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The Instrument of Government and NATO membership

1. Introduction

So much to talk about, so little time and space. This contribution deals with how the Swedish Instrument of Government (IG) becomes relevant when Sweden applies for membership in the North Atlantic Treaty Organisation (NATO).¹ Several articles in the IG are concerned. Most obviously, perhaps, the provisions on how Sweden enters into international agreements are involved. Moreover, the provisions relating to the transfer of decision-making authority to other states and international organisations have been applied in the context of the NATO membership application. The constitutional provisions on self-defence and the sending of armed forces abroad or their deployment otherwise are also central when membership in NATO is considered. Apart from these, most obviously relevant, constitutional provisions as far as NATO membership is concerned, it is likely that the NATO membership will have indirect consequences for other constitutional provisions too. The NATO membership may affect the interpretation and application of many provisions in the IG. In fact, the NATO membership may even lead to constitutional amendments. In Chapter 1, Article 10 of the IG, certain international

¹ Sweden has four fundamental laws, which together form the Constitution of Sweden: The Instrument of Government (*regeringsformen*, in Swedish), the Act of Succession (*successionsordningen*), the Freedom of the Press Act (*tryckfrihetsförordningen*), and the Fundamental Law on Freedom of Expression (*yttrandefrihetsgrundlagen*); see the Instrument of Government Chapter 1, Article 3. In addition, there is the Riksdag Act (*riksdagsordningen*) which contains provisions for the work of the Riksdag (the parliament). The Riksdag Act is not a fundamental law, though special rules govern its amendment.

organisations in which Sweden is a member are mentioned: the European Union (EU), the United Nations (UN) and the Council of Europe. Becoming a member of NATO is also significant.

In this contribution, the constitutional provisions which have been directly affected by the Swedish application for membership are analysed, with the help of official Swedish inquiry reports primarily and other official documents. The purpose is to see what the constitutional provisions say and how they have been interpreted and applied by the Government and the Riksdag. An additional purpose is to identify and explain how the interpretation and application of the provisions in question are motivated.

It is impossible to look into the future, but studying the IG, its preparatory works, the decisions made in the context of the Swedish application for NATO membership and their preparatory works, one is left with the impression that there is more to expect in the legal sphere, including the constitutional legal sphere. So far, the membership process has moved forward smoothly, from the Swedish constitutional legal perspective, as well as from the perspective of ordinary Swedish law, but the question remains as to whether there might not be constitutional legal issues remaining, which will have to be dealt with further on. A great number of issues of ordinary law connected with the Swedish membership in NATO are being investigated in an official inquiry that will report on its work at the end of 2023.

Not only the recent membership in NATO but the already existing membership in the EU implies some forms of cooperation in the sphere of defence, even collective self-defence hypothetically. Since the focus here is on NATO and the obligations following from the NATO treaty, the attention paid to the Treaty on European Union (TEU) and the common security and defence policy will be limited. In the future, again, there might be reasons to pay more attention to the EU in this context.

The contribution begins by going through the provision of self-defence in the IG, Chapter 15, Article 13. This provision concerns the situation where Sweden would defend itself against an armed attack. This is also the situation where Sweden would ask for help in defending itself from NATO and the NATO members; thus, the provisions in the IG on the transfer of authority to other states and international organisations, the members of NATO and NATO in this case, are analysed together with the provision on self-defence (Chapter 10, Articles 6 and 8). It is the situation in which Sweden would, hypothetically, ask for help in defend-

ing itself that has been devoted most attention in the membership application process so far, as far as the constitutional framework is concerned.

Thereafter, the provision in the IG on the sending of Swedish armed forces abroad or their deployment otherwise is studied, Chapter 15, Article 16. This provision would be concerned if another member state of NATO would be subject to an armed attack and would ask the other members for assistance. Becoming a member of NATO implies the right to ask for assistance but also the obligation to assist other members. This provision in the IG has been devoted less attention in the Swedish membership application process, so far. It is indicated in the official documentation that there might be reason to come back to some issues involved in the giving of armed assistance later. In the case of both the constitutional provision on self-defence and the provision on the sending of Swedish armed forces abroad or their deployment otherwise, there are obvious and, in the case of the provision on self-defence, explicit connections to international law in the field. The international law also has to be taken into account in the interpretation and application of these provisions.

The accession to the NATO treaty (North Atlantic Treaty) is a constitutional issue of its own. The provisions in the IG regarding the entry into international agreements by Sweden are the ones concerned here. These are addressed in the contribution to the extent they are relevant to the Swedish accession to the NATO treaty (Chapter 10, Articles 1 and 3). Finally, the content of the NATO treaty is presented briefly, focusing particularly on Article 5 concerning the mutual defence obligation.

2. Self-defence and getting assistance

2.1 Self-defence under the Instrument of Government

The provisions in the IG most directly affected by the Swedish membership in NATO are found in Chapter 15 entitled War and the danger of war. One provision – Chapter 15, Article 13 – deals with the Defence of the country. The other provision – Chapter 15, Article 16 – deals with the Deployment of armed forces. We will begin by analysing the significance and implication of the first of these provisions in relation to the coming Swedish membership in NATO. Later on in this section, an additional provision will be studied as well, which becomes directly relevant in the discussion of Chapter 15, Article 13, namely Chapter 10, Article 8 on

the Transfer of decision-making authority outside the framework of EU cooperation. The title of Chapter 10 in the IG is International relations.

The provision in Chapter 15, Article 13 on the defence of the country states that:

The Government may deploy Sweden's armed forces in accordance with international law to meet an armed attack against the country or to prevent a violation of its territory.

The Government may instruct the armed forces to use force in accordance with international law to prevent a violation of Swedish territory in peace or during a war between foreign states.

The term “armed attack” is used in Article 51 of the UN Charter on the right of self-defence to which the Swedish constitutional provision implicitly refers.² In this context, “armed attack” is a concept relating entirely to international law. As the commission of inquiry on the conditions under the IG for deepened defence cooperation, of 2016, so aptly put it in its report, from the Swedish constitutional legal viewpoint, the competence limit for the Government that the provision on self-defence draws up is thus, for its substantive content, dependent on the content of international law.³ And, one could add that the content of international law in this area is constantly evolving.

Further, as if the reference to international law through the use of the term “armed attack” in the provision was not enough, an explicit reference to “international law” is included as well. As we can see, the Swedish armed forces possibly deployed by the Swedish government to meet an armed attack should be deployed “in accordance with ‘international law’”. The explicit reference was added to the provision on self-defence in the IG. This was because, as was argued in the inquiry report of 2008 on a reformed constitution, while it is clear from the preparatory works for the previous version of the provision on self-defence in the IG of 1974 that the rule links to the UN Charter rules on the right of states

² *Väpnat angrepp*, in Swedish; cf., for instance, Swedish Government Official Reports (*Statens Offentliga Utredningar* (SOU)) 2008:125 A reformed constitution, pp. 508, 519; government bill 2009/10:80, 8 December 2009, A reformed constitution, pp. 205, 300; there is an official English version of the Instrument of Government, www.riksdagen.se. All translations into English have otherwise been made by the author, where nothing else is indicated.

³ SOU 2016:64 Conditions under the Instrument of Government for deepened defence cooperation, pp. 103–104.

to self-defence in the event of an armed attack, it would be valuable if the rules in the IG concerning the possibilities to deploy Swedish armed forces could be tied closer and in an even clearer manner to the UN Charter and international law.⁴ This should be done, the inquiry report suggested, through the insertion of an explicit reference to “international law”, with respect to the right of the Government to deploy Sweden’s armed forces to meet an armed attack against the country.⁵ The Government and, later, the Riksdag agreed to the commission of inquiry’s wish, and the passage “in accordance with international law” was inserted into what would become Chapter 15, Article 13 of the IG.⁶

Also, the provision talks about an armed attack against the country, i.e. Sweden, and not about an armed attack generally, against anything or any country. Thus, the provision addresses the situation where Sweden potentially becomes subject to an armed attack and exercises its right of individual self-defence.

⁴ SOU 2008:125, p. 519; referring back to the Royal Majesty’s bill with proposals for a new Instrument of Government and a new Riksdag Act, etc., 1973:90, 16 March 1973, p. 373; see also government bill 2009/10:80, pp. 205, 300.

⁵ SOU 2008:125, p. 519; in fact, the suggestion of the official inquiry was somewhat wider, and the official inquiry also suggested various ways in which other provisions in the chapter on war and the danger of war in the Instrument of Government should be amended in order to tie these other provisions more closely and clearly to the UN Charter and international law as well (cf. SOU 2008:125, pp. 519–520). Apart from the narrow version of the reference to international law in the context of self-defence in the event of an armed attack, none of the other suggested changes were kept in the Government’s subsequent bill to parliament. Had all the suggested changes been accepted, the Instrument of Government would most likely have had to be amended once again before Sweden could have become a member of NATO (although NATO membership was not on the political agenda at the time (see further Inger Österdahl, “Deployment of Armed Forces: Swedish Constitutional Considerations”, *Nordic Journal of International Law*, vol. 89, issue 1, 2020, pp. 94–116).

⁶ Government bill 2009/10:80, p. 300; although this is not obvious either from the inquiry report of 2008 or from the ensuing government bill of 2009, in the inquiry report of 2016 on the conditions according to the Instrument of Government for deepened defence cooperation, it is stated that from the reference to international law in Chapter 15, Article 13, it also follows that the deployment of Sweden’s armed forces must take place not only in line with the law of war (*jus ad bellum*) contained in the UN Charter, but also in line with the law in war (*jus in bello*) (SOU 2016:64, p. 103). The law in war applies independently of any reference to it in the Swedish Instrument of Government, of course, as does the law of war.

