



NO SAFE HAVEN SERIES

1



SWEDEN

END IMPUNITY THROUGH
UNIVERSAL JURISDICTION

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CONTENTS

1. INTRODUCTION	7
2. THE LEGAL FRAMEWORK	9
2.1. Type of Legal System	9
2.2. Status of International Law	9
2.3. Court System	9
2.4. Role of the Police and the Prosecutors	10
2.5. Proposal for Legal Reform	10
3. EXTRATERRITORIAL CRIMINAL JURISDICTION OTHER THAN UNIVERSAL JURISDICTION	12
3.1. Active personality jurisdiction	12
3.2. Passive personality jurisdiction	13
3.3. Protective jurisdiction	14
4. LEGISLATION PROVIDING FOR UNIVERSAL CRIMINAL JURISDICTION	15
4.1. Ordinary crimes	15
4.2. Crimes under national law of international concern	19
4.2.1 Two different jurisdictional schemes	19
4.2.2 An Overview: Crimes under national law of international concern that are subject to universal jurisdiction in Sweden	20
4.3. Crimes under international law	31
4.3.1. War crimes	31
4.3.2. Crimes against humanity	33
4.3.3. Genocide	34
4.3.4. Torture	35

4.3.5. Extrajudicial executions.....	35
4.3.6. Enforced disappearances	36
4.3.7. Aggression	36
5. CIVIL JURISDICTION OVER TORTS.....	38
5.1. Legislation providing for universal jurisdiction over torts in civil cases.....	39
5.2. Legislation providing for raising civil claims in criminal cases initiated by a prosecutor or investigating judge.....	40
5.3. Private prosecutions by victims or others acting on their behalf, <i>actions civiles</i> or <i>actio popularis</i>	41
5.4. Restrictions on private prosecutions and civil claims procedures	41
6. OBSTACLES TO THE EXERCISE OF CRIMINAL OR CIVIL JURISDICTION	43
6.1. Flawed or missing definitions of crimes under international law, principles of criminal responsibility or defences	43
6.2. Presence requirements in order to open an investigation or request extradition	57
6.3. Statutes of limitationS applicable to crimes under international law	58
6.4. Dual criminality	61
6.5. Immunities.....	62
6.6. Bars on retroactive application of international criminal law in national law or other temporal restrictions	63
6.7. Ne bis in idem	64
6.8. Political control over decisions to investigate and prosecute.....	67
6.9. Restrictions on the rights of victims and their families	68
6.10. Amnesties	68
7. EXTRADITION AND MUTUAL LEGAL ASSISTANCE	69
7.1 Extradition.....	69

7.1.1. Inappropriate limits on Swedish extradition requests	71
7.1.1.1. Political control over the Swedish extradition requests.....	71
7.1.1.2. Presence and Swedish Extradition Requests.....	71
7.1.2. Inappropriate bars to granting extradition requests	71
7.1.2.1. Political control over the granting of extradition requests	72
7.1.2.2. Nationality.....	72
7.1.2.3. Dual criminality and territorial jurisdiction	73
7.1.2.4. Political offence.....	73
7.1.2.5. Military offence.....	75
7.1.2.6. <i>Ne bis in idem</i>	75
7.1.2.7. Non-retroactivity	76
7.1.2.8. Statutes of limitation.....	76
7.1.2.9. Amnesties, pardons and similar measures of impunity.....	76
7.1.3. Safeguards	76
7.1.3.2. Torture and other cruel, inhuman or degrading treatment or punishment....	77
7.1.3.4. Humanitarian concerns.....	78
7.1.3.5. Speciality	78
7.2. Mutual legal assistance	79
7.2.1 Unavailable or inadequate procedures	80
7.2.2 Inappropriate bars to mutual legal assistance	80
7.2.3. Safeguards	81
8. SPECIAL POLICE OR PROSECUTOR UNIT	82
9. JURISPRUDENCE.....	84
9.1 Universal jurisdiction cases.....	84

9.2 Passive personality case.....	87
9.3 Active personality case	88
9.4 Protective jurisdiction.....	92
RECOMMENDATIONS	93
BIBLIOGRAPHY	98

1. INTRODUCTION¹

Sweden consistently takes a strong stance against impunity for the most serious crimes in international fora. However, according to a reliable report, up to 1500 war criminals freely roam the streets of Sweden.² The police have shown a willingness to make sure that Sweden does not become a safe haven for war criminals by founding a special war crimes unit. However, there are serious gaps in the legal framework required for the effective prosecution of crimes under international law, including the failure to define certain crimes under national law as crimes under Swedish law, failure to define principles of criminal responsibility in accordance with the strictest requirements of international law, requirements that the government – rather than an independent prosecutor - approve prosecutions or extraditions in certain circumstances and a wide range of obstacles to prosecutions and extraditions. In addition, more than six years after a proposal was presented by a national law commission in 2002 for a law implementing the Rome Statute of the International Criminal Court (Rome Statute), no proposal has yet been presented by the government to the Parliament. This inaction has led to an national debate in which members of Parliament, legal scholars and non-governmental organizations have criticized Sweden's failure to implement its obligations under international law. A major overhaul of the legal framework is necessary for Sweden not to be a safe haven for persons responsible for crimes against humanity, torture, extrajudicial executions, enforced disappearances and other crimes under international law. For Sweden to uphold its credibility as champion against impunity in the international arena, significant changes are required.

¹ This report was drafted by Anna Dahlbäck, Mark Klamberg, Fredrik Sandberg and Anna Åkerlund, members of Amnesty International Sweden's International Criminal Court Group (www.amnesty.se/icc), and Lena Skoglund, in cooperation with the International Justice Project in the International Secretariat of Amnesty International. Amnesty International wishes to thank Dr. Iain Cameron, District Court Judge Rikard Backelin, and one expert who prefers to remain anonymous, for their thoughtful and helpful comments and suggestions on the report during the drafting stage. In addition, Amnesty International is grateful for the very helpful cooperation and assistance provided by members of the Swedish National Criminal Police War Crimes Unit and specialized prosecutors in the International Public Prosecution Office in Stockholm in providing information about their work and locating court decisions and other documents. Every effort was made to ensure that all the information in this paper was accurate as of 1 December 2008. However, for an authoritative interpretation of Swedish law, counsel authorized to practice in Sweden should be consulted. Amnesty International welcomes any comments or corrections, which should be sent to ijp@amnesty.org. Amnesty International plans to update and revise this and other papers in the *No Safe Haven Series* in the light of developments in the law. All translations appearing in this paper are official unless otherwise indicated.

² *Internationella Förbrytare i Sverige, Att spåra upp, utreda och lagföra förövare av folkmord, brott mot mänskligheten, krigsförbrytelser och vissa andra grova internationella brott*, joint report by the International Prosecutor's Office, the Police and the Migration Board, January 26, 2007, page 44.

