ROLE OF LEGAL ADVISERS IN ARMED FORCES

by G. I. A. D. Draper

A. INTRODUCTION AND BACKGROUND

There emerged at the close of the three years of preparatory work by the Government Experts convened by the ICRC, from 1971 to 1973, a provision that had no counterpart in the four Geneva Conventions of 1949. This was a provision requiring the employment of legal advisers to military Commanders. It was a bold provision, for which the Canadian Experts can claim the credit for its introduction, although the idea went through a number of changes both of substance and presentation in the course of debate. It was clear to the participants that the presence and role of such advisers would be a valuable modality for implementation of the Conventions of 1949 and of Protocol I. Such a modality could operate in close association with the military instruction required to be given to armed forces concerning the law contained in those instruments.

In the sensitive area of implementing the international law governing armed conflicts, both in monitoring its application and in finding devices persuasive of its observance, the Experts in effect devised a twofold system, namely, advising military commanders upon the application of the Conventions and Protocol I and upon instruction in those instruments.

The precocious codification of the Law of war at the two Hague Peace Conferences of 1899 and 1907, produced little about implementation and enforcement mechanisms of the substantial body of the written law of war that emerged in 1907. All that we inherited from that redaction was:—

(1) the requirement, in Article 1 of Convention IV, that "Belligerents shall issue instructions to their armed land forces which shall be in conformity with the Regulations... annexed to the present Convention." That was the seminal point for the appearance of "Manuals" issued by States;

(2) the provision in Article 3 of that Convention for State responsibility and compensation for breaches of the Regulations annexed thereto.

B. IMPLEMENTATION AND ENFORCEMENT

If we consider Article 1 of Hague Convention No IV of 1907 as the starting point for implementation devices in the codified Law of War, it would seem that this century has been singularly slow in weaving together the three devices of (1) instructions issued to armed forces, (2) the giving of instruction to armed forces, and (3) the employment of legal advisers to commanders to further the implementation of the law of war. Officers and soldiers are subject to discipline by the nature of their calling. That disciplinary system is then harnessed to their military training. The military authorities can require such instruction as they see fit to order. Finally, military staffs can be organised and assigned specialist tasks according to military needs.

We seem in retrospect to have arrived at the conjunction of discipline, instruction and advice by three slow stages. First, we had the legal requirement of issuing instructions to armed forces to comply with the Regulations annexed to Hague Convention No IV of 1907. It is not encouraging to see how relatively little use was made of this device since 1907.

The second phase of our story is to be found in the Geneva Conventions of 1949, common articles 47/48/127 and 144. The adoption of those articles in 1949 was the direct outcome of the experience of World War II. It emerged in the war crimes trials that instruction in the Law of War had not been a feature of military training between the two World Wars. Military law is a mandatory subject of study by officers in most armies. The step from teaching the law of war as an appendix to military law would seem an obvious one but it was not taken, to mankind's misery. Those entrusted with military training did not think it fit

to educate the military in the limits of military obedience. Let us recall in this context the passage from the Judgment of the IMT at Nuremburg dealing with the German General Staff and High Command which was found not guilty of being a criminal organization. Although undoubtedly criminal in their actions, the individuals concerned were not a "group" within the meaning of the Indictment. The Tribunal expressed its views thus:—

"Many of these men (members of the German High Command and General Staff) have made a mockery of the soldier's oath of obedience to military orders. When it suits their defence they say they had to obey; when confronted with Hitler's brutal crimes which are shown to have been within their general knowledge, they say they disobeyed. The truth is that they actively participated in all these crimes or sat silent and acquiescent, witnessing the commission of crimes on a scale larger and more shocking than the world has ever had the misfortune to know." (IMT Judgment, p. 83.)

It was against the background of that condemnation that the common articles on instruction and dissemination were inserted in the Conventions of 1949, accompanied by a modest attempt to include the civilian population within the instruction incumbent upon States.

