian law”, also known as the “law of armed conflict”, refers to the body of international treaty and customary law regulating the methods and means of warfare and establishing protections for the victims of war.
- 7 See Joint Chiefs of Staff, *Joint Operations: Joint Publication 3-0*, 11 August 2011, A-2, available at: www.dtic.mil/doctrine/new_pubs/jp3_0.pdf (defining the term “unity of command” with a single responsible commander as a primary element).
- 8 US Department of the Army, *Army Leadership, ADP 6-22*, 1 August 2012, p. 1, para. 2, available at: http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/adp6_22_new.pdf. (“An Army leader is anyone who by virtue of assumed role or assigned responsibility inspires and influences people to accomplish organizational goals. Army leaders motivate people both inside and outside the chain of command to pursue actions, focus thinking, and shape decisions for the greater good of the organization.”)

Leadership and battle command

Within a military organization there are many individuals who exercise leadership responsibility, ranging from low-level unit leaders such as infantry squad and team leaders to staff officers responsible for supervising the function of subordinates assigned to them. Unit command, however, involves a subtly different form of leadership, for a simple reason: it is the commander who is ultimately responsible for the effectiveness of the unit in executing whatever mission it may be assigned. While other leaders throughout the command play an important role in this process, their contributions will always be subordinate to the direction and priorities established by the commander. Ultimately, it is the commander who is responsible for providing the unit with the purpose, motivation and direction necessary to produce maximum operational and tactical effect.⁹

The IHL notion of responsible command is not synonymous with the manifold responsibilities inherent in the function of command. It is, however, inextricably linked to these responsibilities. This is because IHL is unquestionably and intuitively premised on the expectation that the proper exercise of command responsibility is essential to enhancing the probability of IHL compliance in the most physically and morally challenging martial situations.¹⁰ Thus, “responsible command” in the IHL sense does not connote a distinct command function, such as the responsibility to train soldiers, or provide clear and effective orders, or ensure equipment is properly maintained, or manage the expenditure of finite unit resources. Instead, the IHL notion of “responsible command” inherently connotes an expectation that *all* command responsibilities will be conceived and executed in a manner that advances the core objectives of IHL. Preparing a military unit to execute its combat function within the bounds of IHL is therefore an inherent expectation of responsible command, and as such, IHL permeates the entire concept of command and every function performed in the execution of command responsibilities.

Leader and subordinate expectations

Framing the meaning of command responsibility within the architecture of IHL – the law that it is intended to advance – illuminates the rationale of linking lawful combatant status with the requirement that the individual belligerent operatives

⁹ See *ibid.*, p. 2, para. 8.

¹⁰ See AP I, above note 4, Art. 87; Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of June 8 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, para. 1017.

function under responsible command.¹¹ This status qualification within the meaning of IHL requires much more than simply the capacity to engage in armed violence, or even the competence to do so in a tactically effective manner. IHL imposes a higher bar, reflected in the criteria incorporated into the prisoner-of-war definition found in the 1929 and 1949 Geneva prisoner-of-war conventions and the combatant definition found in AP I. Collectively, these “four qualification criteria” indicate an inherent expectation that lawful combatant status carries with it a level of confidence that:

1. the individual execution of tactical violence is subordinated to the will of the military organization – an inherent consequence of being a member of or incorporated into the armed forces of a party to the conflict;
2. the individual fighter is effectively incorporated into the military organization in a manner that clearly signals to the individual that he or she is an agent of a higher authority and not an autonomous actor – an inherent consequence of the requirement that members of militia or volunteer corps “belong” to a party to the conflict;¹²
3. most importantly, the higher authority exercises the function of command to ensure that subordinate conduct is consistent with core IHL principles – an inherent consequence of the requirement that lawful combatants operate under responsible command.

Fielding a force that only meets some but not all of these expectations is inconsistent with the IHL notion of responsible command. The essence of command unquestionably necessitates the development of subordinates whose obedience to orders, personal courage and tactical proficiency enables the commander to utilize the military unit to achieve defined outcomes. However, while it might produce a military unit that is *effective* in its ability to execute the orders of the commander, this is not sufficient to ensure that the unit will execute its mission in a manner that advances the overall objectives of the State or non-State group that it serves. In other words, being tactically effective is not, in and of itself, sufficient to ensure contribution to the strategic end-state driving the use of combat power.

