

# Legal advisers to the armed forces — The Swedish experience\*

by **Krister Thelin**

## **1. Introduction**

In ratifying the 1977 Protocols additional to the Geneva Conventions of 1949, Sweden pledged to inform and instruct the authorities responsible for the country's policy of "total defence" and their personnel, as well as the civilian population, on the rules of international law.

Article 82 of Additional Protocol I of 1977 requires the High Contracting Parties to ensure at all times that legal advisers are available to advise military commanders at the appropriate level on the application of the Geneva Conventions and Protocol I and on the appropriate instruction to be given to the armed forces.

In this paper I shall try to give an account of the Swedish experience in implementing this important part of international humanitarian law (IHL). By way of background, I shall also briefly describe the Swedish Defence Forces and outline the general military policy in Sweden.

However, in considering every aspect of this subject it has to be kept in mind that Sweden has had the good fortune to stay out of conflicts for nearly 200 years. The last time Swedish armed forces were involved in combat was in 1814, towards the end of the Napoleonic wars. Since then, Swedish troops have restricted themselves to participation in UN peace-keeping and peace-making forces.

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\* Article based on a paper presented at a seminar on international humanitarian law in Sofia on 21 September 1990 by Krister Thelin, who was then Justice of Appeal and Legal Adviser to the Commander of Sweden's Southern Military Command.

## **2. Sweden's military policy and the structure of the Swedish Defence Forces**

The goal of Sweden's security policy is, not surprisingly, the preservation of national independence, freedom and democracy.

Sweden is a large country which, together with Finland, geographically used to separate the two military alliances in northern Europe. The distance from the very north of Sweden to its southern tip is about 1,600 kilometres, which equals that between the Baltic and Naples in Italy.

While the territory is fairly large, the population is only less than nine million. Such an extensive territory calls for a large number of combat units. A military system meeting this need can be built only upon the principle of compulsory military service. Thus, to square the circle, Sweden must rely on timely mobilization, not only of its armed forces but also of the resources of our society at large: hence the concept of "total defence".

The Swedish armed forces, therefore, range from units with a high degree of combat readiness, especially within the Air Force and the Navy, to a large number of units more dependent on the call-up of reservists.

The principal aim of the Swedish defence system is to dissuade any would-be aggressor. Any military attack against Sweden, or any form of violation of its territory, will meet with resistance.

Sweden is, as a matter of often-stated policy, determined to protect its territorial integrity by all possible means, not only in war but also in peacetime. Repeated submarine intrusions have led to countermeasures reflecting the firm resolve to deal with the issue. The Swedish rules of engagement authorize every unit commander to use weapons without prior warning in internal waters to repel such intrusions. The same rules of engagement can also be applied by the military authorities in territorial waters. This has occurred occasionally during the last few years.

The Swedish armed forces depend for their operations on the organized support of the civilian infrastructure. This functional reliance renders them incapable of large-scale operations outside Swedish territory.

Forces on high alert, of all three services, are prepared to deal with incidents, to ward off border violations, to protect and if necessary demolish key facilities such as airfields and harbours, and to act as covering forces, should the need arise. In a matter of hours forces on the alert can be supplemented by the volunteer Home Guard (125,000 men).

Sweden's geographical position means that in the event of a serious crisis or war in the vicinity there are obvious risks of violation of its territory. Should there be any indication that preparations are being made for an invasion, Sweden would mobilize massively.

The mobilization system has certain unique features. There are more than 5,000 mobilization depots throughout the country, where pre-assigned, trained reservists will collect their stockpiled equipment and form units. The time required for mobilization ranges from less than a day for some territorial units to a few days for other units. All in all, Sweden can mobilize some 800,000 men and women.

Should forward defence, in the context of an attack by sea or across land borders, not succeed, organized combat will take place in every part of the country, including any area temporarily occupied. Full use will be made of the rough terrain and Ranger units will conduct organized operations against enemy lines of communications. Remaining naval and air units will cut enemy reinforcement and supply lines. The strategic objective is to inflict unacceptable losses on the aggressor, in terms of time as well as casualties. Preparations are also made for guerrilla warfare in temporarily occupied territory. It is understood that resistance will never cease in any part of Sweden.

Sweden's defence requirements, in combination with its small population, require optimum use of the pool of 800,000 trained reservists who represent ten per cent of the population. The combat-readiness of units in all branches of the military is maintained through regular call-up for refresher training.

Command and control at operational level under the Supreme Commander are exercised by six regional commanders. These have full command authority over all armed forces within their respective areas. Operational reserves may be transferred among them. Should a command function be disrupted, authority is automatically passed on.

### **3. The Swedish Committee on International Humanitarian Law**

Sweden has traditionally been involved in the development of international humanitarian law (IHL) applicable to armed conflicts. It is therefore natural that in 1979 Sweden ratified the two Protocols additional to the 1949 Geneva Conventions.