What has happened under this second phase, namely that of compulsory military instruction, since 1950, is a matter of some debate. The experience of "grave breaches" of those Conventions in the period since 1950 is not lacking. How much can properly be laid at the door of failure by States to give the instruction required by the Convention is difficult to assess. The testing moment at a war crimes trial when the accused pleads that he acted under a superior order and that he did not know the order to be unlawful has not been a feature of the post-1950 experience for the simple reason that such trials for grave breaches have not yet occurred. Meta-legal reasons have inhibited that type of law enforcement.

The third phase of implementation of the law of armed conflict has now been reached in Protocol I additional to the Conventions of 1949. This phase is marked by Article 82 requiring the availability of legal advisers to military commanders, on the application of the Conventions and of the Protocol.

Before attempting an appraisal of the new Article 82, of Protocol I, it is helpful to consider its points of departure from the text of draft Article 71 passed by the Government Experts in 1973. In 1973 the relevant draft text (Art. 71) stood thus:—

"The High Contracting Parties shall employ in their armed forces, in time of peace as in time of armed conflict, qualified legal advisers who shall advise military commanders on the application of the Conventions and the present Protocol and who shall ensure that appropriate instruction be given to the armed forces."

The debates in the Diplomatic Conference in 1975 and 1976 reflected a certain dissatisfaction with this text. In general, the obligation proposed for States was thought to be too hard and too high, and, at the same time, too vague. Consensus could not be reached as to any agreed level of command at which such legal advisers would be mandatorily employed. Further, there would be a need, as a result of the possible participation of "national liberation movements" in international armed conflicts provided for in Article 1 (4) and Article 86 (3), for a mandatory availability of legal advisers to commanders in such liberation movements. The words "Parties to the conflict in time of armed conflict", now inserted in Article 82, reflect that need. Article 82, as established in the Final Act of the Conference, signed on 10 June, 1977, is in these terms:

"The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level of the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject."

When this text is compared with that framed by the Experts in 1973, the "watering down" of the content and level of the obligation is apparent. The nodal points of reduction of the obligation lie in the phrases:—

(*a*) "...ensure that...advisers are available, when necessary..."

(*b*) "...to advise commanders at the appropriate level..."

(*c*) "...legal adviser..."

(*d*) "on the...appropriate instruction..."

As to (*a*) the descent is from the earlier text "...shall employ in their armed forces..." As to (*b*) the like is from the earlier phrase "military commanders..." As to (*c*) the descent is from the former text "qualified legal advisers..." As to (*d*) the descent is from the earlier requirement, "...shall ensure that appropriate instruction be given..."

The general impression gained from a comparison of the texts of 1973 and 1977 is that Governments were not prepared to accept obligations unless there was some flexibility as to the level of commanders who must have the benefit of legal advice on the Conventions and the Protocol and as to the timing when such advice ought to be proffered by the advisers or sought by the commanders. Further, Governments did not desire an obligation on the part of legal advisers to ensure the *giving* of appropriate instruction, but to have their role so defined as to include advising, on the appropriate instruction, a very different matter. Finally, Governments realised that the mandatory use of qualified legal advisers in their armed forces would be more than many States could contrive, if that meant that such legal advisers must be legally qualified. This "watering down" of the obligation as to legal advisers chimed well with the wish of Governments to ease their own duties and to extend them so diluted to national liberation movements where, by the nature of such participants, the duty had to be pitched at a low level.

C THE SIGNIFICANCE OF THE OBLIGATIONS

Has the obligation posited by the Experts in 1973 as a novel device for implementation, been reduced to the level of the ineffectual or has it still retained a force and a value, if met in good faith, that justifies the place of Article 82 in Protocol I? In the first place, it is possible that the presence of the provision in the Protocol is itself of some value. The obligation may be weak, and open to abuse; it is a standard put before States that want to act in good faith. It is also a guideline for States genuinely seeking guidance as to how to implement the law, as opposed to breaking it. Again, it has an educative value for Governments, military commanders and service personnel. Last, but not least, it furthers, by auxiliary action, the requirement of dissemination and instruction contained in Article 83. Admittedly Article 83 is also auxil-

iary to the weak obligation in Article 6 of the Protocol as to the training of qualified personnel to facilitate the application of the Conventions and of the Protocol and the activities of the Protecting Power. Having regard to the generous concessions made to State sovereignty by Article 5 (2) of the Protocol relating to acceptance of the designated Protecting Power, the role of legal advisers under Article 82 assumes an enhanced importance, even in its final, attenuated, form. So difficult has been the implementation of the law of war that the devices designed to that end must be multiform and not exclusive, i.e., they must interact and support each other as their individual efficacy is undoubtedly weak. Legal advisers can and should perform as an auxiliary mechanism for implementation if for any reason no Protecting Power or substitute organization is functioning at all, or only partially.

