
INTERNATIONAL LAW STUDIES

— *Published Since 1895* —

The Howard S. Levie
Distinguished Essay:

Legal Advisers in the Field
During Armed Conflict

Yoram Dinstein

97 INT'L L. STUD. 917 (2021)

Volume 97



2021

Published by the Stockton Center for International Law

ISSN 2375-2831

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CONTENTS

| | | |
|------|---|-----|
| I. | The Concept | 918 |
| II. | Application in Practice | 919 |
| | A. The Appropriate Level of Command..... | 919 |
| | B. The Role of the Legal Adviser in General..... | 920 |
| | C. The Exception: Legal Advisers with De Facto Veto Power.. | 922 |
| III. | Alleged Demerits of the System | 923 |
| | A. Infringement of the Commander's Freedom of Action? | 923 |
| | B. Legal Advisers in a Bind? | 925 |
| IV. | Legal Advice in Context..... | 925 |
| | A. Dissemination | 925 |
| | B. Orders and Instructions | 926 |
| | C. Training in General..... | 928 |
| | D. Training of Legal Advisers..... | 929 |
| V. | Accountability for War Crimes | 930 |
| | A. Military Commanders and War Crimes | 930 |
| | B. Legal Advisers Giving Erroneous Counsel..... | 931 |
| | C. Legal Advisers and Complicity..... | 933 |
| | D. Military Commanders and Mistake of Law | 934 |
| VI. | Conclusions | 935 |

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I. THE CONCEPT

Legal advisers are supposed to be made available to military commanders, particularly during hostilities, as a product of AP/I (Protocol I of 1977 Additional to the Geneva Conventions of 1949). Article 82 of AP/I proclaims:

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.¹

This treaty stipulation was quite innovative in 1977,² but it has definitely caught on thenceforth. Needless to say, all Contracting Parties to AP/I are bound to comply with Article 82 (unless an explicit reservation has been recorded at the time of ratification or accession³). But even as far as non-Contracting Parties are concerned, it is noteworthy that the United States—which thoroughly objects to numerous provisions of AP/I—by no means dissents from Article 82. Indeed, the US Department of Defense *Law of War Manual* (citing Article 82) attests that qualified legal advisers are made available at all levels of command to provide advice about law of war compliance during planning and execution of operations.⁴

A study of the practice of States, made by the ICRC (International Committee of the Red Cross), confirms that the norm requiring that legal advisers be made available to advise military commanders in time of armed conflict currently reflects customary international law.⁵ The prevalence of germane

1. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 82, June 8, 1977, 1125 U.N.T.S. 3, 41 [hereinafter AP/I].

2. See K.J. Partsch, *Article 82*, in *NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949*, at 564 (Michael Bothe et al. eds., 1982).

3. There are a host of reservations to AP/I. See *THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS* 792 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004). However, none of them deflects from Article 82.

4. OFFICE OF THE GENERAL COUNSEL, U.S. DEPARTMENT OF DEFENSE, *LAW OF WAR MANUAL* § 18.5.1 (rev. ed. Dec. 2016) [hereinafter U.S. DOD LAW OF WAR MANUAL].

5. See 1 *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* 500 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

States' practice cannot be gainsaid, although some critics maintain that it is uncertain whether non-Contracting Parties act the way they do because they feel that they are bound by a customary legal obligation or simply "as a matter of operational practicality."⁶

The language of Article 82 is somewhat unusual. As the ICRC *Commentary* on AP/I stresses, the clause combines a clear-cut obligation (immanent in the phrase "shall ensure") with a certain degree of flexibility (derived from the unspecified reference to "the appropriate level" and the qualifying words "when necessary").⁷

II. APPLICATION IN PRACTICE

A. *The Appropriate Level of Command*

Each State is empowered to determine the appropriate level of military command to which it is necessary to make legal advisers available.⁸ In the past, the operational level considered most suitable in land warfare seemed to have been, in the main, the headquarters of a division or a larger unit.⁹ But there is a growing tendency to post legal advisers to brigades,¹⁰ and even to smaller military formations acting independently.¹¹ In air and maritime campaigns, legal advisers will commonly be assigned to central (theater) commands.

Plainly, an attachment of legal advisers to lower levels of command can prove to be unfeasible to the point of incongruity.¹² A legal adviser cannot

6. David Turns, *Implementation and Compliance*, in PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 354, 362 (Elizabeth Wilmshurst & Susan Breau eds., 2007).

7. Jean de Preux, *Article 82*, in COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 947, 949 (Yves Sandoz et al. eds., 1987).

8. See Leslie C. Green, *The Role of Legal Advisers in the Armed Forces*, 7 ISRAEL YEARBOOK ON HUMAN RIGHTS 154, 163 (1977).

9. See Günther Moritz, *Legal Advisers in Armed Forces: Position and Functions*, 21 MILITARY LAW AND LAW OF WAR REVIEW 483, 486 (1982).

10. See Amendment 7 of 2013 to page 413 of the original 2004 UK Manual. UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT 413 n.16 (2004).

11. See J.F.R. Boddens Hosang, *International Humanitarian Law, Self-Defence and Rules of Engagement: Application in the Netherlands*, 48 COLLEGIUM 172, 174 n.5 (2018).