In this situation, as a member of NATO, Sweden may receive assistance from the other NATO members through the latter's exercise of their right of collective self-defence under the UN Charter and in accordance with Article 5 of the NATO treaty. Still, as pointed out in the Government Official Report, preceding the major revision of the IG in 2010, in the event of an armed attack against Sweden, the Government may also deploy Sweden's armed forces outside the country's borders.⁷ It would still be a case of individual self-defence, since the deployment of the armed forces thus outside Sweden's borders would take place in order to meet an armed attack on Sweden. A potential armed attack against another member of NATO, which would lead to Sweden deploying Swedish armed forces outside the country's borders in order to assist the NATO member subject to an armed attack would be a case of collective self-defence. An armed attack against another member of NATO (or any other country), in principle, would not trigger the right of individual self-defence, but exclusively the right of collective self-defence. From the Swedish constitutional legal point of view, the most important aspect of the provision on (individual) self-defence is that it is the government alone who makes the decision on whether to deploy Sweden's armed forces to meet an armed attack against the country.

If Sweden were to be subject to an armed attack and the Government wanted the other members of NATO to assist Sweden in its self-defence, the Government may request support under the relatively recent law on operative military support.⁸ The law on operative military support states in Article 2 that, if Sweden is at war or at risk of war, the Government may request assistance in the form of military forces from the North Atlantic Treaty Organization and from a state that is a member of that organisation or of the EU, in order to meet an armed attack against Sweden in accordance with international law.⁹ For this purpose, the Government may transfer administrative functions to the organisation or state

⁷ SOU 2008:125, p. 508.

⁸ Swedish Code of Statutes (*Svensk författningssamling* (SFS)) 2020:782.

⁹ The reference to the North Atlantic Treaty Organization was added by SFS 2023:166; however, this law will not enter into force until the Government so decides. Currently, the Government may request assistance from a state that is a member of the North Atlantic Treaty Organization or of the European Union (SFS 2022:430). Article 3 in the law on operative military support contains a corresponding provision relating to the request of assistance in case of a violation of Swedish territory in peace or during a war between foreign states.

providing the support. Since the Riksdag, through this law, also authorises the Government to approve a transfer of administrative functions in particular cases to another state or international organisation, under Chapter 10, Article 8 of the IG on Transfer of decision-making authority outside the framework of EU cooperation, the decision of the Riksdag to adopt the law on operative military support had to be taken by a qualified majority of the votes.¹⁰

The law on operative military support was amended in March 2023 in order to include NATO among the international actors from whom the Government would be authorised to request assistance in case Sweden is at war or at risk of war.¹¹ In May 2022, the same law was amended in order to include a state that is a member of the EU or of the North Atlantic Treaty Organisation in Article 2, and to delete the reference to Finland as the sole state from which the Government would be authorized to request assistance.¹² Originally, the law on operative military support between Sweden and Finland was adopted in September 2020 as a result of the deepened defence cooperation between Sweden and Finland.¹³ In the government bill preceding the decision by the Riksdag in March 2023 to approve Sweden's coming accession to the NATO treaty, the issue of Sweden requesting assistance from other NATO or EU members or from NATO is the constitutional legal issue devoted most attention,

¹⁰ In accordance with Chapter 10, Article 6 of the IG, the Riksdag may approve a transfer of authority, provided at least three-fourths of those voting and more than half the members of the Riksdag vote in favour of the decision.

¹¹ SFS 2023:166, adopted 22 March 2023.

¹² SFS 2022:430, entry into force 19 May 2022; there are explicit references to Finland left in other Articles in the law. After the entry into force of the Agreement on Defence Cooperation between the Government of the Kingdom of Sweden and the Government of the United States of America concluded on 5 December 2023, it is suggested in Ds 2024:2 Agreement on defence cooperation with the United States of America, that references are added in the law on operative military support to American military personnel, American military troops, American suppliers to the troops, etc.

¹³ SFS 2020:782, entry into force 10 September 2020; terms of reference (*Direktiv* (Dir.)) 2017:30 A legal regulation of defence cooperation with Finland; SOU 2018:31 A law on operative military support between Sweden and Finland; government bill 2019/20:110, 5 March 2020, Operative military support between Sweden and Finland; on this and on other previous legal developments of (indirect) relevance to the NATO membership, see also Inger Österdahl, "Sveriges ansökan om Natomedlemskap: Några folkrättsliga, EU-rättsliga och konstitutionellrättsliga reflektioner", *Svensk Juristtidning*, vol. 106, no. 10, pp. 973–992.

relatively speaking, and therefore most space in the bill.¹⁴ We will now look a bit more closely at how the government bill reasoned on the subject of requesting military assistance in the NATO context.

2.2 Increased powers to request help and to transfer authority to NATO

Concerning the situation where the Government decides to request the support of NATO, the government bill finds that the Instrument of Government contains no rules directly aiming at the conditions for Sweden to receive foreign military support, including in the form of military forces.¹⁵ The starting-point is that it is the Government that decides on foreign states' access to Swedish territory.¹⁶ A judicial or administrative function, which is not directly based on the IG, may be transferred to another state, international organisation, or foreign or international institution or community by means of a decision of the Riksdag, according to Chapter 10, Article 8 of the IG, as stated in the government bill.¹⁷ The Riksdag may authorise the Government or other public authority in law to approve such transfer of functions in particular cases, similarly according to Chapter 10, Article 8 of the IG. Where the function concerned involves the exercise of public authority, the Riksdag's decision in the matter of such transfer or authorisation is taken by a qualified major-

¹⁴ Government bill 2022/23:74, 7 March 2023, Sweden's membership in NATO; see also Ministry Publications Series (*Departementsserien* (Ds)) 2022:24 Sweden's membership in NATO.

¹⁵ Government bill 2022/23:74, p. 27.

¹⁶ Government bill 2022/23:74, p. 27.

¹⁷ Government bill 2022/23:74, p. 27; cf. the opposite argument by Ulf Öberg, namely that the administrative function in question is in fact directly based on the Instrument of Government (Dagens Nyheter, DN Debatt, 26 July 2023, www.dn.se). Ulf Öberg argues that Chapter 10, Article 7 should have been applied instead since a transfer of authority in this case would require an amendment of the Instrument of Government, and until the Instrument of Government has possibly been amended, the authority may not be transferred. Joachim Åhman does not agree, but argues that in the future it might turn out that transfers of authority to Nato will become necessary including administrative functions directly based on the IG, which may only 'be transferred to a limited extent, to an international organisation for peaceful cooperation', according to Chapter 10, Article 7 of the IG (Dagens Nyheter, *ibid.*). That such a situation would ever arise is far from obvious, however, Åhman argues (*ibid.*); see further Joachim Åhman, *Överlåtelse av beslutanderätt – En rättsvetenskaplig studie av den i 10 kap. regeringsformen reglerade möjligheten att överlåta beslutanderätt till icke-svenskt organ* (Uppsala: Iustus, 2015).

ity of three quarters of those voting and more than half of the members of the Riksdag, according to Chapter 10, Article 8, second paragraph, referring back to Chapter 15, Article 6 of the IG. Such decisions can also be made by means of the procedure used for adopting fundamental laws, implying, among other things, two rounds of vote with a general election having been held in between; however, such a procedure was not considered in the case of the transfer of administrative functions to NATO under Chapter 15, Article 8.

The task of Sweden's armed forces to meet an armed attack against Sweden and to prevent a violation of its territory under Chapter 15, Article 13 of the RF is a distinctly Swedish administrative function, as stated in the government bill.¹⁸ Furthermore, it is clear that these are administrative functions which can be transferred to another state or international organisation for execution, or for participation in its execution.¹⁹ On the subject of whether the task to meet an armed attack against Sweden or to prevent a violation of its territory involves the exercise of public authority in the sense set out in Chapter 10, Article 8 of the IG, we will see below how the government bill addresses this. In brief, the government bill's reasoning amounts to a yes. The government bill also refers to the two previous decisions which were taken by the Riksdag concerning operative military support, in line with the procedure proscribed for decisions relating to the transfer of administrative functions involving the exercise of public authority under Chapter 15, Article 6 of the IG.²⁰

The government bill argues that the exercise of military powers in the defence of Sweden against an armed attack and against territorial violations constitutes tasks which interfere with Swedish public and private interests and should, therefore, from the point of view of sovereignty, in principle, be reserved for Swedish organs.²¹ To allow supporting foreign military to go into battle with invading enemy soldiers on Swedish territory or to use armed force in order to prevent violations of Swedish territory should be considered constituting such a transfer of an administrative function to another state or international organisation involving the exercise of public authority which necessitates a decision by the Riksdag according to the procedure indicated in Chapter 10, Article 8, sec-

¹⁸ Government bill 2022/23:74, p. 27.

¹⁹ Government bill 2022/23:74, p. 27.

²⁰ Government bills 2019/20:110, and 2021/22:246, 16 May 2022, respectively.

²¹ Government bill 2022/23:74, p. 27; *på ett ingripande sätt*, in Swedish.

ond paragraph of the IG, as stated in the bill.²² Hence, this is a qualified majority, in line with what has been described above.

The government bill also states that more limited cooperation on foreign military action on Swedish territory, which does not involve direct foreign participation in fighting against attackers or the use of armed force against a state violating the Swedish territory would not presuppose a decision according to the special decision procedure.²³ Then, a decision by the Riksdag by a simple majority would be sufficient according to the IG Chapter 10, Article 8, first paragraph. The government bill reminds the members of the Riksdag of the fact that, previously, in the law adopted in 2020 and amended in 2022 on operative military support between Sweden and Finland, first, and then on operative military support including all states that are members of the EU or NATO, when the Riksdag has authorised the government to request support in the form of foreign military forces, and, for this purpose, transfer administrative functions to the foreign states, the decisions have been made according to the special decision procedure under Chapter 10, Article 8, second paragraph of the IG referring back to Chapter 10, Article 6, second paragraph. The administrative functions concerned, the government bill explains, are those included in the task of meeting an armed attack through military means, among other things armed combat against attacking forces.²⁴

When the law on operative military support was to be amended for the second time in March 2023, the Government had already been authorised by the Riksdag to request military support and to transfer administrative functions to the foreign states concerned, but the Government had not yet been authorised to request military support from and to transfer administrative functions to NATO as an international organisation. The government bill on Sweden's membership in NATO proposes that the Government should be authorised to do so, presenting several reasons for this.²⁵ The alternative to such an authorisation of the Government would be that the Riksdag participates in the decision-making in

²² Government bill 2022/23:74, pp. 27–28, Chapter 10, Article 8, second paragraph refers back to Chapter 10, Article 6, second paragraph, which states the details of the qualified majority decision-making procedure in this case; see also SOU 2016:64, pp. 108–110.

