

Training Chamber, Stockholm, September 1998

PREFATORY NOTE

P1. The following "report" relates to a trial Chamber investigating allegations of breaches of IHL into a fictional war.

P2. The trial was arranged with great expertise by the Swedish authorities. They provided every possible help (in part by way of relevant hindrance) in the course of our visit to Sweden over four days in September 1998.

P3. The broad purpose was to give five members of the Commission and its secretary a real sense, so far as a trial can, of some of the real problems that a Chamber could face on the ground. That purpose was very well fulfilled, as we attempt to indicate in the following report.

P4. For two reasons the form of the report calls for some explanation : it is incomplete and it consists in a sense of two reports. The Chamber had two days of inspections, meetings and interviews in the field, holding meetings with the commanders of the two parties, visiting and inspecting a field hospital and POW camp, interviewing officers and POWs there and interviewing civilians At various times during those two days and over the following morning the members of the Chamber considered the form, content and conclusions of the report. By the end of the second day, in the nature of things, the respondent to each particular complaint had not had the opportunity - as required by article 90, the Commission's rules and the essential principles of justice underlying them, to reply fully to the evidence, by further evidence or comment – at least in most cases. That means that the report cannot reach firm conclusions on most of the allegations. (This is not a situation of the Chamber reporting that it is unable to secure sufficient evidence, article 90(5)(b); rather, as of course was to be expected, the time simply did not allow the full process to be followed.)

P5. The second report, within the report, highlights lessons which we think are to be learned from the trial. They appear in bracketed passages in the report.

P6. Some of the lessons should also be highlighted here:

1. the importance of a clear initial statement of the alleged breaches and of the supporting evidence (rule 20(2); see also rules 20(5) and 21(2));
2. the importance of an agreement between the parties to the conflict and the Commission (not the Chamber) establishing the rules for the operation of the Chamber; they will in part be determined by article 90 and the Commission's rules, but there will be value in repeating those rules, in providing greater precision, and in filling any necessary gaps; the repeating of provisions of article 90 and the rules does not of course open them for negotiation (except to the extent they allow); the repetition is for clarity and as a reminder;
3. the likely need for supplementary agreements reached after the Chamber has arrived to carry out its inquiry; the balance between these supplementary agreements and the principal agreement will depend on the circumstances but the principal agreement should resolve major issues and confirm the powers of the Chamber and the essential facilities which must be made available to it.

P7. The Commission should consider establishing protocols and standard form agreements on the three matters listed. Some of the documents attached to the report relate to that. Such a process might lead to a review and amendment of Part III of the rules. For instance the role of the ad hoc members might be addressed. A continuing question is of course just how specific to be in formal texts and how much to leave to develop in practice.

P8. Our thinking about the role of the Commission and the challenges it would meet in the field was also greatly assisted by an excellent seminar held at the National Defence College on the last afternoon of the three days of the trial. Points which arose in that seminar are also reflected in the documents.

P9. The Commission members and their secretary are full of admiration for the assistance provided by the Swedish authorities. They are listed in Appendix A to the report. That assistance extended beyond the trial itself to enjoyable social occasions, including a splendid and informative dinner at the Foreign Ministry hosted by Minister Anders Bjurner.

P10. The trial, the seminar and subsequent thinking have highlighted a basic question around the role of the Commission. At a technical level, it can be put in terms of the standard of proof and the related role of evidence. Consider for instance the terms of Rule 27(2):

Accordingly some issues arose in practice about the need for corroboration of evidence and the admissibility and weight of hearsay (second hand) evidence.

P11. The more basic question relates back to the function of the commission : it is to find facts, alleged to be grave breaches or serious violations; and it may make recommendations arrived at restoring an attitude of respect for the law. It is not in the business of determining guilt, particularly not of specific individuals. Its reports would not, as we understand the matter, even be admissible in judicial proceedings brought against individuals. It follows that while we must be fair to the parties, we do not have to make our process more difficult than it already is. In particular, although the matters are very serious and we must be fully satisfied before finding an alleged fact established, we do not have to be satisfied beyond reasonable doubt. In technical (at least common law) terms we must be satisfied on a balance of probabilities, having regard to the seriousness the allegations.

