

## **THE EMPLOYMENT OF LEGAL ADVISERS AND TEACHERS OF LAW IN THE ARMED FORCES \***

**by Dieter Fleck**

During the past few years, activities for the dissemination of international law applicable in armed conflicts have increased substantially. Yet there is no doubt that these efforts will have to be further intensified in order to reflect the increasing importance of humanitarian law in modern armed conflicts.

A most significant point in this context is the question as to which concrete measures in the field of organization and personnel utilization might appear apt to establish humanitarian law as a firm guideline governing the conduct of military personnel. We are referring here to the subject of legal advice and instruction in the armed forces and more specifically to the annexed Model submitted in May 1972 by experts of the Federal Republic of Germany at the second session of the Conference of Government Experts on the Reaffirmation and Development of Humanitarian Law Applicable in Armed Conflicts.<sup>1</sup> This Model calls for some more detailed comments.

The German experts do not raise any claim for priority as far as the concept of legal advice and instruction in the armed forces is

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<sup>1</sup> *Model for the Employment of Legal Advisers and Teachers of Law in the Armed Forces*, submitted by the Experts of the Federal Republic of Germany, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Second Session, Geneva 3 May-3 June 1972, CE/COM IV/23.

concerned. As early as at the Conference of Red Cross Experts held in The Hague in 1971, a representative of the Canadian Red Cross suggested that legal advisers be attached to the staff of military commanders.<sup>2</sup> According to this proposal, such legal advisers were to have the rank of officers. The terms of reference were to enable them to instruct commanding officers and military personnel in matters of international law applicable in armed conflicts and to initiate the steps necessary to avoid breaches of international law. In times of armed conflict, they were to devote themselves to the preparation of humanitarian negotiations notably as far as they relate to the civilian population affected by the conflict. Their main task, however, was to be to disseminate the Geneva Conventions wherever necessary. To this end, it was envisaged that the National Red Cross Societies, acting in close co-operation with the ICRC, should participate in the training of legal advisers. This proposal was taken up again at the Conference of Red Cross Experts held in Vienna in 1972.<sup>3</sup> While it was noted that the wording and the comments of the Basic Texts drawn up by the ICRC for the formulation of Additional Protocols to the Geneva Conventions did not contain a reference to this proposal, a representative of the ICRC pointed out that it was a matter for the Governments themselves to take decisions in this field.

The Geneva Conference of Government Experts dealt with the problem of legal advisers to military commanders as early as at its first session held in 1971.<sup>4</sup>

The appointment of full-time legal advisers to military commanders and the intensification of legal instruction for military

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<sup>2</sup> ICRC, Conference of Red Cross Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, The Hague, 1-6 March 1971, *Report on the Work of the Conference*, Geneva, April 1971, p. 29.

<sup>3</sup> ICRC, Conference of Red Cross Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Second Session, Vienna, 20-24 March 1972, *Report on the Work of the Conference*, Geneva, April 1972, p. 48.

<sup>4</sup> ICRC, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, *Report on the Work of the Conference*, Geneva, August 1971, paras. 578 and 579.

personnel were suggested in connection with the dissemination of the Geneva Conventions, which was believed to offer more effective guarantees for the respect of humanitarian principles than any kind of penal sanction. Apart from experts of the Federal Republic of Germany, Swedish experts in particular have declared themselves in favour of this proposal. An opportunity of viewing the problem under a different aspect arose when the ICRC issued its "Questionnaire concerning measures intended to reinforce the implementation of the Geneva Conventions" during the preparations for the second session. In replying to this questionnaire, the Netherlands Government reverted to the suggestion that advisers to military commanders be appointed who could exercise their function, as far as possible, in conjunction with and in support of the activities of the Protecting Powers. The envisioned functions of these legal advisers were described by the Netherlands Government as follows: "They would instruct the rank and file on the law of armed conflicts and would take steps to prevent breaches of that law. The advisers might also be assigned the more general duty of supervising the observance of that law. In the Netherlands Government's view, this would have a very favourable effect on its enforcement. Moreover, it would be possible to recruit the members of the supervising teams from among the ranks of the advisers."<sup>5</sup> In the same context, the experts of Denmark suggested, during the second session of the Conference of Government Experts, that advisers in matters of international law be attached to the major military headquarters.<sup>6</sup> The proposal submitted by the experts of the Federal Republic of Germany does not prejudice the questions associated with the establishment of international supervising teams and co-operation with the National Red Cross Societies, while laying stress on the need to employ qualified legal advisers to military commanders both in peacetime and in times of armed conflict.