Sweden's universal jurisdiction legislation dates back to a provision in a draft Penal Code prepared in 1923 that would have given Swedish courts universal jurisdiction over ordinary crimes.³ Current legislation permits its courts to exercise universal criminal jurisdiction over genocide and war crimes, to the extent that the latter fall under the term of "crime against international law" in the Penal Code (*Brottsbalken*), Ch. 22, Sect. 6.⁴ The Penal Code does not contain provisions penalizing crimes against humanity, torture, extrajudicial executions or enforced disappearances and thus does not provide for universal criminal jurisdiction over these crimes. Nevertheless, to the extent that the conduct amounts to an ordinary crime under national law, Swedish courts can exercise universal jurisdiction over a considerable amount of conduct amounting to such crimes under international law, such as murder, kidnapping, rape and assault. However, not only is much criminal conduct thereby omitted, but, as the International Criminal Tribunal for Rwanda has found, characterizing genocide and other crimes under international law as mere ordinary crimes trivializes them (see Section 6.1 below).

In response to reports that up to 1500 persons suspected of crimes under international law were present in Sweden and reports of the requirement by other states for assistance, Sweden established a special war crimes unit within the police in March 2008. This unit can investigate and prosecute in the Swedish courts crimes under international law on either expressly, as genocide or "crimes against international law" (war crimes), or indirectly, as ordinary crimes, and it can assist other states investigating and prosecuting such crimes. Civil claims made by victims and their families for reparations based on those war crimes over which courts may exercise universal criminal jurisdiction may be pursued in a criminal proceeding even though such claims cannot be pursued in civil proceedings.

This paper makes extensive recommendations for reform of law and practice so that Sweden can fulfil its obligations under international law to investigate and prosecute effectively persons suspected of crimes under international law, to extradite suspects to another state able and willing to do so in a fair trial without the death penalty, a risk of torture or other cruel, inhuman or degrading treatment or punishment or to surrender them to an international criminal court.

³ Project of Penal Code for Sweden, Ch. 1, Sect. 9 (*cited in* Harvard Research in International Law, 29 Am. J. Int'l L. Supp. 435, 576 (1935)). The development of jurisdictional rules is discussed in the report of the 2002 Commission on International Criminal Law, SOU 2002:98 (<http://www.regeringen.se/sb/d/108/a/438>), Sect. 2.5, p. 145 *et seq.*

⁴ The official English translation of the Penal Code updated to 1999 can be found on the Ministry of Justice website at: <http://www.sweden.gov.se/sb/d/3926/a/27777>.

2. THE LEGAL FRAMEWORK

2.1. TYPE OF LEGAL SYSTEM

The legal tradition of Sweden is *sui generis*, with elements from both civil and common law traditions. For example, Swedish legislation historically has been influenced by the German legal tradition, but generally Roman law has played a lesser role than in European countries with a civil law system and there have been fewer major codifications than in European civil law countries.⁵ Although criminal proceedings are closer to the accusatorial model in common law countries than to the civil law model, judicial precedent plays a less important role than in common law legal systems.⁶

2.2. STATUS OF INTERNATIONAL LAW

The Swedish legal system is dualist, where international law is implemented by amendment of national law either through incorporation of customary or conventional international law into national law or through transformation of international law into national law.⁷ Although the traditional method in Sweden has been transformation, in recent years there have been instances of incorporation of international law, for example through the incorporation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) and incorporation of European Union law.⁸

2.3. COURT SYSTEM

There are three main types of courts in Sweden: ordinary courts, administrative courts and a several special courts. The ordinary courts have jurisdiction over both civil and criminal cases and they can hear civil claims in criminal proceedings in certain circumstances (see Section 5.2 below). At the basic trial level of ordinary courts there are District Courts (*tingsrätter*), directly above are Courts of Appeal (*hovrätter*) and at the top of the ordinary court system is the Supreme Court (*Högsta domstolen*). Although there is no obligatory rule of *stare decisis* (binding precedent), Supreme Court is meant to establish jurisprudence and its rulings are highly persuasive. Sweden does not have a constitutional court; however, all courts have a

⁵ Law and justice in Sweden (http://www.bolag.org/english/sweden/general/e-s-law_and_justice.htm).

⁶ *Ibid.* .

⁷ The dualist nature of the relation to international law of the legal system was confirmed in rulings by the highest courts of the country: the Supreme Court (NJA 1973:423), the Supreme Administrative Court (RÅ 1974:121) and the Labour Court (AD 1972:5). In contrast, under a monist system, courts can enforce international law directly, without either incorporation or transformation.

⁸ In addition, there are some monist elements, as certain EU legislation is directly applicable as law in Sweden.

power of judicial review within the ambits of a particular case heard.⁹

2.4. ROLE OF THE POLICE AND THE PROSECUTORS

Criminal investigations are regulated primarily by the 23rd Chapter of the Code of Judicial Procedure (*Rättegångsbalken* 1942:740) and by the 1984 Police Act (*Polislag* 1984:387). Code of Judicial Procedure, Ch. 23, Sect. 3 states that

“[a] decision to initiate a preliminary investigation is to be made either by the police authority or by the prosecutor. If the investigation has been initiated by the police authority and the matter is not of a simple nature, the prosecutor shall assume responsibility for conducting the investigation as soon as someone is reasonably suspected of the offence.”¹⁰

Consequently, investigations of the crimes discussed in this paper are usually led by a prosecutor assisted by the police.

Unless otherwise prescribed, prosecutors are obliged to prosecute offences falling within the domain of public prosecution, which means that jurisdiction over these crimes is obligatory rather than discretionary.¹¹

A new national Criminal Police War Crimes Unit was established on 1 March 2008 to investigate genocide, crimes against humanity, war crimes and torture, working with specific prosecutors in the Stockholm International Prosecutor’s Office (see Section 8 below).

2.5. PROPOSAL FOR LEGAL REFORM

During the ratification process of the Rome Statute, the Swedish Commission on International Criminal Law (Commission) was established to review Swedish legislation on criminal responsibility for crimes under international law and jurisdiction over such crimes.¹² The mandate of the Commission included a review of Swedish legislation on criminal jurisdiction in general, and in the terms of reference for the Commission, the Government expressed a strong interest in the commission putting forward a proposal in which Swedish legislation authorized prosecution of crimes under international law to the same extent that

⁹ See 1974 Instrument of Government (*Regeringsformen*) Ch. 11, Sect. 14.

¹⁰ Code of Judicial Procedure, Ch. 23, Sect. 3
(<http://www.regeringen.se/content/1/c4/15/40/472970fc.pdf>).

¹¹ The Swedish Code of Judicial Procedure (*Rättegångsbalken*), Ch. 20, Sect. 6. Such crimes include certain war crimes, called “crimes against international law” in the Penal Code (See Section 4.3.1 below).

¹² The Commission was established pursuant to a government decision issued on 12 October 2000, Committee directive 2000:76 (*Straffansvar för brott mot mänskligheten och andra internationella brott enligt folkrätten*). For an explanation of how national commissions of inquiry operate and how their legislative proposals are considered, see Law and Justice in Sweden, *supra*, n. 5.