The link between discipline and operational effectiveness

Discipline is essential to create a tactically effective military unit; that is, a unit capable of efficiently executing its combat mission. But to transform a tactically effective military

11 See Hague Convention IV, above note 2, Arts. 1, 43. Article 1 indicates that a lawful belligerent is “[t]o be commanded by a person responsible for his subordinates”. Article 43 further indicates that to achieve compliance with the law of armed conflict, individuals must be subject to military command: “The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.”

12 See Rachel VanLandingham, “Meaningful Membership: Making War a Bit More Criminal”, *Cardozo Law Review*, Vol. 35, No. 1, 2013.

unit into a unit that is considered “responsible” – at least within the implicit meaning of this term as it relates to lawful combatant qualification – involves more than instilling the discipline to obey orders. Instead, meaningful military discipline must produce a dual outcome. First, subordinates must be imbued with an unhesitating willingness to subject themselves to mortal danger in order to execute superior orders; second, they must also be fully committed to respecting the IHL-based legal limitations on their power. Only when a unit manifests this notion of discipline will orders be executed in a manner that advances the core objective of IHL: to bring the opponent into prompt submission in a manner that mitigates to the extent practicable the humanitarian suffering associated with hostilities.¹³

Responsible command is the *sine qua non* in the development of *this* type of discipline; the type of discipline that genuinely defines a professional military force. The term “responsible command” indicates an exercise of command authority that produces this broader notion of a disciplined and effective fighting force. Thus, an *effective* military unit is by implication a *responsible* military unit: a unit competent in tactically executing combat operations *in a manner* that manifests respect for and compliance with IHL.¹⁴

If unquestioning obedience to orders was the exclusive characteristic of a disciplined and tactically effective military unit, then the Japanese forces that captured Nanking¹⁵ or the German units that murdered thousands of enemy prisoners of war or engaged in collective punishment of civilians¹⁶ could be considered model military units. But this is not the case; instead, such units and the atrocities they committed provide iconic examples of the link between IHL compliance and strategic advantage, and the blunder of allowing subordinates to ignore IHL during the execution of military operations. Indeed, this inherent link between the notion of a responsible military unit—one committed to ensuring respect for IHL in the course of mission execution – and the overall effectiveness of a military unit reveals why these and other military units, all highly effective in a strictly tactical sense, so frequently produced long-term strategic failure.¹⁷ These units obeyed orders, assumed mortal risk and leveraged their combat power to efficiently defeat their enemies. However, by doing so in a manner that consistently violated core humanitarian constraints applicable during armed conflict, they compromised the value of their tactical and operational successes, rendering strategic victory far less likely. The blatant abuses by these forces of the then-existing restraints imposed by the laws and customs of war produced profound negative strategic and moral consequences, including the corrosion of their moral integrity. Such negative effects are not unique to the foregoing examples. Even within an armed

13 Marco Sassòli, Antoine A. Bouvier and Anne Quintin, *How Does Law Protect in War?*, 3rd ed., Vol. 1, ICRC, Geneva, 2011, p. 1.

14 US Department of the Army, above note 1, para. 20.

15 “Scarred by History: The Rape of Nanjing”, *BBC News*, 11 April 2005, available at: <http://news.bbc.co.uk/2/hi/asia-pacific/223038.stm> (all internet references were accessed in July 2014).

16 Michael Reynolds, “Massacre at Malmédy During the Battle of the Bulge”, *World War II*, 12 June 2006, available at: www.historynet.com/massacre-at-malmedy-during-the-battle-of-the-bulge.htm.

17 For another example, see “My Lai Massacre”, available at: www.history.com/topics/vietnam-war/my-lai-massacre.

force whose overall commitment to IHL compliance is the norm, isolated incidents of deviation from this commitment poses immense strategic risks. Incidents such as the My Lai massacre and Abu Ghraib are powerful examples of this reality.¹⁸

The responsibility of command, therefore, should be understood as a responsibility to develop military units that are able to impose their will on opponents at the tactical level in a manner that contributes to strategic success. As such, a truly *effective* military unit is one that executes combat operations consistently with IHL regulatory norms, and truly *responsible* command creates a sense of discipline that produces this effect.