It is apparent that some States will have difficulties in training such legal advisers and finding persons of the appropriate intellectual and moral calibre. Traditionally, legal staff officers in Armed Forces have been concerned with advising commanders upon disciplinary and court-martial cases, both pre-pending, and post-trial, including providing prosecutors in complex or important trials, and in certain States, defending officers as well. The strain upon a State in the initial establishment and training of legal staffs for their Armed Forces is heavy. If one considers, for example, the full range of legal services provided in the U.S. armed forces, it is clear that few States can match that type of legal resource. Most States with armed forces of any size and sophistication require Service legal personnel for (*a*) disciplinary cases; (*b*) general advisory purposes; (*c*) teaching military law; and (*d*) under the Conventions, for teaching the law of those instruments. It is soon discovered that one cannot teach isolated fragments of the international law of armed conflict in a way that makes sense to the audience without giving some explanation of the setting of the Conventions in the law of war and in international law generally.

Added to these commitments, which may already be beyond the reach of many States, there is the new obligation under Article 82 of Protocol I to "make available" legal advisers to commanders "when necessary". The anxiety of Governments to reduce and qualify their commitment in this area is readily understandable. Doubtless the legal adviser will, for economy of personnel, be a multi-purpose staff officer, and preferably, but not necessarily, legally qualified. He will advise:—

(i) commanders at all relevant levels on disciplinary cases; (ii) senior formations on general legal matters affecting the Force concerned; and (iii) may well be called upon to meet the obligation, such as it is, currently contained in Article 82 of the Protocol, i.e., in peace and in armed conflict, on the application of the Conventions and the Protocol. Such a person will need no ordinary talents to discharge those roles.

The great extension in the advisory obligation will enter in in relation to those Parts of Protocol I dealing with combat operations, i.e., Parts III and IV. These Parts have no counterparts in the Conventions. Parts III and IV embrace forty-four detailed Articles of complexity and undoubted importance. If one considers the nature of modern weaponry, the changing technology of weapons systems, the development and sophistication of electronic devices in weaponry and communications systems, it is apparent that if the legal adviser is going to be competent to give a field commander useful advice on Parts III and IV of Protocol I, he will also require a highly technical, non-legal training. Some idea of what would be entailed for the giving of effective legal advice on Protocol I can be gained from a pioneer and percipient article by Professor O'Connell of the University of Oxford, in the British Year Book of International Law, (1970), Vol. 54, at pp. 29-85, entitled "International Law and Contemporary Naval Operations". It is no answer that Protocol I does not deal with such operations. Article 49 (3) makes it clear that the provisions of Section I of Part III apply to "any land, air or sea warfare which may affect the civilian population... or civilian objects on land". At p. 23 of his article, O'Connell writes:— "A legal officer competent in international law is thus becoming an indispensable component of naval staffs... In the U.S. Navy fleet commanders carry on their staffs legal officers of high rank who constitute members of their inner cabinets, and whose function... is to assess operational planning from the international law point of view... Since most naval legal officers have been trained only in disciplinary law, the level of special international legal competence in the fleet has not been high, and this implies a greater responsibility on the part of the professional international lawyers to do the intensive study which is necessary if the level of practical performance is to be raised." These words were written before Protocol I was established. They have, it is suggested, now become relevant to land warfare as well as to that directed at land targets from the sea and the air.

D. THE ROLE OF LEGAL ADVISERS

It is apparent that the tasks of legal advisers, under the Protocol, in time of armed conflict are going to be diverse, difficult and onerous. However, his work really begins in time of peace when the strategical planning is done. The tactical plans in time of conflict are framed to fit into the strategical setting. At the highest level of planning, legal advisers, of rank and experience, should be absorbed into the planning group and processes. He will have to be fully conversant with the language and modes of thinking of military planners and with the latest technological developments in weaponry systems, their use and deployment. This role of legal advisers, in military planning, will be a process of revision, derived from changing political, military and technological factors.