12. See Michael C. Denny, *The Impact of Article 82 of Protocol I to the 1949 Geneva Conventions on the Organization and Operation of a Division SJA Office*, THE ARMY LAWYER, Apr. 1980, at 14, 17.

be ensconced in the turret of a tank, in the cockpit of a jet fighter, or on the deck of a missile boat. That said, the efficacy of modern digital communications (including e-mails) is such that apposite legal advice can be relayed from headquarters to subordinate units with scarcely any time-lag.¹³

In the 1945 war crimes trial of *The Peleus*, a British judge advocate famously said: “It is quite obvious that no sailor and no soldier can carry with him a library of international law, or have immediate access to a professor in that subject who can tell him whether or not a particular command is a lawful one.”¹⁴

The passage relates, of course, to obedience to orders rather than to actions taken by commanders. Leaving that aside, the availability of professional legal advisers to assist military commanders is devised to surmount the obstacle adverted to by the judge advocate. Lawyers, too, may admittedly be in want of a library of international law or a specialist’s opinion. But that should only marginally handicap them. If a problem strays outside the area of expertise of legal advisers, they ought to be able to tap bibliographical resources—as well as benefit from the feedback of colleagues and superiors—by transmitting and receiving messages electronically.

B. *The Role of the Legal Adviser in General*

Whatever the operational layer to which legal advisers are seconded, their duty is to advise military commanders. Article 82 refers to advice on (i) the application of the Geneva Conventions and AP/I, as well as (ii) their instruction. “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.”¹⁵ In other words, the broadest gamut of LOAC (law of armed conflict) is within the ambit of the interaction between military commanders and their legal advisers.

13. See WILLIAM H. BOOTHBY, *THE LAW OF TARGETING* 484 (2012).

14. *The Peleus Trial* [1945] (British Military Court for the Trial of War Criminals, Hamburg, 1945), reported in UNITED NATIONS WAR CRIMES COMMISSION, 1 *LAW REPORTS OF TRIALS OF WAR CRIMINALS* 1, 12 (1947).

15. Maiki Kuhn & Antje C. Berger, *Legal Advisers in the Armed Forces*, in *THE ROLE OF LEGAL ADVISERS IN INTERNATIONAL LAW* 337, 338 (Andraž Zidar & Jean-Pierre Gauci eds., 2016).

Naturally, the appointment of legal advisers to field tasks is a means rather than an end in itself. Legal advisers are made available to military commanders for a purpose. It is pointless to deploy legal advisers to assist military commanders unless the military commanders in effect consult them when LOAC issues arise.¹⁶ For their part, legal advisers have to be prepared to caution military commanders against anticipated actions that are incompatible with LOAC, outlining alternative options.¹⁷ Moreover, “[t]he idea that advice is given only when sought must be discarded.”¹⁸ Legal advisers are expected to offer professional advice “even *proprio motu*.”¹⁹ To be able to do that, legal advisers incontestably need access to the military commanders themselves and to the information that is crucial for the discharge of their duties.²⁰

As a rule, legal advisers have sufficient rank and experience to be able to stand up to the challenge of contributing to the planning and execution of military operations in a skillful manner that invites esteem.²¹ But, since the thinking of legal advisers may not correspond with the ingrained inclinations of military commanders, legal advisers (albeit normally embedded in the armed forces, rather than serving as civilians²²) have to be somewhat detached from the straight chain of command.²³ Correspondingly, the German *Law of Armed Conflict Manual* spells out that “military superiors are only authorized to direct legal advisers in administrative matters, not in the assessment of legal matters.”²⁴

Be their professional counsel as it may, legal advisers acting pursuant to Article 82 are there to advise military commanders and “not to replace

16. See G.I.A.D. Draper, *Role of Legal Advisers in Armed Forces*, 202 INTERNATIONAL REVIEW OF THE RED CROSS 6, 15 (1978).

17. See A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* 370 (3d ed. 2012).

18. G.I.A.D. Draper, *Intervention*, 21 MILITARY LAW AND LAW OF WAR REVIEW 515, 517 (1982).

19. See de Preux, *supra* note 7, at 953.

20. See UNITED KINGDOM MINISTRY OF DEFENCE, *LEGAL SUPPORT TO JOINT OPERATIONS* 83 (3d ed. 2018).

21. See Levator Norsworthy Jr., *Organization for Battle: The Judge Advocate's Responsibility under Article 82 of Protocol I to the Geneva Conventions*, 93 MILITARY LAW REVIEW 9, 18 (1981).

22. See Michael L. Kramer & Michael N. Schmitt, *Lawyers on Horseback? Thoughts on Judge Advocates and Civil-Military Relations*, 55 UCLA LAW REVIEW 1407, 1426 (2008).

23. See Christopher Greenwood, *Historical Development and Legal Basis*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 1, 43 (Dieter Fleck ed., 2d ed. 2008).

24. FEDERAL MINISTRY OF DEFENCE (GERMANY), ZDV 15/2, *LAW OF ARMED CONFLICT MANUAL* ¶ 154 (2013).

them.”²⁵ Differently put, the role of a legal adviser is “confined to advice only” and not to the implementation of that advice.²⁶ At the end of the day, the decision-making is left squarely in the hands of the military commander.