²³ Government bill 2022/23:74, p. 28.

²⁴ Government bill 2022/23:74, p. 31.

²⁵ Government bill 2022/23:74, pp. 29–33.

every case where Sweden, potentially, would request military assistance from NATO to meet an armed attack.

The government bill points out that in the event of an armed attack against Sweden, Sweden will, as a member of NATO, be able to request military assistance in accordance with Article 5 of the NATO treaty.²⁶ The way in which a member state makes decisions to request assistance within the framework of the NATO treaty is not regulated in the treaty, but is up to each member state's constitutional order. Thus, the implementation of the NATO treaty does not require any constitutional amendments regarding the authority to make decisions about requesting support by the Swedish Government, for instance.²⁷ However, the government bill states, it is important that the decision to request support can be made with sufficient urgency.²⁸

The government bill states that the authorisation to the Government in the law on operative military support is motivated by the speed required in the decision-making process so that effective support can be obtained in the event of an armed attack against Sweden.²⁹ Against the background that the starting point in the Instrument of Government is that, in the event of an armed attack the Government shall be able to decide what defence measures will be taken so that these can be deployed as quickly as possible, it should logically follow that the Government also has the authority to request military support from other states that are members of the EU or NATO as soon as this is needed, according to the government bill.³⁰ The government bill concludes that a corresponding point of view can be held with regard to military support from the international organisation NATO.³¹

Military support from NATO, the government bill points out, in reality consists above all of military forces from the individual member states.³² As an organisation, NATO has no military forces of its own. However, military support from NATO does include support from NATO as an organisation, since the armed forces of the member states

²⁶ Government bill 2022/23:74, p. 29.

²⁷ Government bill 2022/23:74, pp. 29–30.

²⁸ Government bill 2022/23:74, p. 30.

²⁹ Government bill 2022/23:74, p. 31.

³⁰ Government bill 2022/23:74, p. 31.

³¹ Government bill 2022/23:74, p. 31.

³² Government bill 2022/23:74, p. 31.

are placed under NATO command, the government bill states.³³ Thus, the Swedish Government will need to request NATO as an organisation for its assistance too, in the event of an armed attack against Sweden. The government bill points out that, according to the law on operative military support before the change in March 2023, the Swedish Riksdag would have to make the decision to transfer the relevant administrative functions to NATO, before the Government could request assistance from NATO as far as the task of meeting an armed attack is concerned.³⁴ Thus, the administrative function could be transferred to NATO, but the Riksdag would have to make the decision in every particular case, if the Government had not previously been authorised to do so through a separate law. Such an arrangement, the government bill states, may lead to the necessary support being delayed in an unjustifiable way.³⁵

If Sweden is the subject of an armed attack, the government bill continues, Sweden's sovereignty is at stake.³⁶ In such a situation, it is obvious that Sweden, as a member of NATO, should be able to receive military support as quickly as possible from NATO.³⁷ Due to a Swedish NATO membership, the authorisation to the Government, in the law on operative military support, should be expanded to also include a right to request operative military support from NATO as an organisation, the government bill argues, and to the Government being allowed to transfer administrative functions to NATO for this purpose.³⁸ By authorising the Government to make that kind of decision, conditions are created to be able to better defend Sweden, the government bill says.³⁹

The authorisation to the Government to request military support for the purpose of meeting an armed attack against Sweden – in accordance with what was already the case regarding support from states that are members of the EU or NATO – should apply both in the situation where Sweden is at war, and in the event that there is a danger of war, the

³³ Government bill 2022/23:74, p. 31; Also pointed out by the Swedish Embassy in Washington DC in its comments on the inquiry report preceding the government bill, Embassy of Sweden in Washington, D.C., Comments on the memorandum Sweden's membership in NATO (Ds 2022:24), Dnr UD2022/14304, 15 November 2022.

³⁴ Government bill 2022/23:74, p. 31.

³⁵ Government bill 2022/23:74, p. 32.

³⁶ Government bill 2022/23:74, p. 32.

³⁷ Government bill 2022/23:74, p. 32.

³⁸ Government bill 2022/23:74, p. 32.

³⁹ Government bill 2022/23:74, p. 32.

government bill states.⁴⁰ Accordingly, it should not be a necessary pre-requisite for the Government's authorisation to request support that an armed attack against Sweden has already occurred and that Sweden is at war.⁴¹ By authorising the Government to request support if Sweden is in danger of war, the Government is given the opportunity, in a heightened security situation, to request such assistance that may be needed due to a feared upcoming attack, the government bill argues.⁴²

To sum up, the government bill says, the Government should be authorised, in case Sweden is at war or in danger of war, to request support from NATO in the form of military forces in order to in accordance with international law meet an armed attack against Sweden.⁴³ Furthermore, it should be stated that for this purpose, the Government may transfer administrative functions to NATO when the organisation is providing such assistance.⁴⁴ The administrative functions referred to are those that are included in meeting an armed attack against Sweden, the government bill adds.⁴⁵

Concerning what situations may amount to war and danger of war, the government bill states that there is no definition of the concepts either in the IG or in the preparatory works.⁴⁶ It is up to the Government, the government bill finds, to assess the situation in question and to determine whether Sweden is at war or is exposed to the danger of war.⁴⁷

The situation is the same regarding the concept of armed attack. It is up to the Government, the government bill states, to assess whether an armed attack is taking place and consequently whether the authorisation to request military support is applicable.⁴⁸ As we have seen above, the concept of armed attack is basically a concept of international law, and the government bill in this context refers to the rules of international law, including the UN Charter, on states' right to engage in self-defence in

⁴⁰ Government bill 2022/23:74, p. 32.

⁴¹ Government bill 2022/23:74, p. 32.

⁴² Government bill 2022/23:74, p. 32; *förhöjt säkerhetsläge*, in Swedish.

⁴³ Government bill 2022/23:74, p. 32.

⁴⁴ Government bill 2022/23:74, p. 32.

⁴⁵ Government bill 2022/23:74, p. 32.

⁴⁶ Government bill 2022/23:74, p. 32.

⁴⁷ Government bill 2022/23:74, p. 32; cf. also Inger Österdahl, "Krig eller fred: Om regeeringsformens definition av krig", *Svensk Juristtidning*, vol. 105, no. 4, 2021, pp. 261–276.

⁴⁸ Government bill 2022/23:74, p. 32.

the event of an armed attack.⁴⁹ The development of international law, to a great extent, lies outside Swedish control, above all through the development of customary law, the government bill adds.⁵⁰ The international legal development so far has meant that large-scale terrorist attacks by non-state actors and certain serious cyber-attacks can be considered as armed attacks that give rise to the right to self-defence, the bill observes.⁵¹

Under Chapter 15, Article 13 of the IG, as we have seen, the Government may deploy Sweden's armed forces in accordance with international law, not only to meet an armed attack against the country but also to prevent a violation of its territory.⁵² According to this provision, the Government has been authorised to instruct the armed forces to use force under international law to prevent a violation of Swedish territory in peace or during a war between foreign states.⁵³ For another state or international organisation to be able to assist Sweden with military forces, a decision by the Riksdag is required on the transfer of administrative functions to the other state or organisation according to Chapter 10, Article 8 of the IG. Under the law on operative military support in Article 3, before the change in March 2023, the Government could request support in the form of military forces from a state that is a member of the EU or NATO, in order to prevent violations of Swedish territory in time of peace or during war between foreign states in accordance with international law. For this purpose, the Government may transfer administrative functions to the state providing such support. There is no corresponding authority for the Government when it concerns the NATO organisation,

⁴⁹ Cf. government bill 2022/23:74, p. 32.

⁵⁰ Government bill 2022/23:74, p. 32.

⁵¹ Government bill 2022/23:74, pp. 32–33; on terrorist attacks by non-state actors, see also, for instance, SOU 2003:32 Our preparedness after September 11th, pp. 12, 211–214; Ove Bring, “En rätt till väpnat självförsvar mot internationell terrorism?”, *Juridisk Tidskrift*, vol. 13, no. 2, 2001/2002, pp. 241–251; Inger Österdahl, “Yes we can, probably: The Swedish position on self-defence against non-state actors in third states”, Working paper 2020:4, Faculty of Law, jur.uu.se; www.expressen.se/nyheter/billstrom-kritiserar-inte--turkiets-anfall-av-syrien/, 21 November 2022; statement by Minister for Foreign Affairs Tobias Billström, 7 October 2023, www.government.se/statements/2023/10/statement-by-minister-for-foreign-affairs-tobias-billstrom/.

⁵² Cf. *supra* section 2.1.

⁵³ See Ordinance 1982:756 on interventions by the Armed Forces in the event of violations of Sweden's territory during peace and neutrality, etc. (*Förordning 1982:756 om Försvarsmaktens ingripanden vid kränkningar av Sveriges territorium under fred och neutralitet, m.m.*).

the government bill says.⁵⁴ Similarly, in the situation involving an armed attack, for the Government to have the authority to request support from NATO regarding the prevention of a violation of Swedish territory, it is therefore required that the Riksdag makes a decision on the transfer of administrative functions, the government bill finds.⁵⁵

A suspected or established violation of Swedish territory occurs many times without warning and requires immediate countermeasures, the government bill continues.⁵⁶ It is often a quick process, the government bill observes.⁵⁷ This means that it must be possible to make a decision immediately or at any rate within a few days of the issue arising, says the government bill.⁵⁸ Nonetheless, crucially, this is not possible in the event that each support measure must be preceded by work with a government bill and then the processing of the government bill in the Riksdag, the government bill concludes.⁵⁹ The possibilities that exist today to request support from a member of the EU or NATO should therefore be extended and also apply to support from NATO as an international organisation, the government bill states.⁶⁰ And finally, in this way, Sweden's ability to prevent and act against violations of Swedish territory can be significantly improved, according to the government bill.⁶¹ The reasoning, as we can see, is similar to the reasoning in the government bill with respect to the situation where the Government would request support from NATO in meeting an armed attack. The law on operative military support was amended in accordance with the proposals in the government bill.