Sweden has promoted internationally.¹³ The Commission consulted civil society during its consideration of this issue.¹⁴ In November 2002, the Commission presented its report.¹⁵

The proposal of the Commission entails, amongst other things, the replacement of the current crime of genocide and the "crime against international law" (war crimes) (see Sections 4.3.1 and 4.3.3 below) by a new Swedish Act on International Crimes (Act). The proposed Act would, if enacted, make it possible to hold individuals criminally (and civilly, if the civil claims are presented in a criminal proceeding) responsible for genocide, crimes against humanity and war crimes. However, it is a matter of concern that the proposed Act would not include acts of torture, extrajudicial executions or enforced disappearances, except when they amount to one of these three crimes. In addition, the report also proposes transfer of the power to grant authorization from the government to the Prosecutor-General, save for a possibility for the latter to refer a particular case to the government for decision. This proposal would permit political concerns to play a part in the process of justice. Furthermore, the Commission's recommendations would continue to permit accused persons to have defences, such as superior orders and necessity, to the worst imaginable crimes. Another concern is that the scope of universal jurisdiction provision would shrink, as the proposal recommends removing the rule authorizing universal jurisdiction over any crime holding a minimum penalty of four years. More than eight years have elapsed since the Commission was established, and more than six years since it published its report, but it is still uncertain when the Ministry of Justice will present a legislative proposal to the Parliament.¹⁶

¹³ *Ibid.*

¹⁴ Head of the Commission and Supreme Court Judge Dag Victor held meetings with relevant non-governmental organizations before presenting the report and he also asked them to present their views in writing on implementation of the Rome Statute. Amnesty International Sweden provided comments, <http://www2.amnesty.se/icc.nsf>. In addition, before the government takes up a position on the recommendations of a commission, its report is referred for consideration to relevant bodies, authorities and organizations, which occurred in this case. In addition, any citizen may comment. See Law and Justice in Sweden, *supra*, n. 5.

¹⁵ 2002 Commission report, *supra*, n. 3.

¹⁶ Amnesty International, as well as parliamentarians, legal scholars and a judge of the International Criminal Tribunal for Rwanda (ICTR) have all criticized the low priority given to the issue by the current and former governments; see letters, articles and parliamentary questions and answers in Swedish at www.amnesty.se/icc.

3. EXTRATERRITORIAL CRIMINAL JURISDICTION OTHER THAN UNIVERSAL JURISDICTION

Swedish courts can exercise active and passive personality jurisdiction, as well as protective jurisdiction, in certain circumstances.

3.1. ACTIVE PERSONALITY JURISDICTION

Active personality jurisdiction is a category of jurisdiction based on the nationality of the suspect or defendant at the time of the commission of the crime or tort.¹⁷ This category of jurisdiction does not include jurisdiction over crimes committed by a foreigner who is not a national, but who is a resident of the country, at the time of the crime, or who subsequently becomes a resident, domiciliary or national of the forum state. Jurisdiction over crimes on such a basis instead falls under the category of universal jurisdiction (see Section 4 below).

The Swedish Penal Code, Ch. 2, Sect. 2, para. 1, provides for jurisdiction based on active personality:

“Crimes committed outside the Realm shall be adjudged according to Swedish law and by a Swedish court where the crime has been committed:

1. by a Swedish citizen ...”¹⁸

¹⁷ This is the approach taken in the International Bar Association Legal Practice Division, Report of the Task Force on Extraterritorial Jurisdiction (October 2008) (IBA Report), p. 144: “The active personality principle, also known as the active nationality principle, permits a state to prosecute its nationals for crimes committed anywhere in the world, if, at the time of the offense, they were such nationals.”. For the scope of the active personality principle, see Amnesty International, *Universal jurisdiction: The duty of states to enact and enforce legislation – Ch. One*, AI Index: IOR 53/003/2001, September 2001, Sect. II.B.

¹⁸ In response to a questionnaire by the Special Rapporteur on *aut dedere aut judicare* of the International Law Commission Sweden stated:

“The basic provisions to meet the requirements of the [*aut dedere aut judicare*] principle are found in Ch. 2, section 2, of the Swedish Penal Code. According to the relevant provisions, Swedish courts always have jurisdiction when the crime has been committed by a Swedish citizen . . .”

A requirement in this section is that acts are also subject to criminal responsibility according to the law of the place where they were committed (dual criminality).¹⁹ Section 3, under which many serious crimes fall, does not require dual criminality. Section 3 provides for, *inter alia*, any crime for which the minimum punishment prescribed in Swedish law is imprisonment for more than four years or for “crimes against international law” (see Section 4 below). Furthermore, the dual criminality rule does not apply to a number of sexual crimes when committed against children under the age of 18, including rape, sexual abuse, procuring and use of children to make sexual images.²⁰

Swedish courts can exercise active personality jurisdiction over civil claims, but only if they are included in a criminal proceeding (see Section 5.2 below).

3.2. PASSIVE PERSONALITY JURISDICTION

Passive personality jurisdiction is a category of jurisdiction based on the nationality of the victim at the time of the commission of the crime or the tort.²¹ It does not include crimes committed against someone who became a national, domiciliary or resident of the forum state after the crime was committed. In addition, it also does not apply to crimes committed against a national of a co-belligerent state in an armed conflict who is not a national of the forum state. The Swedish Penal Code provides for a very restrictive use of the passive personality principle, limited to crimes committed outside the territory of any state. In other circumstances, as in the *Hagelin* case (see Section 9), Swedish courts would have to rely on universal jurisdiction provisions to try foreigners for crimes committed against Swedish nationals abroad when there has been no harm to special Swedish interests.

Penal Code, Ch. 2, Sect. 3 (5), provides:

“Even in cases other than those listed in Section 2, crimes committed outside the Realm shall be adjudged according to Swedish law and by a Swedish court:

...

5. if the crime was committed in an area not belonging to any state and was directed against a Swedish citizen, a Swedish association or private institution ...”

Swedish courts can exercise passive personality jurisdiction over civil claims, but only if they

Replies from governments, U.N. Doc. A/CN.4/579/Add.1, available at:
<http://daccessdds.un.org/doc/UNDOC/GEN/N07/327/56/PDF/N0732756.pdf?OpenElement>).

¹⁹ Penal Code, Ch. 2, Sec. 2 (2). For areas not belonging to any state, the punishment of the crime under Swedish law must be more severe than a fine according to the same provision.

²⁰ Penal Code, Ch. 2, Sec. 2 (4).

²¹ IBA Report, *supra*, n. 17, p.146: “The victim must have been a national of the foreign state, State A, at the time of the crime.”. For the scope of the passive personality principle, see Amnesty International, *Universal jurisdiction (Ch. One)*, *supra*, n. 17, at Sect. II.C.

are presented in a criminal proceeding (see Section 5.2 below).

3.3. PROTECTIVE JURISDICTION

The category of protective jurisdiction involves jurisdiction over crimes committed against the forum state's own special interests, such as counterfeiting the forum state's currency, treason and sedition.²² In the Swedish Penal Code, protective jurisdiction is granted without any requirement that "vital interests" are at stake – a requirement common in the codes of other countries. Accordingly, protective jurisdiction over crimes in the Penal Code is quite expansive. The Penal Code, Ch. 2, Sect. 3 (4), provides that

"[e]ven in cases other than those listed in Section 2, crimes committed outside the Realm shall be adjudged according to Swedish law and by a Swedish court:

...

4. if the crime committed was a crime against the Swedish nation, a Swedish municipal authority or other assembly, or against a Swedish public institution[.]"

²² For the scope of protective jurisdiction, see Amnesty International, *Universal jurisdiction (Ch. One)*, *supra*, n. 17, at Sect. II.D. For a somewhat more restrictive definition, see IBA Report, *supra*, n. 17, p. 149: "[T]he 'protective principle', ... recognizes a state's power to assert jurisdiction over a limited range of crimes committed by foreigners outside its territory, where the crime prejudices the state's vital interests".