C. *The Exception: Legal Advisers with De Facto Veto Power*

There is a notable exception to the rule concerning the purely advisory character of the legal counsel submitted to military commanders, and that is Israel. IDF (Israel Defense Forces) legal advisers are functioning within a MAG (Military Advocate General) Corps. Appointed directly by the Minister of Defense, the MAG—who serves on the IDF General Staff—acts independently of the Chief of Staff insofar as legal matters are concerned. The MAG is “subject to no authority but the law” and is “guided only by Israel’s Attorney General.”²⁷ Furthermore, the MAG’s professional independence “extends to every subordinate military attorney serving as an officer within the MAG Corps.”²⁸

In theory, as asseverated by a former Israeli MAG, “the final decision on all matters” even in Israel is that the military commander “can accept or reject the legal advice tendered.”²⁹ Yet, when all is said and done, once a legal opinion endorsed by the MAG is rendered, Israeli military commanders “have no option but to follow the advice of their lawyers.”³⁰ In consequence, when acting under the personal aegis of the MAG, Israeli legal advisers have gained “a certain de facto veto power” vis-à-vis military commanders.³¹

The de facto veto phenomenon is quite unique. Israel is not a Contracting Party to AP/I, so there is no need to reconcile its practice with Article

25. Jean de Preux, *Article 87*, in COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 7, at 1017, 1021.

26. Dov Shefi, *The Status of the Legal Adviser to the Armed Forces: His Functions and Powers*, 100 MILITARY LAW REVIEW 119, 128 (1983).

27. See Report Published under the Auspices of Government of Israel, *The 2014 Gaza Conflict (“Operation Protective Edge”): Factual and Legal Aspects*, 45 ISRAEL YEARBOOK ON HUMAN RIGHTS 237, 406 (2015) [hereinafter *The 2014 Gaza Conflict*].

28. *Id.* at 406–7.

29. Dov Shefi, *Intervention: The Status of the Legal Adviser to the Armed Forces – His Functions and Powers*, 21 MILITARY LAW AND LAW OF WAR REVIEW 507, 508 (1982).

30. See Michael N. Schmitt & John J. Merriam, *The Tyranny of Context: Israeli Targeting Practices in Legal Perspective*, 37 UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL LAW 53, 86–87 (2015).

31. Amichai Cohen, *Legal Operational Advice in the Israeli Defense Forces: The International Law Department and the Changing Nature of International Humanitarian Law*, 26 CONNECTICUT JOURNAL OF INTERNATIONAL LAW 367, 381 (2011).

82. However, even if inspected through the lens of Article 82, it is impossible to deny the prerogative of a State to rein in its military commanders and to tip the scale in the balance of authority in favor of legal advisers.

III. ALLEGED DEMERITS OF THE SYSTEM

A. Infringement of the Military Commander's Freedom of Action?

Curiously, it was in Israel that serious doubt has been cast on the very concept of posting legal advisers to advise military commanders during combat. This came about in a report of a Public Commission of Inquiry set up by the government—with retired Justice E. Winograd in the Chair—in order to investigate all the dimensions of the 2006 hostilities with Hezbollah (known in Israel as the Second Lebanon War). Chapter 14 of the final Winograd Report, published in 2008, was devoted to diverse aspects of international law; and it addressed at some length the specific topic of legal advisers made available to military commanders.³²

The Winograd Report registered that—in the course of the 2006 fighting—representatives of the MAG dispensed legal advice in real time at the Headquarters of the IDF Northern Command, and in some instances also in subordinate units.³³ Without mentioning Article 82 of AP/I, the Report alluded to the similarity of the Israeli practice to that prevalent in other Western armed forces and remarked that many benefits can be derived from it.³⁴ Even so, the Report queried whether the practice is desirable, since in the jaundiced view of the Commission (i) LOAC norms are often unclear and equivocal³⁵ and (ii) overreliance on legal advice in the midst of hostilities is liable to divert responsibility from military commanders to their legal advisers and to disrupt operational activities.³⁶

The Winograd Commission concluded that, on the whole, it would be better for military commanders in the field to concentrate on combat rather than spend crucial time in consulting with legal advisers.³⁷ The Commission

32. 1 FINAL REPORT OF THE WINOGRAD COMMISSION 481 (2008) (in Hebrew). An unofficial English translation of most of chapter 14 appears in 2 HOW DOES LAW PROTECT IN WAR? 1276 (Marco Sassòli et al. eds., 3d ed. 2011). (References below will be made to the paragraph numbers to enable following all the key points in the English translation.)

33. *Id.* ¶ 26.

34. *Id.* ¶ 27.

35. *Id.* ¶ 21.

36. *Id.* ¶ 29.

37. *Id.* ¶ 31.

preferred a policy of (i) instilling in combatants the legal norms of conduct prior to action; (ii) reviewing the action afterwards, *inter alia*, in the context of incurring responsibility when legal norms are flagrantly breached; yet (iii) vesting decision-makers with freedom of action when fighting is ongoing.³⁸

The Winograd Commission's approach purported to safeguard military commanders from any distraction in the heat of battle. However, on top of colliding head-on with lessons learned in wide-ranging experience accumulated since the adoption of Article 82, the Report overlooked the level of the military command to which legal advisers are designated. After all, it has never been contemplated that commanders of small units under fire should take time out to consult lawyers about critical decisions that may have to be cemented in split seconds. Legal advisers are present at some relative distance from the front line, epitomized by the headquarters of a division or a brigade (the usual levels benchmarking their assignment). In these surroundings, the pace of events—despite its intensity—allows some pause for reflection. Staff discussions are routinely held, in both the planning and execution phases of operations, and teamwork is taken for granted. Is it logical that, of all potential dialogues, only consultations with legal advisers are to be excluded? When all pertinent data (encompassing the choice of means and methods of warfare, the interpretation of intelligence, the allocation and coordination of resources, etc.) are synthesized at headquarters, input by legal advisers would be conspicuous by its absence.