P12. Our role, thinking of our visit to Sweden, can be compared to that of an Ombudsman: we inquire, we gather information as best we can with the positive cooperation of the parties (for there is an obligation on the complaining party to make its case), we do not reach conclusions to anyone's detriment without their first having the opportunity to challenge the relevant allegations and evidence, we then reach conclusions on the information assembled, and as appropriate we make recommendations. Those recommendations might include recommending that the competent authorities consider bringing criminal or disciplinary proceedings, but they cannot go beyond that so far as individual fault or guilt is concerned. As the history of that great Scandinavian office around the world shows, that combination of inquiry, fact finding and appropriate recommendations, generally carried out without significant publicity, can be very effective in resolving complaints by establishing the facts and in maintaining or restoring basic rules.

We cannot conclude without remembering with great affection and sadness our dear colleague Judge Carl-Ivar Skarstedt (1930-1998).

REPORT OF THE TRIAL CHAMBER INTO ALLEGATIONS BY DALECARLIA AND BY SWEDEN 7-11 SEPTEMBER 1998

1. The request to the Commission

1.1 In the context of an armed conflict which is occurring within the territory of Sweden, the authorities of both Dalecarlia and Sweden have requested, in agreement with one another, that the International Humanitarian Fact-Finding Commission (Commission) undertake an enquiry under Article 90 of Additional Protocol I to the Geneva Conventions on the protection of war victims.

1.2 The agreed statement of facts records that an uprising in Dalecarlia, situated in Central Sweden, composed also of traditional independence tendencies in Jämtland (Northern Sweden) has integrated in the new "anti 08 Movement" (08 being the telephone prefix for the Stockholm area). The Movement receives massive popular support, and troops from different regiments are assembled in Southern Dalecarlia. The

troops move south and they are greeted by the people in Enköping as liberators. The revolutionary government in Mora seeks recognition for the new state of Greater Dalecarlia and claims that its armed forces are in control of a territory stretching southwards to Kungsängen (north of Stockholm) and westwards along the line Kungsängen-Väseträs-Karlstad-Charlottenberg. The government in Stockholm mobilises the rest of the Swedish armed forces to "defend the nation". Greater Dalecarlia is recognised as a new state by Norway (very quickly) and Finland (after some hesitation). The conflict is also in other cases internationalised.

1.3 The President of the Commission in accordance with Article 90(3)(a)(i) of Protocol I appointed a Chamber consisting of Professor Ghalib Djilali, Doctor Marcel Roger Dubouloz, Professor Roman Jasica, Justice Kenneth Keith (Head of the Chamber) and Dr Valeri Knjasev. In addition, the two parties to the conflict named Fredrik Holst / Daniel Nord (Dalecarlia) and Magnus Sandhu (Sweden) as the ad hoc Members in accordance with Article 90(3)(a)(ii). To underline their independence from the parties which had named them, the ad hoc Members made a solemn declaration essentially in the terms provided for in Rule 1(2) of the rules of the Commission:

The ad hoc members took a full part in the work of the Chamber, including the gathering, testing and assessment of the evidence presented to the Chamber, and the preparation of this report. [In fact they could not be present on the final morning, and one of them also had another role to play - as an ICRC delegate! Important issues arise in practice about the role of the ad hoc members, for instance when a smaller group of the Chamber interview witnesses or their role as go-betweens in relation to the party which has nominated them. One valuable role is in the questioning of witnesses, especially since it will presumably be unusual for the representatives of both sides to be present. We said that there would be no cross-examination of witnesses: see further 3.9. Questions would be asked by the Chamber, but there is obviously a role for the party calling a witness to do the initial questioning.]

1.4 The secretary to the Chamber was Raffaël Vonovier of the Commission's Secretariat in Berne.

1.5 The authorities named by the parties to the conflict as the chief liaison officers between the Commission and the parties in terms of Rule 20(4) of the Commission's Rules were Professor Ove Bring (Sweden) and Deputy Director Per Nehler (Dalecarlia).

1.6 The parties were agreed that the Chamber was competent to enquire into the allegations they each had made in their agreed statement and to make a report and recommendations to them. (In this final respect the parties agreed to a process departing from that in Article 90(5)(a) which empowers the Commission rather than the Chamber to make a report on the Chamber's friendship with appropriate recommendations.)

1.7 While Sweden has ratified the 1949 Conventions and their 1977 Additional Protocols and has accepted the competence of the Commission under Article 90(2)(a), Dalecarlia has taken no such formal action. As noted, both parties have accepted that the Commission is competent under Article 90 (there being no doubt that the principal allegations on which the report focuses would, if established in fact, be grave breaches or serious violations in terms of the Article). Also, Dalecarlia agreed with the position of Sweden that the customary law of armed conflict which largely if not completely was to be found in the Conventions and Protocol I applies to the conflict. As noted in the final section of this report the Chamber considers that there would be real value in Dalecarlia as well as Sweden, stating that position publicly and formally; as well, both parties could give greater precision to the shared understanding especially in respect of prisoners of war.