4. LEGISLATION PROVIDING FOR UNIVERSAL CRIMINAL JURISDICTION

As explained below in this section, the current Swedish Penal Code expressly provides for universal jurisdiction over ordinary crimes, such as murder, kidnapping, rape and assault, a broad range of crimes of international concern identified in treaties and some crimes under international law, namely certain war crimes and genocide. Swedish courts can also exercise universal jurisdiction over much – but far from all – of the conduct amounting to other crimes under international law when they constitute crimes under ordinary law. One obstacle to exercising such jurisdiction is that some of these crimes are subject to a requirement that the act also be a crime in the place where it was carried out/perpetrated (dual criminality). This obstacle and others, such as statutes of limitations, are discussed in more detail in Sections 6.4 to 6.10 below.

As mentioned above in Section 2.5, the Commission on International Law appointed by the government presented a proposal in November 2002 for a new Act covering certain crimes under international law. The proposed Act would define genocide, crimes against humanity and war crimes, but not other crimes under international law, as crimes under Swedish law and confirm that they are subject to universal jurisdiction.²³ As the Commission (incorrectly) found that jurisdiction under the current Penal Code extends in some respects beyond the limits permitted under international law, it recommended that prosecutions for crimes committed abroad would require the consent of the government or Prosecutor-General.²⁴ The proposals for changes in current law are discussed below in this section in light of the relevant international law.

4.1. ORDINARY CRIMES

Chapter 2 of the Penal Code authorizes courts to exercise universal jurisdiction over ordinary crimes, such as murder, assault, rape or kidnapping.²⁵ This chapter sets out a complicated framework of extraterritorial jurisdiction with provisions that may include active personality,

²³ SOU 2002:98.

²⁴ *Ibid.* See also Håkan Friman, *Political and Legal Considerations in Sweden relating to the Rome Statute for [sic] the International Criminal Court*, in Roy S. Lee, ed., *States' Responses to Issues Arising from the ICC Statute: Constitutional Sovereignty, Judicial Cooperation and Criminal Law* 121, 123 (Ardsley, N.Y. Transnational Publishers 2005), at 143.

²⁵ It also includes terrorist offences, which are discussed below in Section 4.2, dealing with crimes under national law of international concern.

passive personality, protective jurisdiction and universal jurisdiction provisions all in the same sections and that contain a variety of limitations on the scope of jurisdiction, including, in some instances, dual criminality, as well as statutes of limitations (see Sections 6.3 and 7.1.2.8 below).

The universal jurisdiction provisions in Chapter 2 relating to ordinary crimes fall into three groups. The first group, in Sect. 2 (1) to (3) applies to domiciliaries, residents, citizens of other Nordic countries and other foreigners present in Sweden.²⁶ The second group, in Section 3 (2-3a), covers a limited number of cases involving foreign public servants. The third group, in Section 3 (7), includes any crime committed where the minimum penalty in the Penal Code is four years' imprisonment.

Group one – domiciliaries, residents, Nordic citizens and other foreigners present

First, the Swedish Penal Code, Ch. 2, Sect. 2 (1) to (3), provides for universal jurisdiction over aliens domiciled in Sweden; aliens not domiciled in Sweden who subsequently become Swedish citizens, domiciled in Sweden or Nordic citizens who are present in Sweden; and any other alien who is present in Sweden who commits a crime that under Swedish law carries a sentence of more than six months' imprisonment:

“Crimes committed outside the Realm shall be adjudged according to Swedish law and by a Swedish court where the crime has been committed:

1. by ... an alien domiciled in Sweden
2. by an alien not domiciled in Sweden who, after having committed the crime, has become a Swedish citizen or has acquired domicile in the Realm or who is a Danish,

²⁶ Sweden explained in a report to the International Law Commission about how the *aut dedere aut judicare* principle is implemented in national law, citing only the following provisions:

“The basic provisions to meet the requirements of the principle are found in Ch. 2, section 2, of the Swedish Penal Code. According to the relevant provisions, Swedish courts always have jurisdiction when the crime has been committed by... an alien domiciled in Sweden (para. 1), by an alien not domiciled in Sweden who, after having committed the crime, has become a Swedish citizen or has acquired domicile in Sweden or who is a Danish, Finnish, Icelandic or Norwegian citizen and is present in Sweden (para. 2) or by any other alien who is present in Sweden, and when under Swedish law the crime can result in imprisonment for more than six months (para. 3). Those provisions, however, apply only when the act is subject to criminal responsibility under the law of the place where it was committed. Thus, in practice, Sweden may always prosecute when the alleged offender is, *inter alia*, a... resident or at least present on Swedish territory.”

The International Law Commission, The obligation to extradite or prosecute (*aut dedere aut judicare*), A/CN.4/579/Add.1 para. 18. This statement not only omits the other provisions providing for universal jurisdiction, but also fails to note various obstacles to exercising such jurisdiction, such as dual criminality.

Finnish, Icelandic, or Norwegian citizen and is present in the Realm, or

3. by any other alien, who is present in the Realm, and the crime under Swedish Law can result in imprisonment for more than six months."

Group two – public servants

Second, according to Ch. 2 Sect. 3 (2-3a), Swedish courts can exercise jurisdiction over crimes committed in the course of duty outside Sweden by the following persons regardless of nationality: members of the armed forces,²⁷ a person employed in a foreign contingent of the Swedish armed forces²⁸ and an employee of the Swedish police, customs authority or coast guard exercising cross-border duties.²⁹ Of course, in almost all cases, such persons will be Swedish nationals subject to active personality jurisdiction.

Group three – serious crimes

Third, the Swedish Penal Code, Ch. 2, Sect. 3 (7) provides that

"... crimes committed outside the Realm shall be adjudged according to Swedish law and by a Swedish court: ...

7. if the least severe punishment prescribed for the crime in Swedish law is imprisonment for four years or more."

²⁷ Penal Code, Ch. 2, Sect. 3 (2):

"Crimes committed outside the Realm shall be adjudged according to Swedish law and by a Swedish court: ... 2. if the crime was committed by a member of the armed forces in an area in which a detachment of the armed forces was present, or if it was committed by some other person in such an area and the detachment was present for a purpose other than an exercise ..."

²⁸ Penal Code, Ch. 2, Sec. 3 (3)

"[C]rimes committed outside the Realm shall be adjudged according to Swedish law and by a Swedish court: ... 3. if the crime was committed in the course of duty outside the Realm by a person employed in a foreign contingent of the Swedish armed forces or a foreign contingent of the Swedish Police Forces[.]"

²⁹ Penal Code, Ch. 2, Sec. 3 (3a):

"If the crime has been committed in service outside the territory, by an officer of the Police, an officer of the Customs or an officer of the Coast Guard, who performs transnational tasks according to an international treaty to which Sweden has acceded." (translation by Amnesty International).

Accordingly, Swedish courts can exercise universal jurisdiction over the following crimes:³⁰

Murder (Penal Code, Ch. 3, Sect. 1);
Manslaughter (Penal Code, Ch. 3, Sect. 2);
Kidnapping (Penal Code, Ch. 4, Sect. 1);
Gross rape (Penal Code, Ch. 6, Sect. 1);
Gross rape of a child (Penal Code, Ch. 6, Sect. 4);
Gross robbery (Penal Code, Ch. 8, Sect. 6);
Gross arson (Penal Code, Ch. 13, Sect. 2);
Gross devastation endangering the public (Penal Code, Ch. 13, Sect. 3);
Gross spreading of poison or a contagious substance (Penal Code, Ch. 13, Sect. 7); and
Armed threat against the legal order (Penal Code, Ch. 18, Sect. 3).