Why and how responsible commanders ensure compliance with IHL

This conception of “command responsibility” – that a commander is responsible for preparing forces to engage in hostilities in accordance with IHL – may seem self-evident. However, what is not self-evident is exactly why this is so, or how individual commanders may best execute this responsibility. On the first point, it might be legitimate to question the assumption that a military unit cannot be truly effective if widespread IHL non-compliance is a common aspect of mission execution. Although it is not without exception, in general history validates this premise and demonstrates that IHL compliance almost inevitably produces strategic benefit, while widespread (and even isolated) non-compliance produces strategic disadvantage. Indeed, were this not the case, it is unlikely that so many States would agree to bind themselves (and by implication their military personnel) to the constraints inherent in IHL treaty obligations.

There is, of course, a purely humanitarian explanation for demanding that subordinates comply with IHL and for why such a demand is central to the notion of responsible command: it mitigates the human suffering produced by armed conflict. Many will likely consider this the ultimate justification for linking responsible command to IHL compliance. Indeed, the term “international humanitarian law” is a clear reflection of the belief that the central and principle purpose of this body of international law is to protect war victims, most notably civilians.¹⁹ Others argue that humanitarian protection is not the primary purpose of the law, but is instead one component of a body of law that is intended to both *justify* and *regulate* armed violence; hence the assertion that the “law of armed conflict” is a more accurate characterization of this branch of international law than IHL.²⁰ Regardless of where one stands on this debate, there can be no dispute that a link between responsible

18 See Robert Rielly, “The Inclination for War Crimes”, *Military Review*, May–June 2009, available at: http://usacac.army.mil/CAC2/MilitaryReview/Archives/English/MilitaryReview_20090630_art006.pdf; see also Anthony R. Jones, *Army Regulation 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade*, 2004, available at: <http://library.uoregon.edu/ec/e-asia/reada/abugrab.pdf>.

19 See M. Sassöli, A. Bouvier and A. Quintin, above note 13, p. 139.

20 See Michael N. Schmitt, “Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance”, *Virginia Journal of International Law*, Vol. 50, No. 4, 2010.

command and subordinate commitment to IHL serves broader purposes than mitigating the suffering of civilians and other victims of war. The strategic benefit of limiting the brutality of armed conflict, as noted above, is clearly one of these purposes. Such commitment also contributes to the more subtle benefit of protecting the moral integrity of subordinates. This is because IHL provides them with a moral framework that allows them to reconcile their individual participation in the brutal endeavour that is “war” with the innate sense of morality that we hope all individuals will retain as they transition from civilian to soldier and back again.²¹

Protecting subordinates from the morally corrosive effects of combat is probably not commonly considered a benefit of IHL compliance or associated with the execution of command responsibility.²² And yet, inherent in the responsibility of any military commander is the obligation to protect subordinate forces from the risks associated with combat operations, consistent with the dictates of the mission. Indeed, one of the first leadership principles taught to US Army personnel is the prioritization of effort: “mission, men, equipment”.²³ This prioritization includes an inherent obligation to prepare subordinates for the physical, mental and, as addressed in greater detail below, *moral* challenges inherent in combat. In other words, while mission accomplishment is always the first priority of a military leader, the second is protecting the members of the unit.

Executing this aspect of command responsibility is frequently characterized with concepts such as “force protection”.²⁴ But this characterization is somewhat misleading, for it suggests that the exclusive focus of this responsibility is protecting the force from external physical dangers. Such protection is, of course, a vital aspect of effective leadership and effective military command, but not an exclusive one. Commanders bear an equally important obligation to provide subordinates with the tools needed to navigate the moral hazards of military duty, most notably the challenges associated with engaging in lethal violence.²⁵

21 See Telford Taylor, *Nuremberg and Vietnam: An American Tragedy*, Quadrangle, Chicago, IL, 1970, pp. 40–41; James R. McDonough, *Platoon Leader: A Memoir of Command in Combat*, Random House, New York, 1985.