1.8 That shared understanding of the parties, we stress, is in accordance with the fundamental humanitarian character of the Geneva law and with its application without

any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the parties to the conflict.

2. The mandate : the allegations of the parties

2.1 Dalecarlia's allegations relate (1) to aerial attacks, especially on a mobile field hospital, and (2) to the death of a prisoner of war (POW), an allegation related, in terms of suspicion, to an alleged systematic and widespread cruel and violent treatment of POWs.

2.2 Sweden's allegations concern (1) mistreatment and torture of farmers and school children to obtain information on the whereabouts of Swedish troops, and (2) both general and particular matters relating to POWs, the particular matter concerning the death of a named POW.

2.3 The smooth initiation of the Chamber's task was hampered by the rather general way in which the parties had stated the allegations. The requirement of a precise statement of the allegation and of the likely supporting evidence stated by Rule 20(2) and (3) of the Rules provides an important discipline to the parties and real assistance to the Chamber. Early discussions with the chief liaison officers of the parties and with their commanding officers did lead to some greater specification, as appears from the agreement signed on behalf of both parties and the chamber (Appendix B). [Not in fact completed. The appendix lists the headings of a possible agreement. Professor Jasica prepared a list of additional questions which most helpfully indicates how we might have sought greater specification.] The Commission or rather its chamber does not have a general roving commission. The parties must allege facts which they say are grave breaches or serious violations. They must specify them and support them with concrete evidence which may be by eye-witnesses or may be physical : eg evidence of death and personal mal-treatment or of bombardment. The parties must facilitate the access of the Chamber to that evidence and enable it to test it. That agreement also settled some important matters relating to the status and methods of work of the Chamber, to which we now turn.

3. The Chamber's processes

3.1 A basic principle underlying the work of the Commission is that it offers guarantees of fair and thorough procedures for finding the facts. Both the Protocol and the rules call on the parties to provide all relevant information and to facilitate site visits.

3.2 The Protocol and rules also reflect international principles of justice by requiring the full disclosure of all evidence to the parties and giving the parties opportunity to comment on that evidence and to rebut it. At the same time the whole process is confidential as is the report, although the parties may agree to make the report (and only the report) public.

3.3 The purpose of those rules, like the underlying principles, is to ensure that the Chamber is as fully informed as possible so that its findings are as accurate as possible and are made independently and impartially as between the parties.

3.4 Among the initial essential practical steps in support of the process is the identification of the authorities or chief liaison officers of the parties, mentioned earlier in para 1.5. [Another valuable step would be the appointment of liaison officers in respect of each district or site (eg POW camp) or both. In anticipation of interviews and visits they could be provided with lists of issues to be discussed and people to be interviewed. They should also remove the necessity for substantive negotiation of each visit with the relevant commanders.]

3.5 The process of gathering information may be facilitated by the preparation of lists of issues and names of potential witnesses after meetings. We indicated that such lists were to be prepared both by the Chamber and by the authorities of the parties after an initial meeting with the commanders of the two forces and an interview with the commander of the Dalecarlian field hospital. We also sought further information following our visit to the Dalecarlian POW camp. [In fact those steps were not taken, given the exigencies of time. Such follow up would plainly be facilitated by the involvement, including the presence at the meetings, of the relevant liaison officers. As indicated in the

prefatory note the fact that we were unable to complete those processes, and that the opposing party had accordingly not yet exercised its rights meant that we were not able to reach findings on those matters.]

3.6 A further critical issue relating to the taking of evidence concerned confidentiality and the protection of witnesses. The evidence is of course confidential to the process but it must be fully disclosed to the parties so that they can comment on it and counter it (article 90(4)(b) and (c)). That process can plainly put some witnesses at risk. One possible safeguard which we negotiated with the parties is for the ICRC and the Chamber to have access to witnesses for a period after the completion of the enquiry. [Another which was not pursued is for the evidence to be given anonymously - an issue which has been argued before the Tribunal for former Yugoslavia for instance.] A second safeguard is to suppress any reference to the name of the witness in the report (which would probably be significant only if the report were published, given that the evidence including the name of the witness, is disclosed to the other party). We gave that indication to one witness.

3.7 In some situations evidence or relevant information was refused on security grounds. The Chamber cannot deal with such a refusal directly, but as appears later in this report that refusal can lead to a finding that a critical fact is not established or possibly the drawing of an inference adverse to the party refusing the evidence.