In order to study the application of IHL to situations of war, occupation or neutrality in accordance with the Protocols, a special committee (chaired by Judge Carl-Ivar Skarstedt) was set up back in 1978. It submitted its final report in 1984.

On the question of legal advisers, the Committee observed that they should act in both peacetime and in time of war at appropriate military levels. They were to advise generally on how to give instruction in international law to the armed forces and all those involved in the overall defence system. In addition, they were to provide special guidance on application of the rules of international law during preparations for and the actual conduct of military operations. The Committee emphasized that legal advisers have different duties in peacetime and in time of war. It observed that advisers must be assigned to the Supreme Commander and to military commanders at higher regional levels, and should also be available to commanders at lower regional levels.

Moreover, legal advisers should probably be assigned to division commanders and, if possible, also to brigade commanders, but rarely to commanders of smaller units. The legal advisers should form part of the staff of the units concerned. The Committee also examined a number of proposals on the planning of these new advisory duties. It gave its views on the education and training that legal advisers should have and as to whether they should be professional officers with legal training or lawyers with military training. The Committee stressed that the spirit and wording of Article 82, Protocol I, undeniably implied that the legal adviser should be a lawyer. Bearing in mind the organizational and financial circumstances in which the armed forces and the judicial system operate, the Committee was of the opinion that there were several advantages in a system whereby professional lawyers with subsequent military training were engaged as legal advisers. The Committee also outlined the functions of legal advisers in the organization of defence in time of war and in peacetime.

#### **4. Later work**

In general, the Committee's proposals were well received by the agencies, organizations and other interested bodies to which the report was submitted for comments. As a result, in 1986 the Government decided to adopt an Ordinance (1986:1029; most recent amendment 1988:62) concerning Advisers on International Law in the Defence Forces Organization. The Ordinance, which came into force on 1 January 1987, pro-

vided for the appointment of advisers on international law in a number specified by the Supreme Commander. They were to be posted at higher staff levels and would have the task of advising military leaders on how the rules of international law in war and during neutrality would be applied and also take part in the planning work on the staff. The Ordinance stipulated that there would be seven advisers on international law in the peacetime organization of the defence forces, one stationed with the Supreme Commander and one with every military commander. The advisers would participate in the instruction of defence force personnel on how the rules of international law in war and during neutrality should be applied and advise the respective commanders on questions relating to international law.

The advisers in the peacetime organization were appointed by the Supreme Commander on 1 January 1988 and took up their duties. The wartime organization was also recently established.

## **5. The present situation**

As a result of the Government Ordinance and further executive orders issued by the Supreme Commander, the present organization provides for seven peacetime legal advisers: one assigned to the Supreme Commander (Judge Skarstedt) and six others — one assigned to each of the six Military District Commanders.

In the instructions for the peacetime advisers, their tasks are broadly described as follows: to advise on the planning and implementation of instruction of IHL within the armed forces, to instruct those responsible for wartime legal advisory functions and in general to advise on questions relating to IHL. Furthermore, the legal adviser takes part in peacetime operational planning at staff level to ensure that due respect is paid at this stage to the various aspects of IHL.

Apart from the peacetime legal advisers, the wartime slots have now also been filled. All in all, some 50 advisers have been appointed at corps and division level. The number should be seen in comparison with the aforementioned total of 800,000 men and women in the Swedish armed forces, when fully mobilized.

What have been the criteria in choosing the legal advisers? As already mentioned, the Committee which examined the issue put forward two alternatives: either the posts should be filled by officers from the armed forces, who would receive training in the relevant legal areas, or suitable

civilian lawyers should be given the necessary military training. The Committee proposed the latter alternative, and this was the one which was adopted.

From the way these alternatives were stated one could deduce that the Swedish armed forces are, as it were, “poor in lawyers”. In the peacetime organization there are no lawyers at all employed in the Defence Force. i.e. there is no equivalent to the Judge Advocate's Office or similar bodies found in the armed forces of many other countries (e.g. the US, Canada, the Netherlands, the United Kingdom, or, closer to Sweden, Denmark). This lack of lawyers is due to the fact that, traditionally, cases which in other countries are handled, also in peacetime, by military or martial courts are in Sweden dealt with by ordinary courts. This tradition has been further strengthened in the last couple of years by the abolition of special wartime military courts. Military commanders have, both in peacetime and in times of mobilization or war, only a limited right to “punish” minor contraventions of military rules, primarily by imposing restrictions on movement or deductions from salaries, where admonitions are not considered sufficient. Detention proper or fines are dealt with through civilian channels — as are all accusations of ordinary crimes or offences. However, to guide the Commanders (at regimental or the equivalent level) in peacetime there are part-time advisers, usually drawn from the judiciary and known as *auditeurs*. In wartime, the organization also calls for this type of adviser, posted to certain military staffs (brigade and above).