If the contribution of legal advisers is made at the early and higher stages of planning, the need for legal advisory service at the lower formations will tend to be reduced. Much of that crucial work may be done in peace time. A by-product of this association of legal advisers with military planners is the acceptance of legal advisers working with planners and military commanders. Operational directives in time of conflict will require legal vetting before they are issued. Bearing in mind the series of legal limitations upon targetry contained in Articles 48 to 60 of Protocol I, the role of the legal adviser in relation to operational directives will be important and demanding. Much will depend on how he discharges his advisory role. With modern communication methods, it will be at the higher formation levels where the sophisticated weaponry is ultimately controlled that the legal adviser's presence will be critical. It is not so much the over-dramatized local incident, "Do we launch a weapon on that target or do we not?", but the legal vetting of plans and tactical directives before the engagement that will be the central role of the legal adviser to military commanders.

The legal staff officer will have to become a permanent part of the staff organization of senior commands in time of armed conflict and of planning departments in time of peace. Once commanders become accustomed to the presence of such advisory staff officers as they are already to the legal staff engaged in advising them upon disciplinary matters, a major step forward will have been reached. There is not one single Article in the 420 Articles comprising the four Conventions and

the 102 Articles and Annexes of Protocol I upon which legal advice may not be required either in planning or the issuing of general directives in time of peace, or in the day to day advising on tactical directives in time of armed conflict.

Legal Advisers should be a permanent part of peace time exercises on any large scale, whether with or without troops. Modern communications will ease the question of the deployment of legal advisers and tend to reduce the need for their presence in forward areas. It is a fallacy to think that the nearer you are to military operations the better one knows what is going on, i.e., the facts, in the legal sense. One knows only one's own immediate and tiny sector of the fighting. In general, the legal adviser is likely to be more usefully employed at a distance, and at a level of command where he is detached from the individual tactical incident. It is not a question of personal safety but of the efficient discharge of his functions.

The main difficult will probably be the adequate training of the legal advisers and their careful selection in terms of character qualities. In totalitarian regimes legal advisers are useless appendages to the State apparatus except for the justification and concealment of atrocities and to furnish a smoke-screen of legality for gross and persistent illegalities. Leaders of Gestapo Branch Offices were normally "doctors of law". Even in those countries where the "rule of law" is present, at the highest levels legal advisers are often not consulted. Sometimes that omission is not accidental. One of the less comprehensible aspects of the case of *Ireland* v. *the U.K.*, European Commission of Human Rights, (1976), is the fact that no legal advice seems to have been sought by any of the Government authorities or agencies concerned. Neither was it proffered. Legal advisory staffs do not normally advise unless requested. Again it sometimes happens that a multiplicity of Governmental agencies being concerned, no legal advice from any source was obtained. Such an error can be expensive, both in terms of reputation and money, to the Government held responsible.

Military Commanders have not in the past welcomed the presence of legal advisers when they are planning or directing military operations against an enemy. To meet the requirements of Article 82 of the Protocol a different climate of opinion and relationships within the senior echelons of the Armed Forces has to be achieved. That is no easy matter. It will take time. It is a delicate process of education and psychology to

instil a habit not easily received or acquired, and to which there is a tradition of resistance.

At the end of the day the role of the legal advisers in relation to military commanders has to become accepted and operated in time of peace. It is not realistic to expect that the smooth functioning of such advisers can be achieved overnight, when the armed forces become engaged in armed conflict. It is suggested that legal advisers carefully selected and adequately trained for their role under Article 82 of the Protocol, should, in time of peace, become a normal part of all planning staffs at the higher levels. They should receive, for monitoring, all directives and standing instructions issued within the armed forces, as a routine. If such legal advisers are attached to the crucial levels of military command, their numbers need not be great. In time of peace they should also have the important role of advising on the necessary instruction to be given to the armed forces upon the Conventions and Protocol I. In time of armed conflict legal advisers must carry out the vetting and monitoring of planning and operational and non-operational directives.