22 See generally Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society*, Back Bay Books, New York, 2009.

23 This is a common catchphrase among US military leaders, used to emphasize the priority of leadership responsibility at all levels of command: first accomplish the mission, then take care of your personnel, then take care of your equipment.

24 See Joint Chiefs of Staff, above note 7, III-30–III-31. “**Force protection** includes preventive measures taken to prevent or mitigate hostile actions **against DOD** personnel (to include family members), resources, facilities, and critical information. These actions preserve the force’s fighting potential so it can be applied at the decisive time and place and incorporate integrated and synchronized offensive and defensive measures that enable the effective employment of the joint force while degrading opportunities for the adversary. Force protection does not include actions to defeat the enemy or protect against accidents, weather, or disease. Force health protection (FHP) complements force protection efforts by promoting, improving, preserving, or restoring the mental or physical well being of Service members. Force protection is achieved through the tailored selection and application of multilayered active and passive measures commensurate with the level of risk. Intelligence sources provide information regarding an adversary’s capabilities against personnel and resources, as well as information regarding force protection considerations. Foreign and domestic law enforcement agencies can contribute to force protection through the prevention, detection, response, and investigation of crime, and by sharing information on criminal and terrorist organizations” (emphasis in original).

25 See generally D. Grossman, above note 22.

Moral consequences of a *duty* to kill

In this regard, it is probably unlikely that there are many military veterans who have genuinely contemplated the fundamental consequence of the military superior/subordinate relationship. It is relatively self-evident that this relationship results in an obligation that the subordinate obey the orders of the superior. What is not self-evident is the immense moral consequence this obligation encompasses. For the subordinate, this is ultimately manifested in a *duty* to take the life of another human being on demand.²⁶ This is a profound departure from the peacetime expectations of homicidal justification. In that context, the notion that some extreme situations justify the use of homicidal violence to protect oneself against an imminent threat to life is universally understood. However, it is the imminence of the actual and unlawful threat of extreme violence that permits an individual to engage in homicidal self-help. Such uses of force are exceptional in nature and restricted to those rare instances where an individual confronts a threat of imminent death or grievous bodily harm, triggering a necessity-based right of self-defence.²⁷ Thus, the individual acts pursuant to what is arguably a natural human instinct of self-preservation.

Justifiable homicidal action in obedience to military orders may at times also fall into this category, but is much broader in scope. The very nature of armed conflict involves two significant departures from this peacetime justification model. First, homicidal action in lawful combat is justified based on *status* determinations.²⁸ This means that deadly force is routinely ordered absent indicia of an actual imminent threat of death or grievous bodily harm.²⁹ This is because each combatant is presumed to be contributing presently or in the future to the collective effectiveness of the enemy force, the neutralization of which is a legitimate State aim. This presumption alone justifies the use of deadly force, which is therefore lawful as the result of the status of the object of attack.³⁰ In the simplest of terms, a commander points at another human being, who at that moment is not engaged in any aggressive conduct, and orders a subordinate to attack. Obedience to orders requires the subordinate to align his sights and pull the trigger of a weapon designed to create a high probability of death, and in many cases take the life of the status-based target. This also reveals the second significant departure from peacetime justification for engaging in homicidal self-help: the absence of any requirement to employ less-than-lethal means to

26 See T. Taylor, above note 21, pp. 40–41.

27 Wayne R. LaFave and Austin W. Scott, Jr., *Substantive Criminal Law*, West Publishing, St Paul, MN, 1986, p. 649.

28 See Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, 2nd ed., Cambridge University Press, Cambridge, 2010.

29 See William A. Schabas, “Parallel Applicability of International Humanitarian Law and International Human Rights Law: Lex Specialis? Belt and Suspenders? The Parallel Operations of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum”, *Israel Law Review*, Vol. 40, No. 2, 2007, p. 604.

30 See Y. Dinstein, above note 28.

incapacitate the object of attack.³¹ Hence, the subordinate need not, and indeed in many situations must not, exhaust lesser means to disable the status-based target.