3.8 The giving of evidence by vulnerable witnesses can also be facilitated by providing for the privacy of the witness - although of course the evidence will be provided in due course to the other party and as indicated witnesses must be informed of that. [A protocol or standard form agreement on the questioning of POWs and other vulnerable witnesses might be established by the Commission : see Appendix C prepared by M Dubouloz.]

3.9 The issue of cross-examination did not in practice arise. The parties rights of confrontation are in general to be accorded through the right to comment and call to her evidence. As well, members of the Chamber, including ad hoc members, raised the relevant matters through their questions.

3.10 [In practice there would have to be accurate methods for recording the evidence, for instance by video or audio tape with necessary methods of transcribing.]

3.11 We raised with the parties at the outset of the inquiry the matter of the publication of the report. One favoured that course. The other at that stage did not. [We did not return to that issue. We would have. Another possible issue is whether they should see parts or all of the report in draft. That could be helpful both in correcting errors of detail and in getting reactions to possible recommendations (which might also be raised orally).]

3.12 The members of the Chamber and of persons accompanying it are, under rule 27(3), to be assured of the privileges and immunities necessary for the discharge of their functions which shall be not less than those accorded to experts on missions under the 1946 Convention on the UN Privileges and Immunities. They are also to be assured adequate protection. The first matter was included in the agreement reached at the outset. [It should include the status of the Chamber's headquarters and security of all forms of communication. The second requires detailed day by day application which would be facilitated by the chief and other liaison officers.]

3.13 [As appeared from one incident, it is essential for the Chamber to have a press officer who is to be briefed about how to deal with the press. The Chamber as well should establish a process for public relations.]

3.14 [The initial agreement would also deal with the expenses of the Chamber : article 90(7).]

3.15 The programme of the Chamber, attached in Appendix, [not in fact included] indicates the course of the inquiry including the initial meetings, the site visits, the witnesses questioned (with names not being given where appropriate) and the forensic inquiries undertaken.

3.16 [Appendix D suggests a procedure for investigations.]

4. Substantive allegations

4.1 [Included only in outline, to give a sense of the substance. As noted in the prefatory note, time did not allow completion of the task.]

By Dalecarlia

1 Indiscriminate area bombing	not documented	not yet	not established
2 Destroying field hospital	acceptable	yes	established
3 Two ambulances	not documented	not yet	not established
4 Bombing civilian transport	not documented	not yet	not established
5 Death of POW	not documented	in progress	not established
6 Other POWs	not documented	not yet	not established

By Sweden

1 Torture acceptable	documented	yes	established
2 Prisoners acceptable	documented	yes	established
3 Captain Hall	acceptable	yes	not established
4 Bombing civilian transport	not documented	not yet	not established
5 Death of POW	not documented	in progress	not established
6 Other POWs	not documented	not yet	not established

RECOMMENDATIONS

The Chamber, acting with the authority of the parties as recorded in para 1.6 above, recommends that:

1. The authorities of the parties to the conflict should immediately make public their acknowledgement that they are bound in the current conflict by the customary law applicable to armed conflict, including major parts of the 1949 Geneva Conventions and 1977 Protocols. They should immediately consult, through the good offices of the Commission, to establish the detailed rules of the Geneva law which apply to the conflict, especially those protecting POWs.

2. The authorities [identified categories of officers and legal advisers] should immediately take steps to ensure full dissemination to and knowledge of the relevant parts of law of armed conflict by all those engaged in the conflict.

3. The authorities should immediately clarify and, as appropriate, extend their internal disciplinary processes relating to the obligations of members of their armed forces. The operation of these processes should be adequately recorded.

Outline of an Agreement between

1. The mandate : The Chamber consisting of [_____] is to inquire into and prepare a report on the following allegations:

A made by Dalecarlia

B made by Sweden

The Chamber also has the authority to make recommendations to the parties to the conflict arrived at facilitating the restoration of an attitude of respect for the relevant rules of the law of armed conflict.

The Chamber will be supported by _____

2. The relevant law : the parties agree that ...

3. The evidence : The principal evidence which the parties present in support of their allegations is as follows:

The parties have already provided the Commission certified copies of the documentary evidence ... listed above.

If they wish to provide further evidence in support of their allegations they must do so within X days.

The parties will facilitate to the best of their endeavours any exercise by the Chamber of its powers under article 90(4)(a) of the Protocol to seek evidence and carry out investigations in loco other than that presented by the parties.

