

# LEGAL ADVISERS IN ARMED FORCES



Each state must make legal advisers available, when necessary, to advise military commanders at the appropriate level on the application of international humanitarian law (IHL). This obligation, founded in treaty and customary IHL, is a corollary of the customary obligation of states under common Article 1 of the 1949 Geneva Conventions (GCs) to respect and ensure respect for IHL in all circumstances. It also forms part of the general obligation of states to disseminate IHL under the Conventions, their Additional Protocols and customary IHL.

## THE OBLIGATION TO MAKE LEGAL ADVISERS AVAILABLE

Until the Second World War, states primarily instructed their armed forces in the rules of IHL through military manuals. Drafted in response to the atrocities committed during that war, the Geneva Conventions introduced an obligation to make IHL better known (Article 47 GC I, Article 48 GC II, Article 127 GC III, Article 144 GC IV). In this light and in part owing to the development and increasing complexity of IHL, many states began employing qualified lawyers to advise military commanders on the application of IHL. With the adoption of Additional Protocol I (AP I), applicable in international armed conflicts, making legal advisers available in the armed forces became an obligation (Article 82).

Article 82 of AP I states that “[t]he 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 on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject”. This article, coupled with the obligation under Article 6 of AP I to train “qualified personnel to facilitate the application of the Conventions and this Protocol”, necessitates the training of competent personnel in IHL.

It is clear from the wording (“at all times”) that Article 82 applies in time of peace as well as in time of armed conflict. The obligation also extends to national liberation movements, which would come under the heading “Parties to the conflict” for the duration of a conflict.

Today, the obligation on states to make legal advisers available is considered customary IHL, applicable in both international and non-international armed conflicts (Rule 141 of the ICRC study on customary IHL). The obligation is a corollary of the customary obligation of states to respect and ensure respect for IHL (common Article 1 of the GCs, Rule 139 of the ICRC study on customary IHL) and forms part of the general obligation of states to disseminate IHL as widely as possible, in particular by including its study in their military training programmes (Article 47 GC I, Article 48 GC II, Articles 41 and 127 GC III, Articles 99 and 144 GC IV, Articles 80, 82, 83 and 87 AP I, Article 19 AP II, Article 7 AP III, Rules 142 and 143 of the ICRC study on customary IHL).

Though there is no practice or explicit treaty obligation requiring armed groups to have legal advisers, the non-availability of a legal adviser cannot justify any violation of IHL by any party to an armed conflict.

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## APPOINTMENT OF LEGAL ADVISERS

Legal advisers may be recruited from civilian or military sources. They must be capable of advising the military commanders concerned on the application of IHL and the appropriate instruction to be given to the armed forces on this subject.

States are free to regulate the selection, training and appointment of legal advisers, be they civilian or military. While the use and allocation of advisers are described in flexible terms (“when necessary”, “at the appropriate level”), this in no way alters the obligation to create the post of legal adviser. However, the extent to which a state implements the required measures may vary, depending on the anticipated level of combat and the importance of the role that legal advisers are called upon to play. Some may choose to appoint legal advisers at every – or nearly every – level of command. Others will appoint them only at the headquarters of higher formations and at military academies. Still others may only envisage their participation in exceptional situations or on an “as needed” basis. States should, however, specify their functions and responsibilities in precise terms so that legal advisers can carry out their assigned tasks effectively and efficiently.

It could be helpful for the implementation of this obligation if states were to create a unit or service devoted to IHL within the Ministry/Department of Defence. Such a unit or service could be responsible for assembling a complete library of applicable texts, such as the core IHL treaties and military doctrines and manuals (with their translations), and for recruiting and training legal advisers.

## **ROLE OF LEGAL ADVISERS**

The tasks of legal advisers in time of peace differ from those they are required to perform during an armed conflict.

In peacetime, the main task of legal advisers with regard to IHL is to support the dissemination, training and teaching of the subject. Such tasks are not confined to the obligations of states under the Geneva Conventions and AP I but are also carried out as part of their obligation to implement other IHL treaties, such as those restricting means and methods of warfare. For example, Article 14(3) of the Amended Protocol II to the 1980 Convention on Certain Conventional Weapons requires that states party to the Protocol “issue relevant military instructions and operating procedures and that armed forces personnel receive training commensurate with their duties and responsibilities”. Target groups for dissemination and training consist primarily of students at military schools, headquarters staff of the unit to which they are attached, junior commanders, and soldiers, especially when performing exercises or role-playing future conflicts or major disasters. Legal advisers are also regularly part of delegations to negotiate new IHL treaties and support the domestic implementation of those treaties.

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Legal advisers may also be involved in examining the compliance of new weapons, means and methods of warfare with IHL, as required under Article 36 of AP I.

In times of armed conflict, the role of legal advisers is preventive and involves advising commanders on the application of and compliance with IHL. They give opinions on current or planned military operations, apply their expertise to specific issues facing a commander and remind commanders of their duties under Article 87 of AP I. In joint or multilateral operations, the legal advisers of the various armed forces concerned should cooperate to ensure concordant opinions on most points, even where these are controversial.

## **THE POSITION OF LEGAL ADVISERS IN THE HIERARCHY**

Having established the role of its legal advisers, a state must also specify where in the command structure legal advisers should be placed. That decision may depend on their tasks. For example, if their role is to advise on the application of IHL, they might be attached to larger formations and higher levels of command. Where they support IHL instruction, they might be placed in a more operational context, such as at brigade or regimental level.

While legal advisers provide a degree of legal security for commanders, they must do so by complying with the letter and spirit of IHL. Legal advisers do not replace military commanders. Commanders always retain their leading role and their responsibilities and accountability within the decision-making process.




States have different command and control structures. In some cases, legal advisers may be placed exclusively under the command of the officer in charge of the unit or headquarters to which they are attached; in other cases, they may be placed under the direct command of that commander while under the overall direction of the legal department of the Ministry of Defence.

## **ICRC SUPPORT**

The ICRC is ready to support states in fulfilling this obligation and to help prepare legal advisers for their role, for example by running relevant courses and seminars.

## **MISSION**

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance. The ICRC also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the Geneva Conventions and the International Red Cross and Red Crescent Movement. It directs and coordinates the international activities conducted by the Movement in armed conflicts and other situations of violence.

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