This superior/subordinate influence on the employment of homicidal force is a constant feature of armed conflict: commanders issue orders to employ deadly combat power, and subordinates execute those orders. Both sides of this equation must, therefore, carry the mental and emotional weight of such action through the remainder of their lives. Even for the most hardened combatant, this weight should not be underestimated.³² The vast majority of men and women who volunteer or are conscripted into wartime service come to their task with a solid moral foundation and aver the act of killing. So much has been established by empirical studies of the attitudes of front-line combatants in numerous conflicts.³³ Indeed, the challenge of overcoming this natural aversion to killing on demand significantly influences the nature of military training, which consistently seeks to prepare the individual to overcome this aversion by substituting a dehumanized conception of enemy for that of a fellow human being. While this is perhaps an unfortunate necessity of preparing men and women for the demands of combat, it is also a powerful confirmation that most soldiers are not “natural born killers”.

Preserving subordinates’ human dignity in the chaos of mortal combat

Providing military personnel with a decisional framework that enables them to reconcile their innate sense of morality and humanity with the demands of employing lethal force on demand is therefore an essential responsibility of effective command. Leaders who understand this responsibility produce subordinates who are able to retain the recognition that there is a difference between moral and immoral killing, even in warfare. In other words, they will understand that war does not justify all violence, which is the central concept inherent to the principle of military necessity. This, in turn, produces two vital benefits. First, the commander’s unit is much more likely to respect IHL in the most demanding situations, because the distinction between justifiable and unjustifiable violence will have been embedded in the unit culture and the warrior ethos that the commander cultivates. Second, inculcating subordinates with an understanding of the nature and significance of IHL-based constraints on

31 See Leslie Green, *The Contemporary Law of Armed Conflict*, 2nd. ed., Melland Schill Studies in International Law, 2000, pp. 122–125.

32 See David Wood, “Moral Injury: A Warrior’s Moral Dilemma”, *Huffington Post*, 2014, available at: <http://projects.huffingtonpost.com/moral-injury> (covering a three-part series that investigates and analyzes the ethical uncertainties of war and the lasting effects of moral wounds).

33 See John Whiteclay Chambers II, “S.L.A. Marshall’s *Men Against Fire*: New Evidence Regarding Fire Ratios”, *Parameters*, 2003, available at: <http://strategicstudiesinstitute.army.mil/pubs/parameters/articles/03autumn/chambers.pdf>.

their permissible conduct renders them more capable of navigating the moral challenges associated with the execution of their violent duties.

Reinforcing the line between “right and wrong” in combat is no easy task, and will often require commanders to train subordinates to reject the temptation to adopt a “whatever it takes” mentality. Subordinates—and perhaps most importantly, the junior leaders who direct tactical operations—who realize that respect for the constraints inherent in the law contributes to broader mission accomplishment, even if it might increase tactical-level risk, are more likely to reject such temptation. Instead, they will demand that the combat power entrusted to them is utilized within the framework of the law, thereby advancing both military and humanitarian interests. And by preparing troops for this challenge, leaders increase the probability that the line between moral and immoral violence will be preserved as they transition back into civilian society. This is for the simple reason that *justification* will remain the central moral and practical consideration associated with the use of force, ideally enabling the individual to appreciate that different contexts justify different levels of violence.

Both legal and military operational experts have highlighted these benefits of responsible command and commitment to IHL compliance. Two of the most compelling articulations are found in Telford Taylor’s *Nuremberg and Vietnam: An American Tragedy* and James McDonough’s *Platoon Leader*. McDonough offered his perspective after serving as an infantry platoon leader in Vietnam, in a memoir that is considered essential reading for junior military leaders in the US Army. Explaining his role as a combat leader, he wrote:

I had to do more than keep them alive. I had to preserve their human dignity. I was making them kill, forcing them to commit the most uncivilized of acts, but at the same time I had to keep them civilized. That was my duty as their leader ... War gives the appearance of condoning almost everything, but men must live with their actions for a long time afterward. A leader has to help them understand that there are lines they must not cross. He is their link to normalcy, to order, to humanity. If the leader loses his own sense of propriety or shrinks from his duty, anything will be allowed.