⁵⁴ Government bill 2022/23:74, p. 33.

⁵⁵ Government bill 2022/23:74, p. 33.

⁵⁶ Government bill 2022/23:74, p. 33.

⁵⁷ Government bill 2022/23:74, p. 33.

⁵⁸ Government bill 2022/23:74, p. 33.

⁵⁹ Government bill 2022/23:74, p. 33.

⁶⁰ Government bill 2022/23:74, p. 33.

⁶¹ Government bill 2022/23:74, p. 33.

3. Sending armed forces abroad and giving assistance

3.1 International obligation

Being a party to the NATO treaty does not only mean having the right to request assistance in the event of an armed attack, in line with what we have discussed in the previous section. Being a member of NATO also means having the obligation to assist the other members if an armed attack occurs against one or more of them. Under Article 5 of the NATO treaty, as we have seen, the obligation for each member state comprises taking ‘forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area’.

The provision in the IG which is most relevant in case Sweden would assist one or more of the other members of NATO in the event of an armed attack against one or more of them is Chapter 15, Article 16 of the IG on the deployment of armed forces. That is, if the assistance consists of military troops, which is the scenario that we will look at here. Other forms of military support than with armed forces, for instance, military equipment or material, is not something that is directly regulated in the IG.⁶²

Chapter 15, Article 16 of the IG states, firstly, that:

The Government may send Swedish armed forces to other countries or otherwise deploy such forces in order to fulfil an international obligation approved by the Riksdag.

Then the provision states that:

Swedish armed forces may also be sent to other countries or be deployed if: it is permitted by an act of law setting out the conditions for such action; or the Riksdag permits such action in a special case.

We will go through the three different situations where the Government may send Swedish armed forces to other countries or otherwise deploy such forces one at the time. Prior to doing so, it can be pointed out generally that, instead of “Sweden’s armed forces”, which is the term used in the provision in Chapter 15, Article 13 on self-defence, the provision

⁶² Government bill 2022/23:74, p. 29; only indirectly as far as the authority of the Government and the Riksdag, respectively, to dispose of the state’s assets is concerned.

in Article 16 on the deployment of armed forces uses the term “Swedish armed forces”.⁶³ Furthermore, whereas an explicit reference to international law is made in the provision on self-defence, no such reference to international law is found in the provision on deployment of armed forces, although it must be understood that the sending of Swedish armed forces to other countries or their deployment otherwise under Chapter 15, Article 16 must also take place in accordance with international law.

Furthermore, it can be noted that no particular purposes for which, or situations in which, Swedish armed forces may be sent to other countries or otherwise be deployed are specified in Article 16.⁶⁴ The provision only regulates the division of competence between the Government and the Riksdag. As long as the Riksdag agrees, the Government may send Swedish armed forces to other countries or otherwise deploy such forces for any purpose or in any situation, as long as it acts within the limits of international law.⁶⁵ When the IG was last revised in 2010, there were suggestions in the preceding inquiry report that the purpose for which sending the Swedish armed forces to other countries or their deployment otherwise would be allowed should be indicated in Chapter 15, Article 16.⁶⁶ It was suggested in the inquiry report that the exclusive permitted purpose for sending abroad or deployment otherwise of the Swedish armed forces under Chapter 15, Article 16 would be peace promotion, or peace support.⁶⁷ This, according to the commission of inquiry, would tie the constitutional rules closer and in a clearer way to the UN Charter and international law.⁶⁸ This suggested change in Article 16, however, was not included by the Government in its subsequent bill to the Riksdag.⁶⁹ Had this purpose been introduced into Article 16, the instances in which the Swedish Government would have been allowed to send the Swedish armed forces to other countries or otherwise deploy such forces

⁶³ *Rikets försvarsmakt* and *svenska väpnade styrkor*, respectively, in Swedish.

⁶⁴ Cf. government bill 2022/23:74, p. 28.

⁶⁵ See further, for instance, Inger Österdahl, “The Neutral Ally: The European Security and Defence Policy and the Swedish Constitution”, *Nordic Journal of International Law*, vol. 78 no. 1, 2009, pp. 95–132; see also Inger Österdahl, “The Use of Force: Sweden, the Jus Ad Bellum and the European Security and Defence Policy”, *Nordic Journal of International Law*, vol. 79 no. 1, 2010, pp. 141–188.

⁶⁶ SOU 2008:125, p. 519.

⁶⁷ SOU 2008:125, p. 519; *fredsfrämjande*, in Swedish.

⁶⁸ SOU 2008:125, p. 519.

⁶⁹ Government bill 2009/10:80, pp. 205–206.

would have been considerably limited. Sending the Swedish armed forces to other countries in order to participate in collective defence operations, for instance, would not have been possible, depending, of course, on how the term “peace promotion” would have been interpreted by the Swedish Government.

The first case, thus, in which the Government would be allowed to send the Swedish armed forces abroad or otherwise deploy such forces, according to Chapter 15, Article 16 of the IG, would be ‘in order to fulfil an international obligation approved by the Riksdag’. The international obligation that the drafters of the IG, in 1974, had in mind was the hypothetical obligation that would arise in accordance with a special agreement or agreements concluded with the UN Security Council under Article 43 of the UN Charter.⁷⁰ According to Article 43 of the UN Charter, all Member States undertake:

to make available to the Security Council on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

No such agreements have ever been concluded between the UN Security Council and any Member State. The government bill of 1973, proposing a new IG added, in line with what had been suggested by the preceding Swedish Government official report, that since the IG explicitly states that the agreement must have been approved by the Riksdag, there is no reason to limit the scope of the provision to the UN case.⁷¹ From this statement, it would seem to be possible to interpret the term “international obligation” to include obligations also flowing from other international relationships than the one of Sweden to the UN.

Sweden has not undertaken any international obligation of the kind referred to in Chapter 15, Article 16 of the IG, the recent government bill on the Swedish membership in NATO states.⁷² The Government

⁷⁰ The Royal Majesty's bill, with proposals for a new Instrument of Government and a new Riksdag Act, etc., 1973:90, 16 March 1973, p. 374.

⁷¹ The Royal Majesty's bill, with proposals for a new Instrument of Government and a new Riksdag Act, etc., 1973:90, 16 March 1973, pp. 374–375; see also SOU 1973:15 The constitutional committee (*Grundlagsberedningen*), pp. 189–190; SOU 1963:17 The constitutional investigation (*Författningsutredningen*), pp. 249, 478.

⁷² Government bill 2022/23:74, p. 35.

does not regard the NATO treaty Article 5 as an international obligation, in the sense of Chapter 15, Article 16 of the IG.⁷³ This, of course, does not exclude the potential conclusion of such international agreement at some future point in time, although an international agreement laying down an unconditional and automatic obligation for Sweden to send the Swedish armed forces to other countries or otherwise deploy such forces without any intervening political Swedish official political decision of any kind would seem rather improbable. The question is how the term “international obligation” is interpreted, according to Chapter 15, Article 16. So far, the obligation seems to have been interpreted as necessarily obligating Sweden to unconditionally supply armed forces when this is called for, according to the international agreement in question.

Theoretically at least, it is possible to interpret Article 16 in other, less absolute ways as well. For instance, Chapter 15, Article 16 could be interpreted as allowing the Government to send armed forces abroad or otherwise to deploy such forces in order to fulfil an international mutual defence obligation approved by the Riksdag, for instance, like the mutual defence obligation in the NATO Treaty Article 5.⁷⁴ This, however, is not how the Swedish Government interprets Article 16. Still, the door does not seem to be completely closed to the possibility of agreements of the kind intended in Chapter 15, Article 16, first paragraph being concluded in the future in the NATO framework. The government bill on Sweden’s membership in NATO says, a little vaguely, that the extent to which there may be a reason to use these opportunities is something that the Government may come back to.⁷⁵ This is stated on the subject, among other things, of the Government hypothetically, after the approval of the Riksdag, entering into an agreement with NATO, entailing an obligation for Sweden to deploy the Swedish armed forces under certain specified conditions.⁷⁶ And, as we saw, according to the wording in Chapter 15, Article 16, the provision is not limited to the case of the agreements with the UN Security Council concluded under Article 43 of the UN Charter.

⁷³ Government bill 2022/23:74, p. 35; the Government, of course, also does not regard Article 42.7 in the TEU as an international obligation of the kind referred to in Chapter 15, Article 16.

⁷⁴ Or even the TEU Article 42.7, hypothetically; cf. Per Ahlin, *Folkkrätten i regeringsformen* (Stockholm: Poseidon Förlag, 2019), pp. 26–27.

⁷⁵ Government bill 2022/23:74, p. 36.

⁷⁶ Government bill 2022/23:74, p. 36.

In the government bill on the Swedish membership in NATO, it is explained that the NATO agreement, as such, does not imply any legally binding obligation for the parties to deploy armed forces in the event of one or more parties being the subject of an armed attack.⁷⁷ What is required, the government bill points out, is that ‘each of them ... will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, *including the use of armed force*, to restore and maintain the security of the North Atlantic area’ (emphasis added).⁷⁸ Thus, the government bill says, membership in NATO does not entail an obligation, where the fulfilment necessitates the deployment of armed forces.⁷⁹ It can be noted that the elucidating remark that the NATO agreement Article 5 does not imply any legally binding obligation to deploy armed forces in the event of an armed attack is made in the section in the government bill dealing with the deployment of the Swedish armed troops to assist other NATO members, not earlier. Later on in the government bill, laying out the general consequences of a Swedish NATO membership, the Government explains further that decisions within NATO are made unanimously and that the members themselves shape the support given to other allies.⁸⁰ What support Sweden will contribute in the event of an armed attack on another Member State is thus a national decision, according to the bill.⁸¹ Perhaps in order to dispel any fears to the contrary, the government bill also points out that the mutual defence obligations in Article 5 in the NATO treaty only applies to an armed attack on a Member State.⁸² Sweden will not have any duty to engage in conflicts that are not covered by Article 5 in the NATO treaty, according to the bill.⁸³

⁷⁷ Government bill 2022/23:74, p. 35.