A brief outline of the experience gathered by the German Federal Armed Forces with regard to the activities of legal advisers

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<sup>5</sup> ICRC, Questionnaire concerning measures intended to reinforce the implementation of the Geneva Conventions of August 12, 1949, Replies sent by Governments, Geneva, April 1972, p. 3.

<sup>6</sup> Second Session, CE/COM IV/10, Proposal submitted by the Experts of Denmark, Article (iii).

and teachers of law during the past years may be given here in order to illustrate the German Model. Approximately 150 lawyers who are qualified for the office of justice are employed with the Federal Armed Forces as civil servants. They advise commanders and subordinate echelons of command on all legal problems facing the Armed Forces, especially in the field of international law and military law. They assist the commanders in the implementation of training programmes. In military schools and academies, they are charged with the instruction of personnel in all aspects of law, notably international humanitarian law.<sup>7</sup>

Legal advisers are required to be well versed in a wide range of subjects which, in the field of international law, extend from the Geneva Conventions and the Convention for the Protection of Cultural Property to the legal principles governing the use of means and methods of warfare, the law of neutrality, the law of treaties and the rules of international law designed to prevent armed conflicts and to secure peace. In the field of domestic law, they are confronted with legal problems pertaining to emergency legislation and to co-operation with civilian authorities, as well as with problems of criminal law, military disciplinary law, and general military law—subjects which will normally have to be dealt with centrally by one legal adviser for reasons of expediency. The impact of legal problems on the exercise of command authority should, of course, not be overrated. Nonetheless, the activities of the legal advisers are essential in implementing the principle of the rule of law in the armed forces.

Legal advisers in the German Federal Armed Forces have played a decisive part in the application of the legal tenets governing a modern way of leadership and character guidance.<sup>8</sup> They maintain close co-operation with the public prosecutors' offices attached to the courts, provide advice to military superiors in the imposition of disciplinary measures, and act as attorneys at the military dis-

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<sup>7</sup> Cf. Krueger-Sprengel, *The German Military Legal System*, in *Military Law Review*, Vol. 57 (1972), pp. 17 et seq.

<sup>8</sup> Now generally known as "Innere Führung".

ciplinary courts dealing with severe disciplinary offences. During military training exercises, they have to devote their attention to the strict observance of those rules of international law which, failing thorough and regular indoctrination on this specific subject, cannot be expected to be familiar to an officer with no professional legal training.

The multitude of problems of international law which legal advisers may have to deal with illustrates the need for professional legal advice to military headquarters.

Does the commander of Destroyer 3 act in conformity with the rules of international law if he allows persecuted foreign refugees to go aboard his ship in *Situation Blue*? Does a company commander commit criminal offences in *Situation Green* if he finds stocks of ammunition stored in the yard of a field dressing station and therefore orders that station to be evacuated, although this makes it impossible to bring immediate aid to the seriously wounded? Is it permissible to use police stocks of tear gas ammunition for military purposes? May acts of war be regarded as justified because they have been preceded by a warning to the enemy? What standards of international law have to be applied to captured guerilla fighters? What military transports may pass through the territory of a neutral country? This catalogue of questions can be extended *ad libitum*. This makes it clear that the individual commander—however carefully he might be prepared for his mission—will sometimes meet with insuperable legal problems if he cannot avail himself of the advice of a trained lawyer. As regards the organization and activities of legal advisers and teachers of law, we would consider that the status of civil servant as accorded to them in the Federal Armed Forces is not an indispensable element of the international model. The armed forces of many countries employ legal advisers holding the rank of officers with similarly good results as in the Federal Armed Forces. A clear delineation of responsibilities, however, appears to be a matter of great significance. A legal adviser is certainly under the obligation to comply with general instructions issued by the commander to whom he is attached, but these instructions must on no account relate to his

assessment of the legal situation. Senior legal advisers must therefore be appointed at higher echelons of command such as corps and major headquarters. Directives covering the exercise of the adviser's professional activities may only be issued by these senior legal advisers.

Procedural policy rules covering the activities of legal advisers are also required to a certain extent. The legal adviser is under the obligation to give advice to his commander and also to other commanders within his major unit. He is called upon to participate in the decision-making process whenever legal questions arise and to examine envisioned orders from the legal point of view. He bears full responsibility for the correctness of legal opinions rendered to the military authorities within the scope of his duties, and he is bound to draw attention, unequivocally and on his own initiative, to all breaches of law observed, including those that may have been committed by his own commander. The senior legal adviser attached to his major unit's superior headquarters will, as far as necessary, support him in the exercise of these functions.