The Winograd Commission was confident that, by eliminating from the equation time-consuming discourses with legal advisers, it was shielding the interests of military commanders who would thereby retain their full discretion in combat. But the Report is afflicted by a paradox. On the one hand, the Commission noted that the initiative for legal advice during the 2006 hostilities frequently originated from the military units engaged.³⁹ It even brought to the fore the apprehension that military commanders' concern about possible criminal prosecution for LOAC breaches might paralyze them, thus detrimentally affecting operational missions.⁴⁰ On the other hand, the Commission rejected legal advisers as an antidote for that potential paralysis.

It is counter-intuitive to believe that military commanders would choose to face the odium of protracted future prosecutions, liable to taint their reputation and harm their careers, rather than briefly pause for consultations

38. *Id.* ¶ 30.

39. *Id.* ¶ 26.

40. *Id.* ¶ 23.

with legal advisers. The Winograd Commission was simply off the mark in striving to reverse the relentless global tide that enables military commanders to obtain counsel from legal advisers at present, in order to stave off the risk of going through a future *via dolorosa* of showing just cause for their actions.

B. *Legal Advisers in a Bind?*

One argument brought up in the Winograd Report deserves particular heed. The Commission propounded that it would be preferable for the legal advice echelon not to place itself in a situation where it might be precluded from rendering professional *post factum* opinion, inasmuch as it has already sanctioned the action when in progress.⁴¹

This last assertion is cogent in the Israeli context, taking into account that the legal adviser (if backed by the MAG) functions virtually as a full-fledged participant in the decision-making process of the military command. While there is no personal union between the individual legal adviser and any post-op investigator, it must be underscored that the MAG is entrusted with the ultimate review authority of all complaints concerning IDF misconduct.⁴² If the MAG is brought into the loop at the outset—and gives a personal stamp of approval to certain measures resorted to during combat—it may be persuasively argued that some other authority ought to review accusations of malfeasance relating to the self-same measures.

Outside Israel, the sharp edge of the argument is largely blunted. When legal advisers act in a purely consultative capacity, there is no reason for excessive misgivings about the potential role of the head of the relevant JAG (Judge Advocate General) Corps in any post-op inquiry into decisions taken by a military commander.

IV. LEGAL ADVICE IN CONTEXT

A. *Dissemination*

It goes without saying that the presence of legal advisers offering counsel to military commanders in the field cannot by itself safeguard observance of LOAC. A modicum of familiarity of the military commanders with the basic

41. *Id.* ¶ 32.

42. On the legal mechanisms for investigating complaints against IDF conduct, see *The 2014 Gaza Conflict*, *supra* note 27, at 409.

legal norms regulating the conduct of hostilities is an essential precondition for the effective implementation of LOAC.⁴³

In accordance with Article 83 of AP/I, Contracting Parties undertake (in paragraph 1) to disseminate the Geneva Conventions and AP/I as widely as possible—in particular, by including their study in programs of military instruction—and, more significantly for the purposes of this essay, paragraph 2 prescribes: “Any military or civilian authorities who, in time of armed conflict, assume responsibilities in respect of the application of the Conventions and this Protocol shall be fully acquainted with the text thereof.”⁴⁴

The general obligation incumbent on States to disseminate LOAC as widely as possible to their armed forces is accentuated already in all four 1949 Geneva Conventions for the protection of war victims,⁴⁵ as well as in the 1954 Convention for the Protection of Cultural Property,⁴⁶ and in the 1980 Convention on the Use of Certain Conventional Weapons.⁴⁷ Indubitably, this is customary international law today.⁴⁸

B. Orders and Instructions

Article 1 of Hague Conventions (II) and (IV) of 1899 and 1907, with respect to the Laws and Customs of War on Land, imposes an obligation on States to issue instructions to their armed forces in conformity with the Regulations

43. See Knut Dörmann, *Dissemination and Monitoring Compliance of International Humanitarian Law*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES 227, 228 (Wolff Heintschel von Heinegg & Volker Epping eds., 2007).

44. AP/I, *supra* note 1, art. 83(2), at 41.

45. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 47, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, 62 [hereinafter Geneva Convention (I)]; Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 48, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85, 114 [hereinafter Geneva Convention (II)]; Convention (III) Relative to the Treatment of Prisoners of War art. 127, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, 236; Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 144, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, 386.

46. Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 25, May 14, 1954, 249 U.N.T.S. 240, 258–60 [hereinafter 1954 Hague Convention].

47. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects art. 6, Oct. 10, 1980, 1342 U.N.T.S. 137, 165 [hereinafter CCW].