The lack of legal personnel within the Defence Force had implications for both the recruitment and the activities of the newly introduced legal advisers on IHL.

By and large, the legal advisers assigned to wartime posts only were drawn from the same pool of lawyers as those assigned the role of *auditeurs*. The majority of them were practising lawyers in their thirties or early forties. (The legal career system in Sweden is similar to that in Germany or France. It provides for training from the age of 25, when a law degree is usually awarded after five years of study, as a law clerk at the District Court and Appellate levels, and also as an Associate District Court Judge and subsequently as an Associate Justice of Appeal, before an ordinary judgeship is awarded some twenty years later.) Some of them, but not the majority, were also reserve officers in various branches of the Defence Forces. The rest had basic training and were generally also conscript NCOs after refresher training.

In order to ensure an effective advisory function the legal advisers were assigned to the operations section of the staff in question. This was accomplished not without some discussion. First, the only lawyers so far attached to military staffs — the *auditeurs* — had normally been in the

“softer” personnel or logistics sections of the staff. Second, the question of rank was not uncontroversial. In accordance with the clear statement of the Committee, the objective was to confer on legal advisers a sufficiently high rank to secure respect within the military hierarchy. However, this would have meant they would have had a rank higher than that of other “civilian” personnel with an advisory function in the staff (e.g. priests or *auditeurs*). It has now been decided that the legal advisers at corps and division level should hold the rank of major. (The highest rank normally obtained by a reserve officer is captain.)

The peacetime legal advisers are all ordinary judges, and most of them are senior judges. Their military rank in their wartime capacity is colonel or lieutenant-colonel.

Contrary to what one might assume, considering the general level of Sweden’s international involvement in the field of IHL, education in the subject has never formed a major part of the curriculum in Swedish law schools. In order to compensate for this, all legal advisers attend courses in the subject at the Military Academy prior to their appointment. However, this is deemed insufficient and there are at present plans for further education through specially designed seminars at some of the law schools and courses of study abroad (e.g. at the International Institute of Humanitarian Law in San Remo). A society aiming to strengthen the position of IHL and military law in general was set up in Sweden in 1991.

## **6. Some reflections on the system of legal advisers**

What then is the experience so far with the newly introduced system of legal advisers in the Swedish Defence Forces? Taking into account the short period during which legal advisers have been part of the organization, due caution should be exercised in drawing far-reaching conclusions. However, it should be noted at the outset that the idea of assigning legal advisers to military commanders has aroused great interest among the commanders themselves. They usually have a very good knowledge of the requirements of IHL within their own fields and a positive attitude to the implementation of the rules. As far as I can judge, in all instances they have done everything possible to help establish the new system and encourage their new staff members.

In cases where the new system has been tested during field exercises or war games at corps or division level, the experiment has also been successful. The legal adviser has been used and consulted in various ways, depending on the type of staff and the kind of manoeuvre.

These encouraging results could, of course, be explained by the fact that the system is a new one. There is a certain amount of benign curiosity which could wear off once the system is better established and considered routine for the staff in question.

I would, for my part, also suggest that the present favourable situation could be explained by the fact that the legal advisers are considered to be “outsiders”. It is probably a fair assumption that military officers by and large have a degree of respect for civilian lawyers, especially if they are in positions of some seniority or importance (e.g. senior advocates or judges). This respect — which does not necessarily correspond to or reflect the knowledge or skill of the lawyer in the field of IHL — should not be overestimated but is obviously helpful, at least at the present introductory stage. The extent to which peacetime conditions influence performance is always difficult to gauge. The absence of wartime conditions would certainly tend to make the advisory function more idyllic than would be the case in a real conflict situation. This highlights the need for proper training and for imagination in creating the right environment during manoeuvres or field exercises.

At least three levels or fields of application, where different questions arise for the legal adviser, can be discerned:

- First, application of and compliance with the basic soldier's rules or rules of engagement at squad or section level.
- Second, the application of Articles 48-58 (especially Arts. 57 and 58) of Additional Protocol I, for example, at higher levels (battalion and above). These articles call for a high degree of awareness of civilian needs.
- Third, cooperation with one's own civilian authorities.