... War is, at its very core, the absence of order; and the absence of order leads very easily to the absence of morality, unless the leader can preserve each of them in its place.³⁴

McDonough’s perspective seems to be generally overlooked in contemporary IHL scholarly discourse, which focuses primarily on the law’s role in protecting civilians and other non-combatants—an important albeit non-exclusive objective. Little attention has been paid, however, to the role of the law in protecting the moral integrity of the soldier; or, as McDonough notes, in aiding the soldier to remain civilized in the context of the most uncivil of human endeavours. This is unfortunate, for it risks diluting a vital function of IHL, and in turn contributes

34 J. R. McDonough, above note 21, p. 77.

to an under-inclusive understanding of “responsible command”. As McDonough notes, commanders bear a responsibility for protecting subordinates from the moral corrosion inherent in the use of lethal force. IHL gives the commander a vital tool to accomplish this task, as it provides the framework to facilitate the distinction between legal and illegal violence, which will routinely translate to the distinction between moral and immoral individual conduct. Certainly, some may challenge the notion that participating in armed conflict can ever be characterized as a moral endeavour. However, it is undeniable that IHL reflects international consensus on the appropriate and legitimate balance between the necessities of war and humanitarian interest. As such, the law is used by commanders to indicate the line between moral and immoral conduct for those required to participate in armed conflict.³⁵

Telford Taylor, the chief US prosecutor at the Nuremberg Tribunal, also recognized this critical morality-reinforcing function of the law. In his book he discussed the many benefits that flow from IHL compliance, including the following observation:

Another and, to my mind, even more important basis of the laws of war is that they are necessary to diminish the corrosive effect of mortal combat on the participants. War does not confer a license to kill for personal reasons—to gratify perverse impulses, or to put out of the way anyone who appears obnoxious, or to whose welfare the soldier is indifferent. War is not a license at all, but an obligation to kill for reasons of state; it does not countenance the infliction of suffering for its own sake or for revenge.³⁶

These two insights—coming from both the tactical and legal ends of the military intellectual and experiential spectrum—provide a compelling explanation for the inherent command obligation to ensure that subordinates conduct operations in accordance with IHL.

Perhaps more importantly, these insights illustrate why IHL plays such a vital role in protecting the moral integrity of combatants. IHL provides a legal framework for the permissible use of violence—a framework that reflects the inherent international consensus on the moral limits of military action. By imposing limits on justifiable violence in war, and therefore by implication placing many acts of violence beyond the scope of lawful and moral conduct, the law establishes a profoundly important link between an individual’s violent combat actions and the interests of the State for which those actions are taken: violence and the attendant harm it produces are limited to what is necessary to

35 This equation of law with morality is controversial, of course, because as the long-standing natural law versus positivism debates reflect, simply because something is legal does not mean it is moral. Yet in the context of modern warfare, IHL is used by commanders as a substitute for personal morality in order to buffer their subordinates from the moral corrosiveness of killing. The question of whether this represents a “brainwashing” of individuals to do their government’s bidding, or a reinforcement of their individual moral codes that is necessary to translate individual self-defence concepts to an armed conflict setting, is inextricably linked to the morality of war itself.

36 T. Taylor, above note 21, pp. 40–41.

accomplish the collective objectives defined by the State, as implemented through the orders of *responsible* military commanders.

Accordingly, IHL provides the combatant with a rational framework to subjectively justify the infliction of human suffering. When understood as a duty, and not a right, it becomes easier to understand that this suffering is the consequence of the subordinate implementing the will of the command, and by implication the State. In short, moral beings are able to appreciate the link between their duties as subordinate members of a military unit and the necessity – perhaps an unfortunate necessity – of their violent actions. Of course, scepticism related to the moral foundation of the objectives that the State seeks to achieve may compromise individual confidence in the moral legitimacy of a commander’s orders. However, even when soldiers question the legitimacy of their State’s strategic objectives, both the risk to their moral integrity and the humanitarian consequences of their actions will almost certainly be mitigated when their military commanders demand respect for IHL when executing missions to achieve these objectives. Thus, even when executing an operation of dubious legitimacy at the *jus ad bellum* level, IHL provides moral “top cover” for the soldier, allowing her to reconcile her individual conduct with the accepted moral and legal standards applicable to the execution of military operations.