Although the activities of a legal adviser to military headquarters cover a wide scope and may deeply affect decisions pertaining to operations and personnel management, only a limited number of lawyers are required for this office. In the Federal Armed Forces with a strength of about 500,000, the work of the comparatively small group of about 150 lawyers has already had a most beneficial and sustained effect. On the other hand, difficulties might arise from the small number of legal personnel. Legal advisers are distributed over the various garrisons where major military headquarters are located. They cannot be convened for meetings or even vocational training courses whenever this would appear necessary. Vacancies are frequently difficult to fill. The career prospects of experienced specialists can sometimes be improved only at the cost of a complete change of their vocational pattern. Already in the past, these aspects of personnel management, along with considerations aimed at greater professional effectiveness, have brought about a continuous exchange among lawyers acting as legal advisers and teachers of law. Such an exchange is also deemed necessary since, with

the Federal Armed Forces having no separate system of criminal jurisdiction, an exchange between legal advisers and judges or public prosecutors would meet with considerable difficulties without fully benefiting the vocational advancement of the lawyers concerned. For the future, a more frequent exchange between legal advisers and lawyers employed as civil servants in the armed forces is being contemplated. Yet the efforts aimed at vocational advancement must not lead to the disregard of structural differences between public administration and the administration of justice—differences which, in some cases, may even imply a clash of interests.

No one will deny that continuous instruction in humanitarian international law is essential for its enforcement. But it would hardly appear desirable to confine this instruction to efforts at international level. On the contrary, the armed forces of all nations will have to see to it that their efforts for instruction and indoctrination in humanitarian law are brought into line with internationally recognized standards. In view of the vast scope of modern humanitarian law and specifically in view of the lacunae that still exist in present-day international conventions, it appears essential that professional lawyers be employed to advise and instruct the armed forces on this subject which is of paramount importance to the protection of war victims. Only the continuous and systematic work of specialists will be apt to ensure that the principles of humanitarian law will be applied in practice by those on whose conduct the protection of the victims of armed conflicts will ultimately depend.

Experience derived from the administration of justice in the German Federal Armed Forces has shown that the employment of legal advisers and teachers of law in the armed forces is by no means an unrealistic concept. This model would lend itself to adoption at international level, and it is encouraging to note that it has already met with favourable response by various nations. It should be pointed out here that the concept of legal advisers within the armed forces as such is by no means quite new and that recourse to expert advisers is also provided for under the terms of international conventions. As a matter of fact, the armed forces of many nations are nowadays employing qualified lawyers with

precisely defined terms of reference, and clauses providing for the employment of advisers have been set forth in various international conventions, for instance in Article 7, para. 2, of the Convention for the Protection of Cultural Property of 1954. The proposals developed here therefore require no basic change in philosophy as regards their implementation either at national or international level.

The enforcement and dissemination of humanitarian law applicable in armed conflicts could be carried a great step forward if the following model were to be implemented. Contributions made by experts in this context will certainly bring their influence to bear.

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## **M o d e l**

### **for the Employment of Legal Advisers and Teachers of Law in the Armed Forces**

Within the armed forces, qualified lawyers will be employed as legal advisers in major units and as teachers of law in military schools and academies.

#### **I. Legal Advisers**

The legal adviser acts, in time of peace as in time of armed conflict, as the Commander's personal adviser in all service matters involving questions of international law. Within this scope, the legal adviser is called upon to participate in the military decision-making process and to support the commander in the execution of his command authority.

1. *Control*: The legal adviser is placed under the direct administrative control of the commander to whom he is attached and to whom he reports directly. Control in legal matters, however, is exercised by the senior legal adviser attached to the major unit's superior headquarters.

2. *Tasks:* The legal adviser shall provide advice to his commander and subordinate echelons of command, supervise legal instruction provided to the forces in the course of exercises and training programmes, and instruct officers in legal matters.

More specifically, his tasks include the rendering of professional advice on envisaged orders involving questions of international law.

He is under the obligation to draw attention, unequivocally and on his own initiative, to all breaches of law observed.

## **II. Teachers of Law**

Teachers of law in military schools and academies are charged with the training of students and the advanced training of cadre personnel and faculty staff in all aspects of law, notably international humanitarian law. Teachers of law should have practical experience as legal advisers in a major unit.

1. *Control:* The teacher of law is placed under the administrative control of the commandant of the school or academy to which he is attached. Control in legal matters is, however, exercised by the senior legal adviser to the authority exercising administrative control over the school or academy.
  2. *Tasks:* The teacher of law shall, in accordance with the training syllabus, provide instruction in all aspects of law, notably international humanitarian law, co-operate with the other members of the faculty staff in providing instruction covering related subjects, and advise the commandant of the school or academy in all service matters involving legal problems.
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