However, according to the proposal of the Commission on International Criminal Law, universal jurisdiction would no longer apply to any crime with a minimum penalty of at least four years' imprisonment.³¹

Dual criminality and ordinary crimes

As discussed in further detail below (Section 6), there are several obstacles to Swedish courts exercising universal jurisdiction. One such obstacle is the requirement of dual criminality. Jurisdiction for group one above is conditioned on such a requirement (with the exception of sex crimes committed against minors).³² There is, however, no requirement of dual criminality for jurisdiction over groups two and three (certain public servants and serious crimes). Accordingly, there is no requirement of dual criminality for exercising jurisdiction over any of the ordinary crimes listed above, for which the minimum penalty provided for the crime is imprisonment for four years or more. According to the proposal of the commission discussed above in Section 2.5, there would be no requirement of dual criminality for the crimes contained in the new Act on International Crimes.

³⁰ The ancillary crimes to the mentioned provisions do not fall under the jurisdiction provided in Ch. 2, Sect. 3 (7), as the minimum punishments for them are less than four years of imprisonment, see Ch. 23.

³¹ SOU 2002:98 p.170.

³² Penal Code Ch. 2, Sect. 2 (4).

4.2. CRIMES UNDER NATIONAL LAW OF INTERNATIONAL CONCERN

Swedish courts may exercise universal jurisdiction over a number of crimes under national law of international concern, some of which are listed in treaties permitting or requiring states parties to exercise universal jurisdiction, primarily counter-terrorism treaties.³³

4.2.1 TWO DIFFERENT JURISDICTIONAL SCHEMES

There are two different ways for Swedish courts to exercise universal jurisdiction over crimes under national law of international concern: first, where the crimes are expressly listed as falling under universal jurisdiction in the Penal Code, and second, where the crimes falling under this category, usually listed in treaties with *aut dedere aut judicare* provisions,³⁴ can be prosecuted as ordinary crimes for which universal jurisdiction can be exercised (see Section 4.1 above).

Expressly listed crimes

First, the Penal Code (Ch. 2, Sect. 3 (6)) expressly lists a number of crimes for which universal jurisdiction applies:

“Even in cases other than those listed in Section 2, crimes committed outside the Realm shall be adjudged according to Swedish law and by a Swedish court:

...

6. if the crime is hijacking, maritime or aircraft sabotage, airport sabotage, counterfeiting currency, an attempt to commit such crimes, a crime against international law, unlawful dealings with chemical weapons, unlawful dealings with mines, false or careless statement before an international court, terrorist crime according to section 2 of Act (2003:148) on punishment for terrorist crimes or an attempt to commit such crime and a crime described in section 5 of the said Act[.]”³⁵

³³ Crimes under international law, including grave breaches of the Geneva Conventions and Protocol I, the crime against humanity of *apartheid*, torture, extrajudicial executions and enforced disappearances, are discussed below in Section 4.3.

³⁴ Although in certain circumstances a treaty with an *aut dedere aut judicare* provision does not involve universal jurisdiction (for example when the obligation only concerns a national of the requested state), normally it does involve universal jurisdiction by requiring the requested state to extradite any person, including foreigners accused of committing crimes outside the requested state against foreigners where there is no harm to the requested state's own interests. If the requested state declines to extradite the accused, it will then be obliged under the *aut dedere aut judicare* provision to exercise universal jurisdiction.

³⁵ Penal Code, Ch. 2, Sect. 3 (6) (as amended by SFS 2003:149). Although the English text of the Penal Code on the Ministry of Justice website (<http://www.sweden.gov.se/sb/d/574/a/27777>) states that it was published on 21 July 2004 and last amended on 9 November 2005, it does not include this amendment, which added counterfeiting to the list. In a report to the International Law Commission explaining why it had not listed each treaty with a try or extradite requirement, Sweden stated: “Since the generic provisions in the Penal Code are applicable to any international obligation by which Sweden is bound, Sweden saw no need to list each international treaty containing the principle of *aut dedere aut judicare* in its submission.” Swedish submission to ILC, *supra* note 26 para. 19. Nevertheless, this

The crime of terrorism mentioned, involves the commission of any one of a number of crimes listed in Section 3 of this Act when committed with a particular political aim.³⁶

Prosecution under the general rules for ordinary crimes

The second means by which Swedish courts may exercise universal jurisdiction over national crimes of international concern is where crimes falling within this category constitute ordinary crimes for which universal jurisdiction in certain circumstances is provided in the Penal Code (for the rules establishing such jurisdiction, see Section 4.1 above).

As discussed below, there is sometimes ambiguity about the scope of crimes in the Penal Code subject to universal jurisdiction. Although many of the ordinary crimes not covered by the first method (expressly listing crimes) would carry a minimum penalty of four years' imprisonment or more and thus would not be subject to the requirement of dual criminality (see Section 4.1 above), they would be subject to other restrictions applicable to ordinary crimes, such as statutes of limitations (see Section 6).

4.2.2 AN OVERVIEW: CRIMES UNDER NATIONAL LAW OF INTERNATIONAL CONCERN THAT ARE SUBJECT TO UNIVERSAL JURISDICTION IN SWEDEN

The crimes under national law of international concern listed in treaties authorizing or requiring states parties to exercise universal jurisdiction are listed below, where it has been possible to make this determination. There is also an indication of whether Swedish courts can or cannot exercise universal jurisdiction, either as one of the crimes expressly listed in Penal Code, Ch. 2, Sect. 3 (6) or, when the crime is incorporated into the Penal Code upon Swedish ratification of a treaty. In the former case, no attempt has been made in this report to determine whether the crime, such as "airport sabotage", fully corresponds with each of the crimes covered by the relevant treaty.

approach is not easy for someone unfamiliar with the Swedish legal system to follow. The explanation in the report to the Counter Terrorism Committee is misleading as there are no generic provisions applicable to any international obligation, but rather a number of jurisdictional provisions referring generally to specific crimes. Accordingly, one has to review the Penal Code or other legislation to determine which specific crimes are covered and their scope.

³⁶ For further information concerning Swedish universal jurisdiction over crimes of international concern, see Sweden's reports to the Security Council Committee on Counter-Terrorism: Letter dated 20 December 2001 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, U.N. Doc. S/2001/1233, 24 December 2001; Letter dated 20 June 2002 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, U.N. Doc. S/2002/691, 20 June 2002; Letter dated 10 June 2004 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, U.N. Doc. S/2004/476, 10 June 2004; Letter dated 24 January 2005 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, U.N. Doc. S/2005/43, 24 January 2005; Letter dated 21 July 2006 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, U.N. Doc. S/2006/551, 21 July 2006.