⁷⁸ Government bill 2022/23:74, p. 35.

⁷⁹ Government bill 2022/23:74, p. 35; the same reasoning presumably would apply to the practically identical Article 42.7 in the TEU. Article 42.7, however, does not seem to be regarded by the Swedish Government even as a collective defence commitment; (cf. The Statement of Foreign Policy 2023: “Our future NATO membership means a *new Swedish foreign and security policy identity*. We will be an Ally and *enter into collective defence commitments*” (emphasis added) (www.regeringen.se)).

⁸⁰ Government bill 2022/23:74, p. 43.

⁸¹ Government bill 2022/23:24, p. 43.

⁸² Government bill 2022/23:74, p. 44.

⁸³ Government bill 2022/23:74, p. 44.

3.2 Permitted by an act of law

The second case in which the Government would be allowed to send the Swedish armed forces to other countries or otherwise deploy such forces, according to Chapter 15, Article 16, would be if this is permitted by an act of law setting out the conditions for such action. Currently, there is no law empowering the Government to provide support with Swedish armed forces to other states that are a subject of an armed attack.⁸⁴ The government bill on Sweden's membership in NATO points out that there are three laws authorising the Government to send the Swedish armed forces to other countries, albeit not for the purposes contained in the NATO treaty.⁸⁵ There is the law on operative military support, which we have studied above, in which Article 1 states that the Government may, provided that Sweden is not at war and that there is no armed conflict on Finnish territory, upon Finland's request, deploy the Swedish armed forces in order to, in accordance with international law, support Finland in preventing violations of Finnish territory. Then there is the law on armed forces for service abroad.⁸⁶ This law allows the Government, at the request of the UN or in accordance with a decision made by the OSCE, to make an armed force of no more than three thousand people available for peacekeeping operations abroad. Finally, there is the law on training within the framework of international military cooperation, allowing the Government to also make decisions on sending an armed force abroad in order to participate in training within the framework of Sweden's international military collaborations.⁸⁷

In the government bill, the possibility of suggesting a new law authorising the Government to make decisions on the deployment of Swedish armed forces within the framework of NATO without the approval of the Riksdag is considered, i.e. without the Government having to obtain the Riksdag's approval in every particular case.⁸⁸ The government bill rejects this possibility, however, for the time being.⁸⁹ The Government finds that there are no sufficient reasons to currently propose a legal rule that authorises the Government to make decisions about the deployment

⁸⁴ Cf. government bill 2022/23:74, p. 35.

⁸⁵ Government bill 2022/23:74, pp. 28–29.

⁸⁶ Lag (2003:169) om väpnad styrka för tjänstgöring utomlands.

⁸⁷ Lag (1994:588) om utbildning inom ramen för internationellt militärt samarbete.

⁸⁸ Government bill 2022/23:74, pp. 35–36; see also Ds 2022:24, p. 49.

⁸⁹ Government bill 2022/23:74, pp. 30, 35.

of the Swedish armed forces within the framework of NATO without the approval of the Riksdag.⁹⁰ The main reason for maintaining the current order is that support with Swedish armed forces as a member of NATO, to meet an attack on another Member State would probably mean that Sweden becomes a party to the armed conflict concerned, and that Sweden consequently is likely to end up being at war.⁹¹ There are strong reasons why such a decision shall presuppose the approval of the Riksdag, the government bill argues, without developing the strong reasons further, however.⁹² The government bill also points out that it follows from the Instrument of Government that a declaration of war may not be issued by the Government without the Riksdag's consent, except in the event of an armed attack on the country.⁹³ Another reason invoked in the government bill for maintaining the current order, i.e. requiring the Riksdag's approval in every case before the Government may send the Swedish armed forces to other countries or otherwise deploy such forces within the NATO framework, is that the NATO treaty does not contain any requirement that decisions on military support can be made by a government alone.⁹⁴ In several of NATO's Member States, parliamentary decisions are also required to deploy military forces for purposes other than the defence of one's own country, the government bill states.⁹⁵

A further reason, invoked in the government bill as to why the current order can be maintained, is that a decision by the Riksdag to approve Swedish support with military troops can be made quickly if necessary, without any changes in the law.⁹⁶ It is possible for the Riksdag to take measures that significantly shorten the time for the consideration of the matter in the Riksdag, the government bill explains, presenting these different possibilities.⁹⁷ By taking such measures, the time for a matter being dealt with in the Riksdag can, in some cases, be shortened to a

⁹⁰ Government bill 2022/23:74, p. 36.

⁹¹ Government bill 2022/23:74, p. 35.

⁹² Government bill 2022/23:74, p. 35.

⁹³ Government bill 2022/23:74, p. 35.

⁹⁴ Government bill 2022/23:74, p. 35.

⁹⁵ Government bill 2022/23:74, p. 35.

⁹⁶ Government bill 2022/23:74, p. 35.

⁹⁷ Government bill 2022/23:74, p. 35; the time factor was also discussed in SOU 2018:31 on the subject of a law on operative military support between Sweden and Finland, pp. 59–78.

few days or a week.⁹⁸ It is up to the Riksdag and the Government to jointly ensure that the conditions are in place for a quick decision-making procedure, the government bill concludes.⁹⁹ Moreover, the NATO treaty itself does not contain any requirements on how quickly decisions should be made.¹⁰⁰ In fact, the decision by the Riksdag in March 2023 to approve Sweden's accession to the NATO treaty and to adopt the proposed changes in the law on operative military support, among others, was made after a quick decision-making procedure.¹⁰¹ So was the decision by the Riksdag, to adopt changes in the law on operative military support (then between Sweden and Finland) in May 2022.¹⁰²

3.3 Ad hoc approval

The third case in which the Government would be allowed, under Chapter 15, Article 16 in the IG, to send Swedish armed forces to other countries or otherwise deploy such forces would then be if the Riksdag permits such action in a special case. The third option, thus, is the option that the Government suggests in its bill to the Riksdag for how decisions should be made on sending the armed forces abroad or their deployment otherwise in the context of the mutual defence obligations within NATO, which the Riksdag approved. Therefore, no changes in the law are suggested in the government bill, with respect to the provision of assistance by Sweden with military forces to other members of NATO. A decision by the Riksdag to permit the Government to send the Swedish

⁹⁸ Government bill 2022/23:74, p. 36; this, of course, may affect the quality of the treatment of the matter in the Riksdag; the government bill emphasises the importance of the involvement of the Riksdag generally, in a particular section of the bill dealing with the influence of the Riksdag in matters relating to the request by Sweden, of assistance from a NATO or EU Member State (government bill 2022/23:74, pp. 36–37).

⁹⁹ Government bill 2022/23:74, p. 36; the considerably stricter view concerning the acceptable time consumption before a decision can be made when it comes to decisions where Sweden would need to request assistance from the other NATO members can be noted (cf. *supra* note 29 and following text); cf. also, the summary of the views on the subject of the time factor with regard to decisions by Sweden to provide support by military forces to other NATO members, of different public authorities and other entities having been given the opportunity to provide comments on the inquiry report preceding the government bill (government bill 2022/23:74, p. 30).

¹⁰⁰ Government bill 2022/23:74, p. 34.

¹⁰¹ Government bill 2022/23:74, pp. 4, 7, five days.

¹⁰² Government bill 2021/22:246, pp. 3, 8, one day.

armed forces to other countries or their deployment otherwise is made by a simple majority of the members voting, according to the IG Chapter 4, Article 7. The government bill provides several examples of when the Swedish armed forces have been sent to other countries, like the cases of Afghanistan, Iraq and Mali.¹⁰³ A decision that Sweden will participate in an international military operation pursuant to a mandate from the UN Security Council or following an invitation from the receiving state normally takes place after the Government has obtained the Riksdag's consent in the particular case.¹⁰⁴

Another matter taken up, briefly, in the government bill is the fact that the strict distinction in the Swedish law between the decision-making procedures for requesting military support, on the one hand, and for providing support by military forces to other members of NATO, on the other hand, could turn out to be difficult to uphold in the NATO context where common or coordinated operational activities often lack a clear distinction between who gives and who receives support.¹⁰⁵ The Armed Forces assert that the law on operative military support will be in need of revision, once again, since the law is based on a division in giving and receiving military support that partly loses its relevance in the event of Swedish membership in NATO.¹⁰⁶ For the time being, the Swedish

¹⁰³ Government bill 2022/23:74, p. 29; on the legal aspects of these cases, see further, for instance, Inger Österdahl, "Swedish use of force and the international legal framework: The legacy of Afghanistan", in Jan Hallenberg and Arita Holmberg (eds.), *The Swedish Presence in Afghanistan: Security and Defense Transformation* (Abingdon, Oxon: Routledge, 2016), p. 55–77; Inger Österdahl, "Svenska trupper i internationell styrka under fransk ledning i Mali – några folkrättsliga frågeställningar", *Svensk Juristtidning*, vol. 106, no. 4, 2022, pp. 319–338; Inger Österdahl, An invitation is an invitation is an invitation: legitimate authority to invite in recent Swedish practice, *Uppsala Faculty of Law Working Paper* 2020:2 (www.jur.uu.se); cf. also SOU 2017:16 Sweden in Afghanistan 2002–2014; Dir. 2022:60 Evaluation of Sweden's involvement in Afghanistan during the years 2001–2021 (inquiry report due 2024).

¹⁰⁴ Government bill 2022/23:74, p. 29; see further, for instance, Inger Österdahl, "Challenge or Confirmation: The Role of the Swedish Parliament in the Decision-making on the Use of Force", *Nordic Journal of International Law*, vol. 80, no. 1, 2011 pp. 25–93.

¹⁰⁵ Cf. government bill 2022/23:74, pp. 30, 34.