4. Disclosure of evidence

The parties must comment on the evidence disclosed to them within X days or such other reasonable period as the Chamber determines.

5. Protection of witnesses

6. Publicity (The parties were asked whether they consented to the report being published. One agreed. The other reserved its position. Another matter would be the publicity to be given to the fact of the inquiry.)

7. Status, privileges and immunities and protection of the Commission, its personnel and its headquarters, records, communications and transport.

8. Logistical and other support

9. Financing of inquiry

DRAFT RULES FOR THE INTERVIEWING OF DETAINED PERSONS

1. The purpose of the visit will already be known to the camp commander, others in authority and those to be questioned by the Chamber or otherwise involved with its visit - that is to find the facts alleged to be grave breaches or serious violations of the law of armed conflict, by speaking to those who can provide relevant information, inspecting the camp and examining, recording and, if appropriate, removing any relevant physical evidence, and when needed ensuring the protection of the evidence by the camp commander.

The general purposes are to resolve the dispute about the allegations and as appropriate to make recommendations that will bring the parties back to an attitude of respect for the law and its underlying humanitarian values.

2. In terms of the independence and impartiality of the Commission and its Chamber, the provisions of the Protocol and the rules under which it operates, and the agreement with the parties to the conflict, it is the Chamber that decides its needs in carrying out its mandate, and in particular in assembling the evidence relevant to the parties' allegations. It follows that for that purpose:

- a. the Chamber is entitled to see and question any POW [internee] it wishes to
- b. the Chamber is entitled to visit, inspect and examine any place at all within the camp
- c. the Chamber is entitled to examine all documents, including health and disciplinary documents, relating to any POW [internee]
- d. the Chamber is entitled to examine documents relating to the administration of the camp including documents relating to the disciplining of guards
- e. any interview with, or questioning of, a POW [internee] is to be carried out in private, out of the sight and hearing of any guards or of any agent or representative of the detaining authority; the POW [internee] will be informed that any evidence they give will be made available to authorities of both parties to the conflict and - see (f) - that steps have been taken to ensure their safety and to prevent any retaliation against them

- f. the parties undertake not to take any disadvantageous action against those who are interviewed or questioned
- g. the ICRC and the Chamber have the right to visit any POW [internee] they have interviewed or questioned at any time while they are still detained
- h. the Chamber is entitled to the assistance of interpreters if necessary.

3. The independence, impartiality and purpose of the members of the Chamber and those assisting them must be recognised by the camp authorities by their facilitating the inquiry, protecting the Chamber personnel, and recognising their entitlement to the privileges and immunities necessary for the discharge of their functions which shall be not less extensive than those accorded to experts on mission under the 1946 Convention on the Privileges and Immunities of the United Nations.

PROCEDURE FOR ALLEGATIONS

1. Allegation Phase

- nature
- source of the allegation (who, where, when, how etc ...)
- documentation to support the allegation report/ testimony/ physical evidence such as photographs/ etc ...

2. Investigation Phase

- How: conducted by the Chamber: collecting, recording, analysing, processing, verifying, etc...
- What: reports/ interviews/ site visit/ documents etc

3. Challenging Phase

- allegations + facts are made available to both Parties for comments and contradictory evidence

4. Finding Phase

- presentation of allegations
- presentation of facts
- presentation of comments and contradictory evidence
- position of the Chamber

5. Recommendation Phase

COLLECTING INFORMATION PROCESS

1. Allegations Documentation

1.1 Allegations. Information to the commanders

During the meetings with the military commanders the chairman of the Chamber asked the commander to provide the Chamber with further information, documents or anything that could constitute an evidence or support the allegation - for each single allegation. The commanders were given full information regarding the needs for these details, the use of it especially the way these information will be incorporated into the final report and the fact that both Parties will have complete access to these documents/information/evidence.

1.2 Questions to be answered

For each item below mentioned the commander was requested to give full information

Full description of the event, surrounding circumstances.

Exact location, description of the place, date, time etc.

Who is/are concerned as victim(s): identity, nationality, military or civilian when the events happened etc. Where they are now, where they have been kept etc.

Who is/are the supposed perpetrators, name, nationality, purposes for committing the acts etc.

Exact list of witnesses, who are they, how the testimony has been recorded, where are the documents (nature, extent, place where they can be consulted etc...)

Nature of the evidence, description (document, report, photograph etc, where is the original if necessary) etc...

Type, content, author, etc.

Nature of the investigation, who, where, when, conclusions etc

What, who, when, where etc.