48. See 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 5, at 501–2.

annexed to the instrument.⁴⁹ The idea goes back to the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.⁵⁰ It has progressed to Article 45 of Geneva Convention (I) and Article 46 of Geneva Convention (II) of 1949, which stipulate that each party to the conflict—through its commanders-in-chief—shall ensure the detailed execution of the respective instrument and even provide for unforeseen circumstances (consonant with the general principles of the Conventions).⁵¹

The Geneva texts from 1864 to 1949 use the term “Commanders-in-Chief” in the plural, thereby indicating that the enunciated obligation is not limited to the supreme level of authority but extends to military command in a more general sense.⁵² Article 87(2) of AP/I ordains that, “commensurate with their level of responsibility,” commanders are required to ensure that their subordinates are aware of their obligations under the Geneva Conventions and AP/I.⁵³

The ultimate responsibility in the domain of LOAC devolves on the States concerned. Article 80(2) of AP/I lays down: “The High Contracting Parties and the Parties to the conflict shall give orders and instructions to ensure the observance of the Conventions and this Protocol, and shall supervise their execution.”⁵⁴ In a sense, orders and instructions are meant to “translate” LOAC for ready use by the armed forces.⁵⁵

Supervision of execution of orders and instructions has several dimensions, the most self-evident being the imposition of discipline in the armed forces to enforce LOAC observance. But supervision also connotes the implantation of LOAC into military doctrine. This can be done in multifarious ways. A leading technique is the promulgation of national military manuals,

49. Convention No. II with Respect to the Laws and Customs of War on Land art. 1, July 29, 1899, 32 Stat. 1803, T.S. No. 403; Convention No. IV Respecting the Laws and Customs of War on Land art. 1, Oct. 18, 1907, 36 Stat. 2227, T.S. No. 539.

50. Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 22 Stat. 940, 129 Consol. T.S. 361. *See also* THE LAWS OF ARMED CONFLICTS, *supra* note 3, at 365, 367 (Article 8).

51. Geneva Convention (I), *supra* note 45, art. 45, at 61; Geneva Convention (II), *supra* note 45, art. 46, at 114.

52. *See* INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD ¶¶ 2710–13, at 965–66 (2016).

53. AP/I, *supra* note 1, art. 87(2), at 43.

54. *Id.*, art. 80(2), at 40.

55. *See* FRITS KALSHOVEN, REFLECTIONS ON THE LAW OF WAR: COLLECTED ESSAYS 625 (2007).

such as the aforementioned US Department of Defense *Law of War Manual* (bolstered by complementary *Commander's Handbooks* released by the Army and Marines,⁵⁶ as well as by the Navy, Marines, and Coast Guard⁵⁷). Other mechanisms for inculcating LOAC norms in the armed forces are also in use (telling examples are the Air Force's *The Law of Air, Space, and Cyber Operations*⁵⁸ and the Army's *Law of Armed Conflict Deskbook*⁵⁹).

C. Training in General

It is not enough for States to enact orders and instructions or to produce manuals and handbooks. It is indispensable to provide all tiers of the armed forces with proper LOAC training. Legal advisers under Article 82 of AP/I are required to offer counsel to military commanders not only on the application of LOAC but also on “the appropriate instruction to be given the armed forces on this subject.”

Appropriate instruction in LOAC must commence in peacetime. While it is mandatory to train every soldier, sailor, and aviator in fundamental norms of LOAC, attention must be given to the specialized positions held and functions performed in the military hierarchy.⁶⁰ Senior commanders cannot be treated equally with junior (or non-commissioned) officers: the higher the rank of commanders, the better acquainted with LOAC they should be. Military academies for graduating officers can therefore stick to fairly introductory courses, whereas staff and war colleges should focus on a more advanced syllabus. Obviously, the main thrust of all training has to be attuned to the priorities of the specific Service (with correlative emphasis on land, naval, or air warfare, as the case may be).

56. HEADQUARTERS, DEPARTMENT OF THE ARMY, HEADQUARTERS, UNITED STATES MARINE CORPS, FM 6-27/MCTP 11-10C, *THE COMMANDER'S HANDBOOK ON THE LAW OF LAND WARFARE* (2019) (superseding an earlier version of 1956).

57. U.S. NAVY, MARINE CORPS & COAST GUARD, NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A, *THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS* (2017) (superseding an earlier version of 2007).

58. JUDGE ADVOCATE GENERAL & COMMANDANT, *THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. AIR FORCE, THE LAW OF AIR, SPACE, AND CYBER OPERATIONS* (4th ed. 2020).

59. NATIONAL SECURITY LAW DEPARTMENT, *THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, LAW OF ARMED CONFLICT DESKBOOK* (2020).

60. See Elzbieta Mikos-Skuza, *Dissemination of the Conventions, including in Time of Armed Conflict, in THE 1949 GENEVA CONVENTIONS: A COMMENTARY* 597, 604 (Andrew Clapham et al. eds., 2015).

Considering that a study of LOAC is only one component in the training curriculum of officers of whatever rank, a greater exposure of senior commanders to LOAC does not signify that they are likely to acquire more than sketchy legal proficiency. It is consequently important to verify that commanders absorb the core rules of LOAC falling within their actual remit.⁶¹ Bearing in mind that commanders may not be fully conversant with the relevant LOAC strictures, legal advisers are called upon to assist them in weighing military versus legal constraints.

D. Training of Legal Advisers

The “unstated but necessary corollary” of the general training requisite is that legal advisers themselves must get their share of the “appropriate instruction.”⁶² The average graduate of law school is rarely adept at the intricacies of LOAC. That being the case, the necessary training of armed forces must begin with in-depth and well-rounded⁶³ preparation of legal advisers for their missions in the field.