It is of particular importance that legal advisers to commanders are not only available when necessary, but that they be kept informed of all matters which concern their areas of legal advice. In the strict sense, advisers are approached by those needing advice. It is implicit in the terms of Article 82 that commanders should consult such advisers on the application of the Conventions and of the Protocol. Too often in the past legal advisers have been ignored, or if consulted, their advice has been disregarded if it did not accord with the wishes of the party advised. Also there is the risk of a commander playing off one adviser against another or casting around the range of advisers until one is found who gives the advice required. Article 82 does not in terms permit the adviser to "protest" proposed illegal acts or to report such acts after their commission. A basic directive governing the role and functions of these legal advisers and their relationship to commanders might have some value if such advisers are to be given a fair chance of discharging the tasks entrusted to them by Article 82. Advising in the military organization also poses the question of the rank of the adviser, normally considerably lower than that of the commander advised. This will need attention.

E. CONCLUSIONS

The idea of legal advisers to military commanders is nothing novel. Such advisers have an accepted and established role in relation to discipline and courts-martial. The novelty of their role under Article 82 of the Protocol is three-fold:— (i) advising commanders upon the application of the Conventions and of the Protocol, i.e., a substantial area of the international law of armed conflict; (ii) advising commanders in time of armed conflict upon those Parts, III and IV of the Protocol, which deal with the conduct of military operations; and (iii) advising commanders upon the instruction to be given in the armed forces on those instruments. Article 82 places a heavy, crucial and diverse responsibility upon those advisers as well as on the commanders to whom their advice is proffered, particularly in operations.

To the extent that systematic and effective instruction is given to armed forces in time of peace the greater is the chance that such legal advice will be effective in time of armed conflict. Commanders who are aware that the troops under their command have been properly instructed as to what may not be done in armed conflict, whether in operations or otherwise, will not normally be prepared to ignore advice proffered to them which reinforces those prohibitions.

The real value of the work of legal advisers to commanders lies probably in their close peace time association of such advisers with planning and the issuance of the operational directives which flow from that planning. Once these legal advisers have become accepted as part of the regular staff grouping round a commander as are Intelligence or Operational Staffs, in time of peace, their tasks will be that much facilitated in time of armed conflict. Clearly advising on instruction in the Conventions and the Protocol should be a peace time role. The staff of legal advisers will also have to prepare in peace time their own expansion in order to train the large numbers of lawyers who will be joined to them from civilian life in time of armed conflict.

The main advisory role in time of peace, apart from advising on instruction, will probably be active participation in all military planning and in the monitoring of all operational and other directives prepared before the armed conflicts begin. In time of armed conflict their role should extend to the "clearing" of all operational directives issued from higher commands on land and from air and naval commands engaged in

operations against land targets. How far forward such advisers should be sited will depend on the combat situation and the nature of the operations being undertaken. Article 82 rightly gives considerable flexibility as to the availability of such advisers.

Likewise, such advisers will have an important role to play in advising upon the day to day application of the Conventions and the Protocol in the rear areas and in occupied territory.

The implementation of Article 82 in time of peace will be a vital testing of the good faith of States and of their genuine acceptance of international humanitarian law in the conduct of warfare. The application of that law will depend in part upon whether legal advisers are to be allowed to perform the functions conferred upon them by Article 82 of Protocol I. Governments would be well advised to launch this system of legal advice and to accept legal advisers on their military staffs now, in time of peace. There is plenty of work to be done by such legal advisers long before armed conflicts occur if States are going to implement Article 82 in good faith, as their legal obligation requires them to do when they accept Protocol I. That provision has been framed with a measure of flexibility and pragmatism which leaves little excuse for ignoring it. The system of legal advisers to commanders, if properly implemented, may give the Conventions and the Protocol a significance and a relevence in armed conflict which the Protecting Power system has hitherto not been able to achieve. Finally, this is an area of activity where the international lawyer may play a vital part in salvaging some remnants of humanity and decency amid the cruelties, miseries and squalor of all wars. The task is worth the attempt.

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