¹⁰⁶ Försvarsmakten, Försvarsmaktens remissyttrande över promemorian Sveriges medlemskap i NATO (Ds 2022:24), FM2022-24856:2, 15 November 2022, p. 2; cf. also Kungl. Krigsvetenskapsakademien, Yttrande över Promemorian Sveriges medlemskap i NATO (Ds 2022:24), 6/22, 9 November 2022, p. 8 (www.regeringen.se).

law and decision-making procedure is characterised by this distinction, not least since the distinction is so clear in the provisions in the IG.¹⁰⁷ This does not exclude that, later on, there may be reason to review the relevance of this distinction, the government bill adds.¹⁰⁸

In conclusion, concerning Sweden's support with military forces to other members of NATO, the government writes that the extent to which further measures should be taken in order to improve Sweden's conditions for providing operative military support within the framework of a membership in NATO is a question that there may be reason to return to.¹⁰⁹ An analysis that includes this issue is being carried out by the Ministry of Defence.¹¹⁰ It will be interesting to see what the future holds in this respect, and others.

¹⁰⁷ Government bill 2022/23:74, pp. 34, 36.

¹⁰⁸ Government bill 2022/23:74, p. 34.

¹⁰⁹ Government bill 2022/23:74, p. 36.

¹¹⁰ Government bill 2022/23:74, p. 36; see also similar references to the forthcoming results of this inquiry in government bill 2022/23:74 pp. 39, 47; the terms of reference of the inquiry are very extensive (Ministry of Defence, Memorandum (*Försvarsdepartementet, Promemoria*) Fö2022/00983, 14 July 2022): in addition to investigating what further changes in Swedish law might be necessitated by Sweden's accession to a great number of NATO treaties (reported on 3 July 2023, in Ds 2023:22 Sweden's accession to certain NATO treaties), the investigator will also inquire into what other changes in Swedish law a membership in NATO should entail, with the aim of enabling effective participation on the part of Sweden and appropriate support from NATO and its Member States (p. 4). The investigator shall submit the necessary legal proposals (p. 4). The investigator is free to submit proposals on matters that are closely related to the assignment (p. 4). A relatively detailed list of questions for the investigator to investigate can be found on p. 3. The list seems to include all the big questions that could not, due to time constraints (cf. government bill 2022/23:74, p. 43), be investigated before the government bill 2022/23:74 was presented to the Riksdag, including issues relating to publicity and confidentiality. The results of the second inquiry would be presented in December 2023 (Ministry of Defence Fö2022/01551, 12 December 2022). Although not directly related to the NATO membership, cf. also the terms of reference (Dir. 2023:123) of the inquiry entitled 'Strengthened protection for Swedish security at general meetings', the results of this inquiry will be presented in July 2024.

4. Accession to the NATO treaty

The Swedish decision to apply for membership in NATO was made by the Government on 16 May 2022, and the decision to join NATO was made by the Swedish Riksdag on 22 March 2023.¹¹¹

The actual decision to join NATO was the easiest one to make, according to the IG.¹¹² From the point of view of the IG, the NATO treaty is an international agreement like any other. According to Chapter 10, Article 1 of the IG, agreements with other states or with international organisations are concluded by the Government. In some cases, under Chapter 10, Article 3 of the IG, the Riksdag's approval is required before the Government concludes an international agreement which is binding upon the country. This applies, firstly, if the agreement requires the amendment or abrogation of an act of law or the enactment of a new act of law, and secondly, if the agreement otherwise concerns a matter to be decided by the Riksdag. None of these conditions apply with respect to the NATO treaty for Sweden's part.¹¹³ There is a third situation in which the Riksdag's approval is also required, however, before the Government concludes a binding international agreement and that is if the agreement is of major significance.¹¹⁴ As the government bill observes, the NATO treaty is an international agreement which, in constitutional terms, must be regarded as an agreement of major significance.¹¹⁵ For this reason, the Riksdag's approval is required before the government can decide on Swe-

¹¹¹ For the debate in the Swedish Riksdag, see Records of proceedings in the Riksdag (*Riksdagens protokoll*) 2022/23:79, 22 March 2023.

¹¹² Cf. government bill 2022/23:74, pp. 20–21.

¹¹³ As we saw earlier (supra note 27), the changes in the law on operative military support, in order to simplify the Swedish procedure for requesting assistance from NATO and the other NATO (or EU) members, decided on by the Riksdag on the same occasion as when the decision to approve Sweden's accession to the NATO treaty was made, were not strictly necessary in order for Sweden to be able to accede to the NATO treaty. Neither, obviously, were any changes in the law necessary with respect to sending the Swedish armed forces abroad at the request of other NATO members.

¹¹⁴ There is an exception to this rule regarding agreements of major significance in Chapter 10 Article 3 *in fine*, which exception will not be discussed further here: 'The Government may however act without obtaining the Riksdag's approval if national interests so require. In such a case, the Government shall instead confer with the Advisory Council on Foreign Affairs before concluding the agreement.' Whether this exception will be of any relevance in the future by reason of a Swedish membership in NATO remains to be seen.

¹¹⁵ Government bill 2022/23:74, p. 21.

den's accession to the NATO treaty.¹¹⁶ A membership in NATO means a historic change in Sweden's security policy.¹¹⁷ And, achieving the widest possible parliamentary support for this historic choice of path is of great importance to Sweden in the new security policy situation.¹¹⁸

Above, we have closely studied the changes in the law on operative military support decided by the Riksdag with a view to an approaching membership in NATO. However, strictly speaking, the Swedish NATO membership in itself does not require any amendments to existing laws or the enactment of any new law. As pointed out in the government bill, and as we have seen above, the amendments to the law on operative military support were not required in order for Sweden to fulfil its obligations according to the NATO treaty.¹¹⁹ The way in which a Member State decides to request assistance within the framework of the NATO treaty is not regulated in the treaty itself but is up to each Member State's constitutional order, the government bill explains.¹²⁰ Thus, no legal amendments or any new law is necessary before Sweden may accede to the NATO treaty. Obviously, there might be other strong arguments in favour of the amendments to the law on operative military support proposed in the government bill and subsequently decided by the Riksdag. The decision of the Riksdag to approve the conclusion by Sweden of a binding international agreement is normally taken by a simple majority of those voting. The opinion supported by more than half of those voting constitutes the decision of the Riksdag, according to Chapter 4, Article 7 of the IG, unless otherwise provided. Nothing else is provided in the IG of particular relevance to the decision-making procedure of the Riksdag, with respect to the approval of the accession by Sweden to the NATO treaty.¹²¹

¹¹⁶ Government bill 2022/23:74, p. 21.

¹¹⁷ Government bill 2022/23:74, p. 21.

¹¹⁸ Government bill 2022/23:74, p. 21.

¹¹⁹ Government bill 2022/23:74, p. 21.

¹²⁰ Government bill 2022/23:74, p. 21.

¹²¹ Cf., however, the argument put forward by Ulf Öberg, that Sweden's accession to the NATO treaty would necessitate a decision (in reality two decisions with a general election held in between) in accordance with the procedure prescribed for the enactment of fundamental law (see IG Chapter 10, Article 7 and Chapter 8, Article 14) (Dagens Nyheter, DN Debatt, 26 July 2023, www.dn.se). Joachim Åhman does not agree (Dagens Nyheter, *ibid.*; cf. *supra* note 17 and following text).

Also, as pointed out in the government bill, NATO is an international organisation – as opposed to a supranational organisation – and the decisions made in the North Atlantic Council on which each of the Member States is represented are made by consensus.¹²² Membership in NATO, as such, therefore, does not entail any transfer of decision-making rights.¹²³

The decision by the Riksdag to approve the accession of Sweden to the NATO treaty was most immediately preceded by the government bill which deals with the legal issues involved including the constitutional legal issues discussed above in this contribution.¹²⁴ The government bill in its turn was preceded by an official inquiry by the Government, primarily into the legal aspects of the Swedish NATO membership presented on 5 October 2022.¹²⁵ In the spring of 2022, the Government produced an inquiry concerning issues of security policy rather than issues of law and based on discussions among representatives of all the political parties represented in the Riksdag.¹²⁶ The report was presented on 13 May 2022. After the decision was made to join NATO, as we have seen, two further inquiries would be undertaken in order, firstly, to examine what legal amendments may be necessary in order for Sweden to accede to a number of treaties that Sweden is expected to accede to as a NATO member and, secondly, to examine what other legal amendments in the area of defence should be introduced by reason of the NATO membership.¹²⁷

It so happens that all the major constitutional legal issues involved with respect to the Swedish membership in NATO were examined indirectly within the framework of the inquiry on the conditions under the

¹²² Government bill 2022/23:74, p. 24; NATO treaty, Article 9, see further below.

¹²³ Government bill 2022/23:74, p. 24.

¹²⁴ Government bill 2022/23:74.

¹²⁵ Ds 2022:24 Sweden's membership in NATO.

¹²⁶ Ds 2022:7 A deteriorating security policy situation – consequences for Sweden; for earlier official analyses of the security policy situation, see Fö 2013:B Defence policy cooperation – efficiency, solidarity, sovereignty, Report from the Inquiry into Sweden's defence policy cooperation; SOU 2016:57, Security in a new era, Report of the Inquiry into Sweden's defence and security political collaborations (in the terms of reference of this inquiry, it was explicitly stated that the investigator was not supposed to evaluate the military non-alignment, Dir. 2015:88). None of the earlier analyses led to any (immediate) change in the Government's policy on Swedish NATO membership. On the Swedish NATO debate at that time, see, for instance, Per Ahlin, *Efter neutralitetspolitiken: folkrätten i svensk säkerhetspolitik 1993–2017* (Stockholm: Jure Förlag, 2018), pp. 30–32.

¹²⁷ See supra note 110.

IG for deepened defence cooperation in 2016.¹²⁸ The more direct focus of this investigation was the deepened defence cooperation between Sweden and Finland.¹²⁹ In the terms of reference of the inquiry, the unilateral Swedish declaration of solidarity is also mentioned, implying ultimately defence cooperation with all EU members and Norway and Iceland, and deepened defence cooperation among the Nordic states, of which Finland thus would be one cooperation partner.¹³⁰ From a Swedish perspective in the field of defence, the terms of reference say, there are no other limitations of principle than the cooperation involving no mutual defence obligations.¹³¹

¹²⁸ SOU 2016:64; see also the ensuing Dir. 2017:30; SOU 2018:31; government bill 2019/20:110; law 2020:782 on operative military support between Sweden and Finland.