Training a typical attorney to become a legal adviser with LOAC adroitness is not just a matter of polishing some edges. The sheer size of the materials to be perused speaks for itself. For instance, the US Department of Defense *Law of War Manual* runs into almost 1,200 pages and each of the complementary Service handbooks is comprised of hundreds of additional pages.⁶⁴ Besides, LOAC training cannot be confined to memorizing manuals and studying general orders. There is no way for wide-spectrum texts to come to grips with every concrete challenge engendered by combat contingencies. When the chips are down, legal advisers should be trained to cope not only with conventional scenarios but also with unforeseen circumstances (cf. Geneva Article 45/46).

61. See 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 5, at 502.

62. Michael A. Newton, *Modern Military Necessity: The Role & Relevance of Military Lawyers*, 12 ROGER WILLIAMS UNIVERSITY LAW REVIEW 877, 890 (2007).

63. By way of illustration, legal advisers “need to be thoroughly trained in the protection of cultural property” in light of the provision of Article 25 of the 1954 Hague Convention. 1954 Hague Convention, *supra* note 46, art. 25, at 258–60. JIRI TOMAN, THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT 276 (1996).

64. The 1995 version of the U.S. COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (see *supra* note 57) even had an elaborate *Annotated Supplement*, published as 73 INTERNATIONAL LAW STUDIES (A.R. Thomas and James C. Duncan eds., 1999).

The United States has established an outstanding Army JAG School,⁶⁵ with parallel Naval and Air Force JAG Schools in operation. Yet, not every country enjoys the luxury of such expensive educational facilities. If national training resources are limited, States can obtain external sustenance from various foreign sources.⁶⁶ It is also possible to profit from training opportunities available in international centers like the San Remo Institute of International Humanitarian Law, which for many years has provided LOAC courses (in several languages) for both lawyers and operational officers from across the globe.⁶⁷

V. ACCOUNTABILITY FOR WAR CRIMES

A. Military Commanders and War Crimes

We live in an era of constant upsurge in public pressure for exposing the military community to the ordeal of war crimes trials. After decades during which the international community declined to hold such trials,⁶⁸ a new *zeitgeist* has evolved, culminating in the establishment in 1998 of the International Criminal Court (starting to function in 2002). Even in countries like the United States that have not accepted the jurisdiction of the Court, there is a growing demand that members of the armed forces will be subjected to the full brunt of the domestic penal code if and when they perpetrate serious breaches of LOAC.

The person who is especially in the limelight of any war crimes investigation is patently the military commander. When the record is examined, any LOAC admonition by a legal adviser against pursuing a questionable course of action during combat acquires special significance by hindsight. A military commander who ignores professional remonstrance *in flagrante* should not be surprised by the ensuing criminal consequences. Indeed, if war crimes

65. On the JAG School, see Richard P. DiMeglio, *Training Army Judge Advocates to Advise Commanders as Operational Law Attorneys*, 54 BOSTON COLLEGE LAW REVIEW 1185, 1192–95 (2013).

66. See Laurie R. Blank & Gregory P. Noone, *LAW OF WAR TRAINING: RESOURCES FOR MILITARY AND CIVILIAN LEADERS* 6–7 (2d ed. 2013).

67. For the origins of the San Remo military courses, see Giorgio Blais, *The International Institute of Humanitarian Law (San Remo) and Its International Military Courses on the Law of Armed Conflict*, 37 INTERNATIONAL REVIEW OF THE RED CROSS 451 (1997).

68. The failure of the international community for half a century to punish war criminals was underscored by Howard S. Levie, *War Crimes*, 72 INTERNATIONAL LAW STUDIES 95, 107 (1998).

charges lead to a verdict of conviction, a military commander's refusal to follow professional legal advice will inescapably be considered an aggravating circumstance affecting the sentence to be determined.

B. Legal Advisers Giving Erroneous Counsel

There is a natural tendency to envisage every legal adviser as a metaphorical brake, applying pressure on the military commander to desist from conduct that might clash with LOAC. But legal advisers are not infallible and they are liable to give a go-ahead signal to acts branded as war crimes in later judicial proceedings.

To analyze the subject in its most rudimentary form, it may be useful to explore the paradigmatic scenario in which a military command is engaged in comprising a list (or "bank") of potential targets for attack by military aircraft, missiles, artillery, or otherwise. The targets' selection must be based on the LOAC cardinal principle of distinction between military objectives and civilian objects.⁶⁹ When looked at from the angle of penal accountability, the pivotal text is Article 8(2)(b)(ii) of the 1998 Rome Statute of the International Criminal Court defining as a war crime the act of "[i]ntentionally directing attacks against civilian objects, that is, objects which are not military objectives."⁷⁰

Targeting is a multifaceted operation that includes taking of precautions and minimizing collateral damage to innocent civilians.⁷¹ But the quintessential first step is to identify military objectives (i.e., lawful targets for attack), in contradistinction to civilian objects. Under Article 52(2) of AP/I, "military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."⁷² The United States has expressly accepted this definition of military objectives,⁷³ which is shored up

69. On the cardinal principle of distinction, see *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 78 (July 8).

70. Rome Statute of the International Criminal Court art. 8(2)(b)(ii), July 17, 1998, 2187 U.N.T.S. 90, 95.

71. On the whole process of targeting, see Geoffrey S. Corn, *Targeting, Command Judgment, and a Proposed Quantum of Information Component*, 77 BROOKLYN LAW REVIEW 437, 444–50 (2012).