Preserving the distinction between collective and individual necessity

When commanders encourage or even permit subordinates to transform the justification for inflicting suffering from serving the interests of the State to satisfying the individual impulse for revenge, for retribution or, as Taylor suggests, “to put out of the way anyone who appears obnoxious”,³⁷ this link to rationality dissipates. This is when the danger of humanitarian suffering and moral corrosion becomes most profound, because such conduct renders the infliction of suffering as a necessary act for achieving a State’s legitimate purpose (military necessity) indistinguishable from the infliction of suffering driven by personal motives. At that point there is little to distinguish the soldier from the murderer, a distinction that must be preserved in the interests of both the victims of violence and those asked to inflict harm.³⁸

A commander, therefore, cannot be legitimately characterized as “responsible” unless these distinctions are established and reinforced through the exercise of command authority. Doing so mitigates the risk that the violence inherent in armed conflict will exceed that which is linked to the achievement of

37 *See Id.*

38 States do, of course, receive the ultimate benefit from characterizing their soldiers as morally and legally correct; it is the States’ ends that are being served by this IHL paradigm. Regardless of the important collateral effects of minimizing civilian and combatant suffering, IHL is a tool of states to ensure they can continue to effectively wage war in pursuit of state interests, regardless the legitimacy of those interests.

State purposes. This, in turn, reduces the suffering resulting from armed conflict, suffering which impacts both victims of war and the warriors themselves. Accordingly, this commitment to IHL compliance, and only this, justifies the permission granted by international law for individuals to employ lethal force in the context of armed conflict. This interrelationship between the role of the commander and the imposition of the legal framework within which subordinates are permitted to execute their tasks is bundled in the notion of responsible command, and the requirement that only those who operate under responsible command may qualify for lawful combatant status.

Teaching versus training on IHL

Ensuring that subordinates understand and respect this legal framework and are prepared to execute their combat tasks within it is more complex than many might assume. Relying exclusively or even primarily on classroom education about IHL, perhaps accompanied by the admonishment that IHL violations will result in disciplinary and potentially criminal sanction, will rarely produce truly effective understanding and commitment to the law. Soldiers do not truly learn to effectively perform their battle tasks by classroom instruction; they learn by doing.³⁹ And because IHL obligations frame the performance of these tasks, IHL compliance must be integrated into the same training and development process used to produce proficiency in the battle task itself. The threat of a potential criminal sanction for violating IHL is not an adequate substitute for training integration, and will likely provide little or no deterrence when soldiers confront *in extremis* situations involving pressures to act in violation of the law. At that point, the soldier may be willing to prioritize immediate interests over the risk of future disciplinary sanction. In contrast, when IHL compliance has been integrated into all aspects of training battle tasks, that compliance will become increasingly instinctive and automatic, like the execution of the task itself.

This is not to say that education related to both IHL content and the individual disciplinary consequences for violations of the law are unimportant. Instead, responsible command requires a more nuanced appreciation for how the law implicates virtually every battle task assigned to subordinates and therefore must be integrated into soldier training so that the battle instincts of the soldier include respect for and compliance with the law.

Training is the essential component in preparing soldiers and military units for success in battle and other military operations. Training involves the complex process of building competence from the ground up, starting with individual soldier skills, progression to small unit capabilities, and finally integrating all of this into collective battle simulations. All of this contributes to developing almost instinctual reactions and responses to the myriad of situations that will confront

39 US Department of the Army, above note 1, p. 35 (placing emphasis on training programmes and experience as keys to learning the skills necessary to be an effective soldier).

the individual and collective military assets of an armed force. This is explained by US Army doctrine as follows:

Success in future Army operations depends in great measure upon effective, realistic training to build the necessary competence and confidence in soldiers, units, and leaders. ... Combat and collective training centers develop high-end collective proficiency to ensure unit readiness for deployment. Deployed forces continue to benefit from new sources of training support and reach back to sustain critical skills while away from home station regardless of the mission. Army schoolhouses and units at all levels access nested and operationally relevant scenarios that guide training and leader development across the force. Army training also incorporates increased levels of joint and interagency participation to broaden both Army and partner understanding and expertise. All of these efforts become part of a broad training enterprise that develops and sustains the tactical and technical competence that builds both confidence and agility.⁴⁰

Leaders influence training at every step of this process. How leaders conceptualize their responsibilities in relation to training subordinates will in large measure define the nature, quality and focus of that training. Executing this command “responsibly” requires that challenges associated with IHL compliance be fully integrated into the training process. The value and importance of this is almost self-evident: the myriad of operational and tactical challenges likely to confront soldiers and units includes those related to IHL itself. Leaders who understand this will understand why just *teaching* IHL obligations is insufficient to fully execute their responsibilities, because they will understand that only by *training* compliance with this law will soldiers be genuinely prepared for their inevitable moments of decision.