For the purposes of this paper, it is sufficient simply to note whether Sweden has implemented, at least in part, the relevant treaty obligation. If so, it is indicated whether the Penal Code expressly defines the conduct, or at least some of the conduct, prohibited in the treaty as a crime or not. Even if the Penal Code has not expressly defined the conduct as a crime, it may be possible in some instances to prosecute a person for some of that conduct as an ordinary crime. In most instances, there is little or no jurisprudence addressing the scope of jurisdiction. The exact scope of conduct subject to universal jurisdiction has also yet to be definitively resolved in Swedish jurisprudence. The crimes are discussed roughly in chronological order, based on when a crime became generally recognized as subject to universal jurisdiction as with piracy, or when it was the subject of an international or regional treaty provision, regardless when Sweden became a party. Indeed, in some cases, Sweden has not ratified the relevant treaty. The crimes and the relevant treaties (protocols are discussed together with the related treaty) discussed below are as follows:

- Piracy: Customary international law, 1958 Convention on the High Seas and 1982 United Nations Convention on the Law of the Sea;
- Counterfeiting: 1929 International Convention for the Suppression of Counterfeiting Currency;
- Narcotics trafficking: 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Protocol amending the Single Convention on Narcotic Drugs;
- Violence against passengers or crew on board a foreign aircraft abroad: 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention);
- Hijacking a foreign aircraft abroad: 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention);
- Sale of psychotropic substances: 1971 Convention on Psychotropic Substances
- Certain attacks on aviation: 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention);
- Attacks on internationally protected persons, including diplomats: 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;
- Terrorism suppression: 1977 European Convention on the Suppression of Terrorism;
- Hostage taking: 1979 International Convention against the Taking of Hostages;
- Theft of nuclear materials: 1979 Convention on the Physical Protection of Nuclear Material;
- Attacks on ships and navigation at sea: 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation;

- Environmental crime: 1988 Convention on the Protection of the Environment through Criminal Law;
- Use, financing and training of mercenaries: 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries;
- Attacks on UN and associated personnel: 1994 Convention on the Safety of United Nations and its 2005 Protocol;
- Terrorist bombing: 1997 International Convention for the Suppression of Terrorist Bombings;
- Financing of terrorism: 1999 International Convention for the Suppression of the Financing of Terrorism;
- Transnational crime - Transnational organized crime: 2000 UN Convention against Transnational Organized Crime;
- Transnational crime - Trafficking of human beings: 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children;
- Transnational crime – Firearms: 2001 Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition;
- Nuclear terrorism: 2005 International Convention for the Suppression of Acts of Nuclear Terrorism; and
- Terrorism – prevention: 2005 Council of Europe Convention on the Prevention of Terrorism.

Piracy

Piracy is a crime which can be committed only on the high seas or outside the territorial jurisdiction of any state, and, under long-established customary international law, courts of any state can exercise universal jurisdiction over piracy, independently of any treaty. However, one definition has been codified in two treaties providing for universal jurisdiction over this crime. Sweden is not a party to the 1958 Convention on the High Seas.³⁷ Nevertheless, it has been a party to the 1982 United Nations Convention on the Law of the Sea since 25 June 1996.³⁸ Both treaties provide for universal jurisdiction over piracy.

³⁷ Convention on the High Seas (http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_high_seas.pdf), 29 April 1958 (entered into force 29 Sept. 1962), Arts. 19 (authorizing seizure of pirate ships or aircraft on the high seas), 15 (defining piracy).

³⁸ UN Convention on the Law of the Sea (http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf), 10 Dec. 1982 (entered

Sweden has not defined piracy as a crime in the Penal Code, but it might be possible for Sweden to prosecute persons for certain ordinary crimes amounting in the circumstances to piracy, such as murder, kidnapping and gross robbery, based on universal jurisdiction since they carry minimum sentences of four years' imprisonment (see Section 4.1 above).³⁹

Counterfeiting

Sweden has been a party to the 1929 International Convention for the Suppression of Counterfeiting Currency since March 15 2001. This treaty requires states parties to make counterfeiting of foreign currency and attempts to do so ordinary crimes (Art. 3), to make such crimes subject to extradition (Art. 10) and, if the state party recognizes a general rule of extraterritorial jurisdiction, to prosecute persons suspected of counterfeiting of foreign currency abroad if extradition has been requested and rejected for a reason not connected with the crime (Art. 9).

Sweden has defined some conduct as counterfeiting in the Penal Code Ch. 14, Sect. 6. The provision also includes the counterfeiting of foreign currencies. Swedish courts can exercise universal jurisdiction over counterfeiting of foreign currency abroad since these crimes are listed in Penal Code, Ch. 2, Sect. 3 (6).

Narcotics trafficking - 1961 Single Convention

Sweden has been a party to the 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Protocol amending the Single Convention on Narcotic Drugs, since December 5 1972.⁴⁰ This treaty requires states parties to define certain conduct concerning narcotic drugs as crimes under national law (Art. 36 (1)) and, if a person suspected of conduct is present in its territory and not extradited, to prosecute the suspect (Art. 36 (2) (a) (iv)).

Sweden has defined some or all of the conduct prohibited by the 1961 Single Convention as crimes in the 1968 Penal Narcotics Act.⁴¹

Violence against passengers or crew on board a foreign aircraft abroad

Sweden has been a party to the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention) since 4 December 1969.⁴² This treaty

into force 16 Nov. 1994), Arts. 101 (Definition of piracy), 105 (Seizure of a pirate ship or aircraft).

³⁹ In addition, some acts of piracy may be punishable as hijacking under Penal Code, Ch. 13, Section 5a.

⁴⁰ 1961 Single Convention on Narcotics Drugs, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 25 Mar. 1972 (entry into force 25 Aug. 1975).

⁴¹ Translation by Amnesty International. Swedish title: *Narkotikastrafflag (1968:64)*.

⁴² Convention on Offences and Certain Other Acts Committed on Board Aircraft (<http://untreaty.un.org/English/Terrorism/Conv1.pdf>), Tokyo, 14 Sept. 1963 (entered into force 4 Dec. 1969).

authorizes states parties to take measures to ensure persons suspected of violence against passengers or crew on board a foreign aircraft abroad can be extradited or prosecuted (Art. 13 (2)) and to extradite persons suspected of responsibility for such acts or to institute criminal proceedings against them in their own courts (Art. 15 (1)).

The Penal Code of Sweden contains crimes involving causing an aircraft accident (devastation endangering the public),⁴³ or interfering with the operation of an aircraft (under the definition of hijacking).⁴⁴ It has defined some acts of violence against passengers or crew on board an aircraft as a crime in Penal Code, Ch. 13, Sect. 5a (2). Sweden has expressly provided its courts with universal jurisdiction over the crime of hijacking, Penal Code Ch. 2, Sect. 3 (6), and as gross devastation endangering the public carries a sentence of at least six years of imprisonment, courts can exercise universal jurisdiction over these crimes according to Penal Code Ch. 2, Sect. 3 (7).

Hijacking a foreign aircraft abroad

Sweden has been a party to the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention) since 7 July 1971.⁴⁵ This treaty requires states parties to define seizures of aircraft as crimes under national law (Art. 2), to establish jurisdiction over persons suspected of such seizures who are present in its territory if they are not extradited (Art. 4 (2)), to take measures to ensure presence for prosecution or extradition (Art. 6 (1) and (2)) and to submit the cases to the competent authorities if they are not extradited (Art. 7).