¹²⁹ Cf. Memorandum of Understanding between the Government of the Republic of Finland and the Government of the Kingdom of Sweden on Defence Cooperation, 9 July 2018 (www.forsvarsmakten.se); while the form of the Memorandum of Understanding at first sight looks like the one of a treaty under international law, the approval by the Riksdag under the IG Chapter 10, Article 3 was not considered necessary in this case, however, because the Memorandum of Understanding was not considered by the Government to contain any legally binding obligations (Ministry of Defence, Fö2018/00950/SI, 27 July 2018, To the Riksdag, Answer to a question 2017/18:1586 from Hans Wallmark (M) A deepened defence cooperation between Sweden and Finland); see also, for instance, Statement of Intent between the Ministry of Defence of the Republic of Finland and the Ministry of Defence of the Kingdom of Sweden, Ramstein, 20 January 2023 (www.government.se); during the NATO membership application process, Sweden has entered into three international agreements which are legally interesting but which probably do not constitute treaties under international law: United Kingdom – Sweden Statement, Harpsund, 11 May 2022 (www.gov.uk) (explicitly “not a legally binding commitment under international law”); Trilateral Memorandum, Madrid, 28 June 2022 (www.nato.int); Press statement following the meeting between Türkiye, Sweden, and the NATO Secretary General, Vilnius, 10 July 2023) (www.NATO.int); on the Trilateral Memorandum, see, for instance, Andrea Maria Pelliconi, “The Trilateral Agreement between Turkey, Finland and Sweden and the Silence of Human Rights: The Need to Apply the MoU in Light of Human Rights and Refugee Law Protections”, 6 July 2022, (www.ejiltalk.org).

¹³⁰ Dir. 2015:111, pp. 1–4; today, developing bilateral defence alliances with mutual defence guarantees outside the existing European and Euroatlantic structures is dismissed by the Government as unrealistic (government bill 2022/23:74, pp. 23–24; cf. also Ds 2022:24, p. 36); the Memorandum of Understanding between the Government of the Republic of Finland and the Government of the Kingdom of Sweden on Defence Cooperation explicitly did not contain any mutual defence obligations (Section 2 (3) in the Memorandum).

¹³¹ Dir. 2015:111, p. 2; indirectly, this would also seem to illustrate that the Government did not consider Article 42.7 in the TEU to constitute a mutual defence obligation.

Whether the deepened defence cooperation with Finland, other Nordic states or EU members involved mutual defence obligations or not, however, was and is of lesser relevance with respect to the major Swedish constitutional legal questions involved. In fact, the terms of reference of the official inquiry reporting in 2016 were formulated in very general terms by the Government: 'A special investigator shall investigate the conditions according to the Instrument of Government for Sweden, provided that the necessary political decisions are made, to act jointly with military resources with another state in order to meet an armed attack against any of the states and in order to prevent violations of any of the states' territory in times of peace and during war between foreign states'.¹³² We recognise the references to meeting an armed attack and preventing the violation of the territory, respectively, from the Swedish constitutional provision cited above, namely the IG Chapter 15, Article 13. The inquiry, thus, as one element, and arguably the most important element, concerned the possibility for Sweden within the Swedish constitutional legal framework to act jointly with other states in military self-defence, of Sweden or of the other states. The principal conclusion drawn by the official inquiry was that the IG does not put any obstacles in the way of defence cooperation, as long as the constitutional rules of relevance for the decision-making are observed.¹³³ Swedish membership in NATO was not on the political agenda when the official inquiry was

¹³² Dir. 2015:111, pp. 1, 4; see further Inger Österdahl, "Sweden's Collective Defence Obligations or this is Not a Collective Defence Pact (or Is It?): Considerations of International and Constitutional Law", *Nordic Journal of International Law*, vol. 90, issue 2, 2021, pp. 127–160, covering developments up to the beginning of 2021.

¹³³ SOU 2016:64, pp. 10, 115; cf. also SOU 2023:75 Strengthened constitutional preparedness, pp. 251–270; this conclusion happens to coincide with the conclusion drawn in Inger Österdahl, "Regeringsformen och det internationaliserade svenska försvaret" ("The Instrument of Government and the internationalized Swedish Defence"), in Karin Åhman (ed.), *Regeringsformen 40 år 1974–2014, De lege, Juridiska fakulteten i Uppsala Årsbok 2014* (Uppsala: Iustus, 2014), pp. 225–239, p. 230, on the subject of the extensive internationalisation, and activation, of the Swedish defence policy which had taken place during the 2000s, preceding the return to the defence of the national territory in the 2010s, as of recently complemented with the Swedish membership in NATO: 'In summary, the Instrument of Government does not put any obstacles in the way of an active and internationalized defence policy'; cf. also Inger Österdahl, "Internationaliseringen av det svenska försvaret – regeringsformen, EU-rätten och folkrätten", *Kungl. Vetenskapssamhällets i Uppsala årsbok*, vol. 38, 2009–2010, pp. 131–140; Inger Österdahl, "Vilka konsekvenser får internationaliseringen av det svenska försvaret", *Tvårsnitt* 3:09, Humanistisk och samhällsvetenskaplig forskning, pp. 27–30.

being carried out, but once Swedish membership in NATO appeared on the political agenda, the conclusions of the official inquiry on the constitutional legal conditions for deepened defence cooperation must have been a relief.

5. The NATO treaty

Having gone through the Swedish constitutional provision on self-defence in Chapter 15, Article 13 of the IG and having made references to the fundamental rule of international law on the right of self-defence in Article 51 of the UN Charter, and having likewise studied the Swedish constitutional provision on the sending of Swedish armed forces to other countries or their deployment otherwise, it might be appropriate to say a few words about the content of the central article in the NATO treaty on collective self-defence, Article 5. Article 5 reads as follows:

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

Any such armed attack, and all measures taken as a result thereof, shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

Here, we may remind ourselves of what the Government wrote in its bill to the Riksdag on Swedish membership in NATO on the concept of self-defence, namely that it is up to the Government to assess whether an armed attack is taking place.¹³⁴ In the inquiry report on the conditions under the IG for deepened defence cooperation, of 2016, it was clearly stated that it is the Government who has the constitutional responsibility to assess whether a hostile activity is of such a nature and extent that there is an armed attack.¹³⁵ There is no definition of armed attack or of

¹³⁴ Government bill 2022/23:74, p. 32, *supra* note 48.

¹³⁵ SOU 2016:64, p. 103.

self-defence in the IG. The concepts of armed attack and self-defence in the IG, as we have seen, implicitly refer back to the international legal concept of self-defence.¹³⁶ As we can see from the text of the NATO treaty quoted above, there is no definition of armed attack in the NATO treaty either. In international law generally, there is the rule laid down in the UN Charter Article 51 that every member enjoys the right of individual or collective self-defence if an armed attack occurs and, furthermore, the rule that every state has an inherent right of self-defence is considered to constitute a rule of international customary law as well. The meaning and implication of the international legal concept of armed attack and the question of what measures a state may take in exercising individual self-defence, or that other states or organisations may take in their exercise of the right of collective self-defence are controversial issues, both in international practice and theory.¹³⁷ One could even venture to say that these are among the most controversial issues in international law today, not least due to the fact that there are increasingly different kinds of actors perpetrating armed attacks, and that there are also increasingly different kinds of activities that could be considered hostile in the new cyber context, for instance.¹³⁸

An important issue in the international discussion concerning the right of self-defence has been the issue of armed attacks carried out by terrorist groups, or non-state actors, and whether such an armed attack would count as an “armed attack” under Article 51 of the UN Charter, i.e. giving rise to a right of self-defence. If an armed attack by a terrorist group would be considered to give rise to a right of self-defence, one of

¹³⁶ Cf. government bill 2022/23:74, p. 32.

¹³⁷ See, for instance, among many others, Olivier Corten, *Le droit contre la guerre*, 3rd Ed. (Paris: Editions A. Pedone, 2020); Christine Gray, *International Law and the Use of Force*, 4th Ed. (Oxford: Oxford University Press, 2018); Christian Henderson, *The Use of Force and International Law* (Cambridge: Cambridge University Press, 2018); Mary Ellen O’Connell, Christian J. Tams, Dire Tladi, *Self-defence against Non-State Actors* (Cambridge: Cambridge University Press, 2019); Said Mahmoudi, “Self-defence and ‘unwilling or unable’ states”, *Hague Academy of International Law, Recueil des cours*, vol. 422 (Leiden/Boston: Brill/Nijhoff, 2022). James A. Green, *Collective Self-Defence in International Law* (Cambridge: Cambridge University Press, 2024).

¹³⁸ Cf. A national cyber security strategy, The Government’s letter (regeringens skrivelse (Skr.)) 2016/2017:213; cf. also Position Paper on the Application of International Law in Cyberspace, Government Offices of Sweden, July 2022 (www.regeringen.se); see also, for instance, François Delerue, *Cyber Operations and International Law* (Cambridge: Cambridge University Press, 2020).

many other questions has been by what means the right of self-defence may be exercised and most importantly against whom and where – on whose territory – the right of self-defence may be exercised. We will not go further into the details of the international legal debate concerning the right to self-defence against non-state actors in this contribution, or the details of the international legal debate on the right of self-defence on the whole, except for noting that the Swedish position reiterated, for instance, in the official inquiry on the conditions under the IG for deepened defence cooperation, among other similar investigations and official documents, is that some forms of large-scale terrorist attacks by non-state actors are regarded as armed attacks that can give rise to a right of self-defence.¹³⁹ Many difficult legal questions relating to the individual self-defence of Sweden as well as the collective self-defence of the other NATO (or EU) members at the request of Sweden could potentially arise due to large-scale attacks by non-state actors, including cyber-attacks.