72. AP/I, *supra* note 1, art. 52(2), at 27.

73. See U.S. DOD LAW OF WAR MANUAL, *supra* note 4, § 19.20.1.1.

by other treaty texts.⁷⁴ The definition has been held by the Eritrea-Ethiopia Claims Commission to reflect customary international law.⁷⁵

Although buttressed by consensus, the abstract terminology of Article 52(2) does not really enlighten military commanders faced with practical dilemmas in concrete battle situations.⁷⁶ Commanders are often baffled by the question whether a particular object (say, a TV broadcasting installation⁷⁷) qualifies as a military objective by nature or a given area outside the combat zone is classified as a military objective by location.⁷⁸ Not to mention the broader quandary whether “war-sustaining” (at variance from “war-fighting”) can constitute military objectives.⁷⁹ If legal advisers are at hand, military commanders will presumably be eager to consult them on the resolution of these and similar perplexities. Interestingly, the German *Commander’s Handbook* states categorically that “[l]egal advisers are to be involved in the process of targeting.”⁸⁰

It is only natural to assume that—when consulted—legal advisers would do whatever they can to steer military commanders away from proscribed conduct.⁸¹ But the Winograd Commission should be complimented for putting its finger on the plight of a military commander whose legal adviser makes a wrong call by approving certain acts that are regarded by third parties as a war crime.⁸² The issue was raised by the Commission in the singular

74. See Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices art. 2(4), Oct. 10, 1980, 1342 U.N.T.S. 168, 168; Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons art. 1(3), Oct. 10, 1980, 1342 U.N.T.S. 171, 172.

75. Partial Award, Western Front, Aerial Bombardment and Related Claims, Eritrea’s Claims 1, 3, 5, 9–13, 14, 21, 25 & 26 (Eri. v. Eth.), 26 R.I.I.A. 291, 332 (Eri.–Eth. Claims Comm’n 2005), *reprinted in* 45 INTERNATIONAL LEGAL MATERIALS 396, 418 (2006).

76. See YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 103–4 (3d ed. 2016).

77. See Arne W. Dahl, *Military Objectives by Nature*, 48 ISRAEL YEARBOOK ON HUMAN RIGHTS 1, 16–17 (2018).

78. See IAN HENDERSON, THE CONTEMPORARY LAW OF TARGETING 56–57 (2009).

79. The U.S. position is resoundingly affirmative. U.S. DOD LAW OF WAR MANUAL, *supra* note 4, § 5.6.6.2. *Contra* SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA 148–50 (Louise Doswald-Beck ed., 1995).

80. FEDERAL MINISTRY OF DEFENCE (GERMANY), COMMANDER’S HANDBOOK: LEGAL BASES FOR THE OPERATION OF NAVAL FORCES ¶ 321 (2002).

81. See Laura A. Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104 AMERICAN JOURNAL OF INTERNATIONAL LAW 1, 26 (2010).

82. 1 FINAL REPORT OF THE WINOGRAD COMMISSION, *supra* note 32, ¶ 27.

normative landscape of Israel. However, the peril of legal advisers proffering possibly faulty counsel to military commanders is fraught in every country.

Clearly, the fact that a military commander has been assured by a legal adviser that a specific object passes muster as a military objective cannot be regarded as conclusive. An eventual judicial probe may infer from the same set of circumstances that (contrary to the legal adviser's opinion) the object was truly civilian in character. Would the military commander and/or the legal adviser then be exposed to war crimes prosecution by virtue of Article 8(2)(b)(ii) of the Rome Statute?

C. Legal Advisers and Complicity

The war crime defined in Article 8(2)(b)(ii) is couched in terms of “[i]ntentionally directing attacks against civilian objects.” Evidently, the direction of attacks must be ascribed exclusively to the military commander, who—if culpable of the war crime—would be convicted as the principal actor. However, if the legal adviser dismisses doubts about the military status of an object against which an attack is to be directed, would it not be possible to charge him/her as an accomplice to the war crime? Aiding, abetting, and otherwise assisting in the commission of a crime are grounds of individual responsibility in keeping with Article 25(3)(c) of the Rome Statute.⁸³ Aiding or abetting may consist of encouragement or lending moral support to the perpetration of a war crime.⁸⁴

Judges and prosecutors, acting as accessories abetting criminal activities, can be found guilty of war crimes: this has been judicially confirmed in the setting of the acts of barbarism perpetrated under the Nazi regime.⁸⁵ No actual case law exists stigmatizing legal advisers in the field as accomplices in criminal activity. Yet, it would be hard to refute the proposition that in principle they can be deemed complicit in the commission of war crimes.⁸⁶

83. Rome Statute, *supra* note 70, art. 25(3)(c), at 105.

84. *See* Prosecutor v. Vasiljević, Case No. IT-98-32-A, Appeals Chamber Judgment, ¶ 102 (Int'l Crim. Trib. for the former Yugoslavia Feb. 25, 2004).