The importance of this broader vision of executing the responsibilities of command as it relates to maximizing IHL compliance is perhaps more compelling today than at any time in recent memory. Indeed, as the complexities of the battle space increase as the result of the unconventional and rapidly evolving nature of the contemporary strategic environment, the importance of developing an *instinct* for IHL compliance also increases. This correlation is articulated by US Army doctrine:

The Army must clarify and reinforce standards of behavior for both leaders and Soldiers. To defeat enemies whose primary sources of strength are coercion, brutality, and the stoking of hatreds, the Army must provide its members a clear set of expectations. Ignorance, uncertainty, fear, and combat trauma can lead to breakdowns in discipline and conduct that often result in violations of the Uniform Code of Military Justice, the Law of War, and the Geneva Conventions. Against such challenges, leaders must strive to reduce uncertainty through tough, realistic training that builds cohesion, confidence,

40 *Ibid.*

and mutual trust. In addition, all Soldiers must understand and apply the essential tenets of *jus in bello*, discrimination (between combatants and noncombatants), and proportionality in the use of force, measured against the necessity of military operations. Finally, leaders and Soldiers must internalize and sustain a Warrior Ethos that insists upon commitment to core institutional values. Particularly important is the recognition that Soldiers are expected to take risks and make sacrifices that place them at increased risk of danger or death to accomplish the mission, protect their fellow Soldiers, and strive to safeguard innocents. The Army values of loyalty, duty, respect, selfless service, honor, integrity, and personal courage serve as a guide to all Soldiers about the covenant between them and the society they serve.⁴¹

As this doctrinal extract highlights, commanders at all levels must ensure their subordinates genuinely *understand* how IHL impacts their warrior functions. This understanding is absolutely essential to effective IHL implementation, because it links such implementation to two fundamental responsibilities of the commander: protect the subordinate from the risks inherent in armed conflict, and limit the harm caused by conflict to only that which serves the interests of the State. By developing this understanding, responsible commanders prepare subordinates to walk a proverbial tightrope between employing deadly force on demand and without hesitation, and at the same time respecting the limitations imposed by the law.

Concluding remarks

Preparing subordinates to execute their deadly combat tasks often includes deliberate efforts to minimize the moral consequence of such action. This ranges from training to develop battle response instincts, to emphasis of the collective obligation of each member of the unit to perform effectively in order to accomplish the collective mission, to rewarding subordinates for their aggressiveness and personal courage in battle. It also often involves measures to enable the subordinate to view the opponent more as an object of tactical violence than a fellow human being. This is often done in quite subtle ways—for example, by using faceless silhouettes as targets during marksmanship training. It can also take the form of disparaging characterizations of the enemy writ large.

Whatever the method used to produce this moral minimization, IHL demands that these same subordinates be capable of shifting their attitude toward an enemy in the briefest of time. Once that enemy is captured or subdued—the point at which the captured enemy is at the total mercy of his captors—he is, as a matter of law, no longer allowed to be treated as an object of hostility, but must instead be treated like any other human being. When commanders weave IHL

41 *Ibid.*, pp. 35–36 (footnotes omitted).

compliance into their training, they prepare subordinates to execute this incredibly demanding mental shift in perspective in the briefest of moments between attack and submission.

Preparing subordinates to navigate this complex challenge is the essence of responsible command. It is also central to the international legal qualification of lawful combatant and the accordant legal privilege to participate in hostilities. That status and privilege is built on the assumption that commanders will discharge this duty “responsibly”. This inextricable link between responsible command, combatant status and humanitarian interests must constantly be emphasized in every aspect of leader training and development. Indeed, societies’ best hope for mitigating the detrimental impact of mortal combat is the responsible commander, a reality that has been and will continue to be central to balancing the interests inherent in IHL.