Sweden has provided for universal jurisdiction over hijacking under Penal Code Ch. 2, Sect. 3 (6). Also, it has identified hijacking as a terrorist offence under Section 3 of the Terrorism Act 2003. Swedish courts can therefore exercise universal jurisdiction pursuant to Penal Code Ch. 2, Sect. 3 (6) under the heading of “crime of terrorism”. Sweden has also defined hijacking an aircraft as a crime under Penal Code Ch. 13, Sect. 5 (a).

1971 Convention on Psychotropic Substances

Sweden has been a party to the 1971 Convention on Psychotropic Substances since December 5, 1972.⁴⁶ The Convention requires each state party, subject to its constitutional limitations, to treat as a punishable offence, any intentional action contrary to a law or regulation adopted in pursuance of its obligations under the Convention, and ensure that serious offences are liable to adequate punishment (Art. 22 (1) (a)), to prosecute offences committed in their territory and suspects found in its territory, if extradition is not acceptable under that state’s law (Art. 22 (2) (b)).

⁴³ *Devastation endangering the public*, Penal Code Ch. 13, Sect. 3.

⁴⁴ *Air traffic sabotage*, Penal Code, Ch. 13, Sect. 5 (a).

⁴⁵ Convention for the Suppression of Unlawful Seizure of Aircraft (http://untreaty.un.org/unts/1_60000/24/40/00047980.pdf), The Hague, 15 Dec. 1970 (entered into force 14 Oct. 1973).

⁴⁶ Convention on Psychotropic Substances, 21 Feb. 1971.

Sweden has defined some or all of the conduct prohibited by the 1971 treaty as crimes in the 1968 Penal Narcotics Act.

Certain attacks on aviation

Sweden has been a party to the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention) since July 10, 1973.⁴⁷ This treaty requires states parties to define certain attacks on aviation as crimes under national law (Art. 3), to establish jurisdiction over persons suspected of such attacks who are present in its territory if they are not extradited (Art. 5 (2)), to take measures to ensure presence for prosecution or extradition (Art. 6 (1) and (2)) and to submit the cases to the competent authorities if they are not extradited (Art. 7).

Sweden has defined such attacks as crimes under the Penal Code Ch. 13, Sect. 5 (a) and (b). Courts can exercise universal jurisdiction over aircraft or airport sabotage according to Penal Code Ch. 2, Sect. 3 (6). Sweden has also identified certain attacks on civil aviation in the form of aircraft and airport sabotage as terrorist offences under Section 3 of the Terrorism Act 2003. Swedish courts can therefore exercise universal jurisdiction pursuant to Penal Code Ch. 2, Sect. 3 (6) under the heading of “crime of terrorism”. Sweden has also defined such attacks as crimes.

Attacks on internationally protected persons, including diplomats

Sweden has been a party to the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents since July 1, 1975.⁴⁸ This treaty requires states parties to define attacks on internationally protected persons, including diplomats, as crimes under national law (Art. 2), to establish jurisdiction over persons suspected of such attacks who are present in its territory if they are not extradited (Art. 3 (2)), to take measures to ensure presence for prosecution or extradition (Art. 6 (1)) and to submit the cases to the competent authorities if they are not extradited (Art. 7).

Sweden has not expressly defined attacks against internationally protected persons as a crime. However, its courts can exercise universal jurisdiction over certain attacks to the extent that they are ordinary crimes, such as murder, under Penal Code, Ch. 3, Sect. 1, and manslaughter, under Penal Code, Ch. 3, Sect. 2, carry minimum sentences of four years' imprisonment.

⁴⁷ Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (<http://untreaty.un.org/English/Terrorism/Conv3.pdf>), 23 September 1971 (entered into force 26 January 1973).

⁴⁸ Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons Including Diplomatic Agents (<http://untreaty.un.org/English/Terrorism/Conv4.pdf>), 14 Dec. 1973 (entered into force 20 Feb. 1977).

Suppression of terrorism

Sweden has been a party to the 1977 European Convention on the Suppression of Terrorism since 15 September 1977.⁴⁹ This treaty requires states parties not to regard certain acts as a political offence or as an offence connected with a political offence or as an offence inspired by political motives, for the purposes of extradition (Article 1). State parties are also required to establish jurisdiction over persons suspected of such crimes who are present in its territory if they are not extradited (Article 6 (1)) and to submit the case to the competent authorities if they are not extradited (Article 7).⁵⁰

Swedish Courts are entitled to exercise universal jurisdiction over terrorist acts according the 2003 Terrorism Act, under Penal Code Ch. 2, Sect. 3 (6).

Theft of nuclear materials

Sweden has been a party to the 1979 Convention on the Physical Protection of Nuclear Material since its entry into force.⁵¹ This treaty requires states parties to define theft of nuclear material and certain other acts as crimes under national law (Art. 7), to establish jurisdiction over persons suspected of such acts who are present in its territory if they are not extradited (Art. 8 (2)), to take measures to ensure presence for prosecution or extradition (Art. 9) and to submit the cases to the competent authorities if they are not extradited (Art. 10).

Sweden has not defined theft of nuclear material and other acts prohibited in this treaty as crimes in the Penal Code and it has not specifically authorized its courts to exercise universal jurisdiction over crimes involving theft of nuclear material.

Hostage taking

Sweden has been a party to the 1979 International Convention against the Taking of Hostages since 15 January 1981.⁵² This treaty requires states parties to define the taking of hostages, attempts to do so and participation as an accomplice, as a crime under national law (Art. 2), to establish jurisdiction over persons suspected of such acts who are present in its territory if they are not extradited (Art. 5 (2)), to take measures to ensure presence for prosecution or extradition (Art. 6 (1)) and to submit the cases to the competent authorities if they are not extradited (Art. 8).

⁴⁹ <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=090&CM=1&DF=6/5/2008&CL=ENG>.

⁵⁰ European convention on the Suppression of Terrorism, 1977, available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/090.htm>.

⁵¹ Convention on the Physical Protection of Nuclear Material, Vienna, 26 Oct. 1979 (<http://untreaty.un.org/English/Terrorism/Conv6.pdf>).

⁵² International Convention against the Taking of Hostages (<http://untreaty.un.org/English/Terrorism/Conv5.pdf>), 17 Dec. 1979 (entered into force 3 June 1983).

Sweden has not defined hostage taking as a crime, but it has identified kidnapping as a “crime of terrorism” under the 2003 Terrorism Act.⁵³ It has authorized its courts to exercise universal jurisdiction over hostage taking as a “crime of terrorism” in Penal Code Ch. 2, Sect. 3 (6).

Attacks on ships and navigation at sea

Sweden has been a party to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation since September 13, 1990.⁵⁴ This treaty requires states parties to define attacks on ships and navigation at sea as crimes under national law (Art. 5), to establish jurisdiction over persons suspected of such attacks who are present in its territory if they are not extradited (Art. 6 (4)), to take measures to ensure presence for prosecution or extradition (Art. 7 (1) and (2)) and to submit the case to the competent authorities if they are not extradited (Art. 10).

Sweden has identified certain acts of maritime sabotage as terrorist offences under Section 3 of the Terrorism Act 2003. Swedish courts can therefore exercise universal jurisdiction pursuant to Penal Code Ch. 2, Sect. 3 (6) under the heading of “crime of terrorism”. Furthermore, Sweden has defined such attacks as crimes under the Penal Code Ch. 13, Sect. 5 (a), which would be subject to universal jurisdiction under Penal Code, Ch. 2, Sect. 3 (6).

