Legal Advisers in the Armed Forces

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1 Introduction and Concept

The roles of legal advisers in public international law are multifaceted as they emanate from a range of legal, political and administrative systems. This chapter focuses on legal advisers to the armed forces under Article 82 of the 1977 Additional Protocol I (hereinafter AP I) to the 1949 Geneva Conventions and international customary law with special emphasis on the work of legal advisers working with the German military. It builds on the experiences of one of the authors who is legal adviser with the Bundeswehr; the federal armed forces of Germany. Article 82 of AP I reads as follow:

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 on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.

Therefore, legal advisers in the armed forces form a special group among the legal advisers in public international law. State Parties to the AP I (to date 174) have an obligation to provide legal advisers to commanders. However, even States that have not ratified AP I usually have legal advisers in their armed

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forces. Thus, Article 82 of AP I is seen as customary international law for State armed forces.3

In practice, legal advice to the armed forces is not limited to the Geneva Conventions and AP I but encompasses the whole range of public international law linked to international humanitarian law (IHL) and the law of armed conflicts. Moreover, no distinction is made in practice between legal advice on humanitarian law applicable in international armed conflicts and that applicable in non-international armed conflicts.4

States Parties have a duty to appoint legal advisers “at all times”, ie both during peacetime and in armed conflict. “Parties to the conflict”, on the other hand, shall make legal advisers only available in time of armed conflict. The term “Parties to the conflict” refers to armed opposition groups under Article 1 (4) AP I and customary international law. However, so far, this has remained a rather theoretical issue without practical relevance.5 Nevertheless, armed opposition groups are not only obliged but advised to employ legal advisers since all parties to a conflict must equally respect and ensure respect for international humanitarian law and all individuals are subject to criminal responsibility.

According to Article 82 of AP I, legal advisers shall be made available to commanders “at the appropriate level”, which gives the States Parties discretion in the modalities of employment. In most countries, they are giving legal advice to military personnel from company commander upwards, that is from the lowest level where disciplinary authority is exercised.

Additionally, there are different rules and regulations for legal advisers in armed forces in the respective national laws. For example, legal advisers to the German armed forces have to be lawyers who are qualified to exercise the function of a judge.6 However, since the wording “qualified” was deleted during negotiations of the drafting process of AP I, it is well accepted that also military personnel trained in public international law can serve as legal advisers.7

In some countries, for example Cameroon, legal advisers need to hold officer...