*The first level* is mainly a matter of education, instruction and supervision. As far as can be judged, military instructors' current knowledge as regards the obligation of the individual soldier to behave properly towards, for instance, the wounded, POWs and civilians could be regarded as sufficient — at least on the theoretical level. To what extent this would also hold true under combat conditions is difficult to assess. The main task of the legal adviser would be to stress the importance of compliance with the basic rules of IHL, including the duty to report violations, and to try to explain the whole rationale underlying the rules of IHL. *In this respect, those instructing squad leaders or company commanders would be the prime targets.*



In the past there have been incidents during field exercises involving rangers or commando units where the interrogation of POWs has not been conducted in a proper manner. This was before the introduction of legal advisers, but to what extent that development has affected an over-zealous attitude, marked by too much “Ramboism”, is hard to assess. However, such incidents are clear evidence of the need to keep a close watch in an area where it is easy to assume that the application of IHL does not cause any difficulty. In order to change an otherwise negative attitude, instructors and others need to be reminded at least of the self-serving rationale for strict compliance with the rules. Attention should be drawn to the counterproductive effect of reprisals and to the punishment prescribed for breaches of the law; it should also be pointed out that warfare is executed more efficiently if the rules are observed.

*The second level*, where the advisory element is to be integrated into actual tactical planning, is more complicated. Here too it is important to create an atmosphere where the interests of protected persons and property are duly respected and all necessary safety measures taken. Of course, most operations are planned by staff at a rank lower than that of legal adviser. This means that the adviser's best course of action is to instruct the commanders. As has been said before, the importance attached to questions of IHL at the Military Academy is very great, but relevant aspects need to be introduced more often during exercises. One of the legal adviser's main tasks is to ensure that examples are provided when discussions involving IHL at the tactical level take place.

Here the question of the legal adviser's position within his own staff, at corps, division or a higher level, must also be considered. If the legal adviser is a member of the operations section of the staff, conditions will be more favourable. However, it takes initiative and activity on the part of the adviser to gather information in order to make an evaluation and render an opinion.

A balance also needs to be struck between the role perceived as that of an “interfering busybody”, insensitive to the concepts of “military necessity” or “military advantage”, on the one hand, and the apparently permissive role of one who absolves all guilt and whose mind is always open to military needs, on the other.

In this context, it should be borne in mind that the adviser is merely someone who gives advice; the decisions are not his to make. An over-eager adviser could do as much harm as a more passive one, by making legal issues out of every aspect of operational planning.

*The third level*, i.e. cooperation with the civilian authorities, raises some questions which may be peculiar to Sweden. As mentioned before,

the concept of total defence is part of the overall Swedish defence policy. This means that military defence relies very heavily upon cooperation, not only with the civil defence forces but also with civilian authorities that have wartime functions. At the regional (county) civil administrative level, legal advisers, or persons specifically assigned to handle issues involving IHL, are in the process of being introduced. They total some 30 lawyers, presently employed at the Defence Section of the County Boards.

In creating opposite numbers, as it were, to the military legal advisers, one could easily imagine a situation where the legal adviser to the military commander has to present a “military view” on questions of IHL in contrast to a different position taken by the civilian authority in question. One case in point might be where there is a question of removing civilians from a prospective combat area, where the transport and other logistic needs of civilians would pose a threat to a military objective, whereas their presence in the area would also pose a threat — but primarily to the civilians themselves. How should the right to general protection against dangers arising from military operations (see Protocol I, Art. 51) be interpreted in such a case, bearing in mind that the ultimate purpose of distinguishing military objectives is to protect civilian society in general? Should the question be resolved in accordance with the principle of proportionality (“body-count”) only? In a case where the civilian side is counselled by its own legal adviser, would the military legal adviser be justified in giving an interpretation more favourable to the “military view”? The decision has, in any event, to be taken at a higher level if points of contention persist — assuming that there is still time for such an orderly legal discourse.

## 7. Conclusions

The Swedish experience of legal advisers, although fortunately never tested in real conditions, has so far proved to be encouraging. The promotion of IHL has probably been helped by the fact that lawyers *per se* are a novelty within the Defence Forces.

However, it must be remembered that there is some knowledge of the demands and restrictions created by the international instruments at all levels within the military structure. In this respect the legal adviser has an easy task at the outset, but must constantly review the need for information and monitor implementation at the various levels of the military hierarchy. In the absence of a situation where every squad is followed

by its own legal adviser — something not desired by anyone — the adviser has to rely on the attitude shown and the example set by commanders. And their readiness to abide by the book is in turn dictated by how the legal adviser is perceived as a member of the staff.

The adviser must retain his integrity, but should not stay aloof and shirk the responsibilities which fall to any member of the staff, such as watch duty and similar routine assignments. His position and rank must, on the other hand, not be so inferior that the weight of his arguments is diminished by the absence of bars, stripes or stars on his uniform. He is, after all, a member of a military organization, a combatant, even if his military function is of a highly civilized nature. In the final analysis, the “civilian” approach is the strongest argument for the legal adviser, be he a military officer turned lawyer, or, as in Sweden, a civilian lawyer in uniform.

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