A somewhat different question relating to Article 5 in the NATO treaty and the right of self-defence is raised by the Armed Forces in its comments to the inquiry report preceding the government bill on Swedish membership in NATO.¹⁴⁰ In its comments, the Armed Forces say, among other things, that they want to highlight the issue that the parties to the North Atlantic Treaty can be considered to have an obligation to assist other parties in the event of an attack, regardless of whether NATO decides to act or not.¹⁴¹ This aspect, the Armed Forces say, may need to be considered, for instance, in the Swedish translation of the NATO treaty Article 5, which stipulates that assistance must take place ‘in concert with the other Parties’.¹⁴² The issue seems to be a relevant one to raise, but the question is not dealt with at all in the ensuing government bill to the Riksdag. Perhaps the fact that the parties to the NATO treaty have an obligation to assist one another in the event of an armed attack, regardless of whether NATO decides to act or not, according to the Armed Forces, and the legal and other consequences of this fact belong to the category of questions that the Government may come back to.

¹³⁹ SOU 2016:64 pp. 51, 89, 95–96; cf. also SOU 2008:125, pp. 508, 519; SOU 2003:32, cf. *supra* note 51.

¹⁴⁰ Försvarsmakten, Yttrande, 15 November 2022, FM2022-24856:2, Försvarsmaktens remissyttrande över promemorian Sveriges medlemskap i NATO (Ds 2022:24), p. 2; Ds 2022:24 Sveriges medlemskap i NATO.

¹⁴¹ Försvarsmakten, Yttrande, *supra* note 140, p. 2.

¹⁴² Försvarsmakten, Yttrande, *supra* note 140, p. 2.

It can be noted that the first paragraph of Article 5 of the NATO treaty is reproduced in much the same words in the first sentence of Article 42.7 of the TEU: 'If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter'. Article 42.7 has never been considered by Sweden, or almost any other EU member so far, as constituting a legally binding collective defence obligation, however, whereas Article 5 of the NATO treaty obviously has.¹⁴³ It remains to be seen whether the currently ongoing activation and strengthening of the EU defence policy will affect the opinion held among the members of the EU on the legally binding force, or not, of the undertaking of the members under the first sentence of Article 42.7.¹⁴⁴ Maybe the currently lacking political will to develop a collective defence in the EU might in fact turn into such a will in the future, hypothetically.¹⁴⁵

Going back to the NATO treaty, both paragraphs of Article 5 make explicit references to the UN Charter. Such references to the UN Charter and its system for collective security are found in several of the other articles of the NATO treaty as well, fourteen in all. Article 1, for instance, refers to the duty of all members of the UN to settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered (Article 2 (3) of the UN Charter). Furthermore, Article 1 of the NATO treaty refers to the duty of all members of the UN, and all states, to refrain from the threat or use of force in any manner inconsistent with the purposes of the UN (Article 2 (4) of the UN Charter) in their international relations. In Article 7,

¹⁴³ Cf. government bill 2022/23:74, p. 10 citing the preceding inquiry report Ds 2022:7, p. 28, saying, according to the government bill, '...that the so called solidarity clause in Article 42.7 in the Treaty on European Union does not constitute a mutual defence obligation and that matters of national security and defence are fundamentally the responsibility of each member state. Further, it is stated that the prerequisites are lacking for a development towards collective defence within the EU'; see also government bill 2022/23:74, pp. 22–24.

¹⁴⁴ See further Inger Österdahl (2021); Inger Österdahl, "Försvarsklausulen i EU-fördraget – i ljuset av Sveriges ansökan om Natomedlemskap", Svenska institutet för europapolitiska studier, *Europapolitisk analys*, 2023:2, www.sieps.se; cf. A Strategic Compass for Security and Defence, adopted by the EU Council on 21 March 2022 (www.eeas.europa.eu); see also NATO 2022 Strategic Concept, adopted by the North Atlantic Council at the level of Heads of State and Government 28–29 June 2022 (www.nato.int).

¹⁴⁵ Cf. government bill 2022/23:74, p. 24; cf. also Ds 2022:24, p. 36.

the NATO treaty states that this treaty does not affect, and shall not be interpreted as affecting in any way the rights and obligations, under the Charter, of the parties that are members of the UN, or the primary responsibility of the Security Council for the maintenance of international peace and security.

What distinguishes NATO from an ad hoc arrangement for collective self-defence under Article 51 of the UN Charter is clearly expressed in Article 3 of the NATO treaty:

In order more effectively to achieve the objectives of this Treaty, the Parties, separately and jointly, by means of continuous and effective self-help and mutual aid, will maintain and develop their individual and collective capacity to resist armed attack.¹⁴⁶

This implies that the members are obliged to keep up a strong national defence and the members together plan and build a collective coordinated defence capability in peacetime before an armed attack against any of them has occurred. According to Article 4, '[t]he Parties will consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened'.

According to Article 9 in the NATO treaty, finally, '[t]he Parties hereby establish a Council, on which each of them shall be represented, to consider matters concerning the implementation of this Treaty'. This Council is called the North Atlantic Council (NAC). According to Article 9, further, the Council shall be so organised as to be able to meet promptly at any time. Central to the NATO organisation, under Article 9, the Council shall set up such subsidiary bodies as may be necessary; in particular, it shall establish immediately a defence committee – called the Military Committee – which shall recommend measures for the implementation of Articles 3 and 5. The defence committee thus oversees the peacetime planning for and the potential carrying out of the collective

¹⁴⁶ This also distinguishes NATO from the EU currently; cf. Ds 2022:7, p. 28, saying that '[t]here is nothing in [Article 42.7] in itself that would make a development toward collective defence impossible, but the limitations lie in how the article is substantiated in practice and the fact that for the 21 [now 22] allied member states it is NATO that is responsible for the collective defence. Nor have the militarily non-aligned member states wanted to build up parallel structures in the EU.'

defence which forms the object of the NATO treaty. The Council makes its decisions unanimously.¹⁴⁷

Considering the more than thirty members of NATO – including Sweden as the potential number thirty-two – there might be a wide range of opinions among the members on such international legal matters as what constitutes an armed attack in a particular case and by what means the attacked state and the states assisting it may respond, when the mutual defence obligation under Article 5 of the NATO treaty arises, and whether armed attacks by non-state actors should be considered “armed attacks” for the purposes of the right of self-defence, individual as well as collective, and how, where, when and against whom the right of self-defence may be exercised, among other things. In addition to this, such international legal issues as the fight against terrorism, the protection of human rights and democratic governance, the respect for international humanitarian law (the law in war, the *jus in bello*), the potential use of weapons of mass destruction, nuclear non-proliferation and disarmament, and many other issues of international legal relevance may come to the fore in the NATO context. However, this is not the place to pursue these issues of international law further. They are mentioned here in order to show the close connection between the Swedish constitutional provisions on self-defence and on the deployment of Swedish armed forces and the host of international legal issues that arise once action in self-defence, individual or collective, is contemplated.

6. Conclusion

Several constitutional provisions have been involved in the Swedish NATO membership application process. On a general level, and importantly, there was nothing in the IG preventing a Swedish NATO membership. Thus, there has been no need to amend the IG before Sweden could apply for membership or potentially start receiving operative military support from or giving operative military support to the other members of NATO, or the NATO organisation once Sweden becomes a member. When the Riksdag approved Sweden's accession to the NATO

¹⁴⁷ The only time so far that Article 5 has been invoked was in the wake of the terror attack against the World Trade Centre in New York on 11 September 2001; cf. <https://www.nato.int/docu/update/2001/1001/e1002a.htm>; cf. also government bill 2022/23:74, pp. 12–17 on the NATO organisation and the NATO treaty.

treaty, the provision in the IG on the transfer of authority to other states and international organisations was followed in order to include NATO as an organisation and not only its Member States among the actors from whom Sweden will be able to apply for assistance once it is a member. States that are members of NATO, or of the EU, had already been included through earlier amendments to the law among those from whom Sweden can apply for military assistance in the event of an armed attack against Sweden. The original law on operative military support, from 2020, only concerned operative military support between Sweden and Finland. The provision regarding the transfer of authority, thus, did not cause any problems in the membership application process.

The provision in the IG relating to self-defence and the provision regarding sending the Swedish armed forces abroad or their deployment otherwise are also considered to allow Sweden to participate fully in NATO cooperation. The respective provisions mainly concern the division of powers between the Government and the Riksdag where the role of the Riksdag is relatively weaker as far as self-defence is concerned and relatively stronger as far as the sending of Swedish armed forces abroad or their deployment otherwise is concerned. In the context of NATO membership, the sending of armed forces abroad or their deployment otherwise would imply participation in collective defence operations in order to assist other Member States. So far, the constitutional framework stays entirely intact with respect to the use of the Swedish armed forces for the defence of Sweden or for the defence of other members of NATO. The role of the Riksdag is intended to remain as strong in terms of decisions on the deployment of Swedish armed troops as it is today, judging from the official documentation relating to the constitutional issues surrounding the NATO membership application. There are hints that it may become difficult to keep the Riksdag as actively involved as before in the decision-making process on the deployment of Swedish armed forces when Sweden becomes a member of NATO; however, at this stage, it is impossible to tell how the Swedish legal development on this point might turn out.

The accession to the NATO treaty as such is a relatively simple affair under the IG. The Riksdag has given its approval to the Swedish accession to the NATO treaty in due order. The Government will accede to the treaty on Sweden's part once all the NATO members have, in their turn, approved the Swedish membership.

In other areas of constitutional law than the ones directly relating to the NATO membership, there have been changes recently which will also indirectly facilitate cooperation within NATO. These changes have concerned foreign espionage and provisions in the Freedom of the Press Act and the Swedish Fundamental Law on Freedom of Expression, and the issue of membership in terrorist organisations and the provision on the freedom of association in the Instrument of Government. Whether this would indicate anything as concerns further changes in the Swedish fundamental laws with direct or indirect connection to the Swedish membership in NATO is highly uncertain. Also, a recent official inquiry report has suggested making it slightly more difficult to change fundamental laws, starting from 2027. Under all circumstances, interesting times, including potentially in the constitutional legal sphere, seem to lie ahead.