85. *See* Notes on the Case of the Justice Trial (Trial of Altstötter and Others), UNITED NATIONS WAR CRIMES COMMISSION, 6 LAW REPORTS OF TRIALS OF WAR CRIMINALS 76–78, 84–90 (1948); BOOTHBY, *supra* note 13, at 484.

86. *See* Ellia Ciammaichella, *A Legal Advisor's Responsibility to the International Community: When Is Legal Advice a War Crime?*, 41 VALPARAISO UNIVERSITY LAW REVIEW 1143, 1147 (2007).

D. Military Commanders and Mistake of Law

There is a corollary to the conundrum of complicity in war crimes by legal advisers. That is the query whether—by consulting with a legal adviser and getting a green light for directing an attack against a preselected object—a military commander might be relieved of individual accountability for a war crime under Article 8(2)(b)(ii). It must not be forgotten that the direction of attacks against civilian objects constitutes a war crime only if it is done “[i]ntentionally.” Pursuant to Article 30 of the Rome Statute and unless otherwise provided, an overall requirement of a mental element of “knowledge and intent” is postulated as a condition of criminal responsibility.⁸⁷ Knowledge “means awareness that a circumstance exists or a consequence will occur in the ordinary course of events,” and intent denotes that a person means to cause a certain consequence.⁸⁸ Can it be averred that a military commander, who has been assured by a legal adviser that a concrete object constitutes a *military* objective, acted with knowledge and intent to direct an attack against a *civilian* object?

The present author believes that it would be exceedingly difficult (if not impossible) to hold a military commander guilty of a war crime in such a frame of reference, assuming that the action was carried out bona fide and the legal advice was not manifestly wrong. The rationale for absolving the military commander is that, notwithstanding the existence of an actus reus, there would be no mens rea. By relying on legal advice, tendered by an expert formally deployed to serve in the command post in compliance with LOAC, a military commander may be deemed to have done all that he/she was reasonably expected and required to do.

An attempt has been made to distinguish between a military commander requesting legal assistance and one receiving unsolicited advice: “A commander cannot be exempted from liability for having relied on wrong advice from his legal advisor. Yet, the fact that he *asked* for advice keeps the possibility of resort to the defence of mistake of law open.”⁸⁹

The active/passive distinction has its attractions. But, once the military commander abides by legal advice offered by a person earmarked for that

87. Rome Statute, *supra* note 70, art. 30, at 107.

88. *Id.*

89. ELIES VAN SLIEDGERT, *INDIVIDUAL CRIMINAL RESPONSIBILITY IN INTERNATIONAL LAW* 274 (2012).

purpose congruent with LOAC, it seems immaterial how the advice percolated. The gravamen of the military commander's predicament is that the action was prompted by spurious professional guidance.

The subject-matter under discussion ties in with the provision of Article 32(2) of the Rome Statute, according to which a "mistake of law" may exceptionally be "a ground for excluding criminal responsibility if it negates the mental element required by such a crime."⁹⁰ Arguendo, a misleading legal advice validating action by the military commander would negate the mental element required by the war crime defined in Article 8(2)(b)(ii).

An authoritative solution to the problem must await elucidation by the International Criminal Court. Most scholars have skirted the issue, and few insights can be elicited from the legal literature. It has been commented that "the conditions under which a military commander can use a wrong legal advice as defence are, in any case, narrow."⁹¹ But, narrow as these conditions may be, there is a compelling need to recognize that—in the final analysis—specious legal advice may exonerate military commanders from criminal responsibility.⁹²

VI. CONCLUSIONS

There can be little doubt that the participation of legal advisers in the deliberative functioning of military headquarters during armed conflict is of vital importance. The mere attendance of legal advisers in staff meetings introduces into the operational agenda the imperative need to pay due regard to the law.⁹³ With legal advisers present, it is difficult for military commanders to plead ignorance or oversight of LOAC.⁹⁴ If a legal adviser gains trust and credibility, numerous prospective breaches of LOAC can be screened and forestalled thanks to timely intervention.

The Winograd Commission to the contrary notwithstanding, the practice of assigning legal advisers to military commands—contrived to ensure that

90. Rome Statute, *supra* note 70, art. 32(2), at 108.

91. Antje C. Berger, *Legal Advisers in Armed Forces*, in 6 THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 779, 783 (Rudiger Wolfrum ed., 2012).

92. See Amichai Cohen & Yuval Shani, *Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts*, 14 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 37, 77 (2011).

93. Cf. Michael F. Lohr & Steve Gallotta, *Legal Support in War: The Role of Military Lawyers*, 4 CHICAGO JOURNAL OF INTERNATIONAL LAW 465, 478 (2003).

94. See GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 400 (2010).

decision-makers will be able to gain access to professional LOAC counsel in real time—is here to stay. Like the dissemination of LOAC to the armed forces, the issuance of proper general orders, and the sponsoring of training courses (adjusted to rank and function), the availability of legal advisers to military commanders is an immensely useful tool. All the same, it must be conceded that this is not by itself a panacea.

No device designed to foster implementation of LOAC can be fail-safe. The integration of legal advisers into the battle environment does not rule out bad judgment calls leading to the espousal of wrongful actions. Such miscues can spawn individual criminal responsibility of legal advisers, while possibly exculpating military commanders. These are theoretical issues that have not yet been scrutinized in practice. Still, inevitably, they are bound to come to the surface (in as yet unknown forms) in future armed conflicts.