Environmental crime

Sweden signed the 1988 Convention on the Protection of the Environment through Criminal Law (No. 172) on 4 November 1998, but as of 1 December 2008, it had not yet ratified it.⁵⁵ The Convention requires each states party to define a number of specified intentional, negligent and administrative offences as crimes under national law (Arts. 2 to 4) and to adopt appropriate measures as may be necessary to establish jurisdiction over those offences in cases where a suspect is present in its territory and it does not extradite the suspect to another state party after a request for extradition (Art. 5 (2)). Although the Convention does not contain an express obligation, found in other treaties discussed in this section, to submit the case of a suspect found in its territory to its prosecution authorities if it does not extradite the suspect, presumably this obligation was seen as implicit by the drafters. Indeed, the explanatory memorandum accompanying the Convention states that this provision ‘is based on the principle of “extradite or punish”’.⁵⁶

⁵³ 2 § *lagen (2003:148) om straff för terroristbrott.*

⁵⁴ Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Rome, 10 March 1988, entered into force on 1 March 1992 (<http://untreaty/un.org/English/Terrorism/Conv8.pdf>).

⁵⁵ Convention on the Protection of the Environment through Criminal Law (No. 172) <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=172&CM=7&DF=1/15/2009&CL=EN> G.

⁵⁶ Convention on the protection of the environment through criminal law (ETS No. 172), Explanatory Report (<http://conventions.coe.int/Treaty/en/Reports/Html/172.htm>).

It is not known to what extent Swedish environmental legislation would meet the requirements of this convention if Sweden were to ratify it.

Use, financing and training of mercenaries

Sweden is not a party to the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries.⁵⁷ The crimes contained in the treaty are not explicitly defined in the Penal Code and jurisdiction can only be exercised over the crimes should they fall under the general rules governing jurisdiction over ordinary crimes, which are described in Section 4.1 above.

Attacks on UN and associated personnel

Sweden has been a party to the 1994 Convention on the Safety of United Nations and Associated Personnel since June 25, 1996 and it has been a party to its 2005 Protocol since August 30, 2006.⁵⁸ The Convention requires states parties to define attacks on UN and associated personnel as crimes under national law (Art. 9 (2)), to establish jurisdiction over persons suspected of such attacks who are present in its territory if they are not extradited (Art. 10 (4)), to take measures to ensure presence for prosecution or extradition (Art. 13 (1)) and to submit the cases to the competent authorities if they are not extradited (Art. 14). The Protocol expands the scope of protection found in the Convention and incorporates the same obligations.⁵⁹

Sweden has not expressly defined attacks on UN and associated personnel as a crime in its own right and universal jurisdiction over such attacks can be exercised only when the crime falls under crimes such as murder, kidnapping etc. for which Swedish courts can exercise universal jurisdiction, as described above in Section 4.1.

Terrorist bombing

Sweden has been a party to the 1997 International Convention for the Suppression of Terrorist Bombings since September 6, 2001.⁶⁰ This treaty requires states parties to define terrorist bombing as a crime under national law (Arts. 4 and 5), to establish jurisdiction over persons suspected of such bombings who are present in its territory if they are not extradited (Art. 6 (4)), to take measures to ensure presence for prosecution or extradition (Art. 7) and to

⁵⁷ U.N. G.A. Res. 44/34, 4 Dec. 1989. This treaty requires states parties to define the use, financing or training of mercenaries as crimes under national law (Art. 5 (3)), to establish jurisdiction over persons suspected of such acts who are present in its territory if they are not extradited (Art. 9 (2)), to take measures to ensure presence for prosecution or extradition (Art. 10 (1)) and to submit the cases to the competent authorities if they are not extradited (Art. 12).

⁵⁸ Convention on the Safety of United Nations and Associated Personnel, U.N. G.A. Res. 49/59, 9 Dec. 1994 (<http://www.un.org/law/cod/safety.htm>).

⁵⁹ U.N. G.A. Res. 60/42, 8 Dec. 2005.

⁶⁰ U.N. G.A. Res. 52/164, 15 Dec. 1997.

submit the cases to the competent authorities if they are not extradited (Art. 8).

Sweden has not defined terrorist bombing as a particular crime under national law, but it has identified some acts that may occur in a terrorist bombing as “crimes of terrorism” under the Terrorism Act 2003, such as murder and manslaughter, gross infliction of damage, devastation endangering the public and various acts of sabotage.

Swedish Courts are entitled to exercise universal jurisdiction over terrorist bombings according the 2003 Terrorism Act, under Penal Code Ch. 2, Sect. 3 (6).

Financing of terrorism

Sweden has been a party to the 1999 International Convention for the Suppression of the Financing of Terrorism since June 6, 2002. This treaty requires states parties to define financing of terrorist activities as a crime under national law (Arts. 4 and 5), to establish jurisdiction over persons suspected of such financing who are present in its territory if they are not extradited (Art. 7 (4)), to take measures to ensure presence for prosecution or extradition (Art. 9 (1) and (2)) and to submit the cases to the competent authorities if they are not extradited (Art. 10 (1)).

Sweden has defined financing of terrorist activities as a crime under Sect. 3 of the Terrorism Act 2003, referring to Ch. 23 of the Penal Code (“preparation of crime”). It has authorized its courts to exercise universal jurisdiction over financing of terrorist activities, under Penal Code Ch. 2, Sect. 3 (6).⁶¹

Transnational crime - Transnational organized crime

Sweden has been a party to the 2000 UN Convention against Transnational Organized Crime since April 30, 2004.⁶² This treaty requires states parties to define certain transnational crimes which involve criminals acting in organized groups as a crime under national law (Arts. 5, 6, 8 and 23), authorizes them to establish jurisdiction over persons suspected of such crimes who are present in its territory if they are not extradited (Art. 15 (4)), authorizes them to take measures to ensure presence for prosecution or extradition (Art. 16 (9)) and requires them, if the state party does not extradite the suspects solely on the ground that the suspect is a national of the requested state, to submit the case without delay to its prosecuting authorities for the purpose of prosecution (Art. 16 (10)).

When ratifying the convention, Sweden concluded that all crimes covered by it were already crimes according to Swedish law.⁶³ No particular provision regarding universal jurisdiction

⁶¹ See also the jurisdictional provisions in Act (2002:444) on punishment for the financing of particularly serious crimes in certain cases (*lag om straff för finansiering av särskilt allvarlig brottslighet i vissa fall, m.m.*)

⁶² U.N. G.A. Res. 55/25, 15 Nov. 2000 (http://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf).

⁶³ Proposition 2002/03:146 p. 27 *et seq.*

has been included in the Penal Code relating to the crimes covered by the convention, thus the general rules regarding jurisdiction over ordinary crimes described in Section 4.1 above apply.

Transnational crime - Trafficking of human beings

Sweden has been a party to the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime since July 1, 2004.⁶⁴ This treaty, which incorporates all of the jurisdictional requirements of the UN Convention against Transnational Organized Crime (Art. 1 (2)), requires states parties to define trafficking in human beings as a crime under national law (Art. 5).

Sweden has defined trafficking in human beings as a crime under national law in Penal Code Ch. 4, Sect. 1 (a), subject to a minimum penalty of four years' imprisonment. Therefore, Swedish courts can exercise universal jurisdiction over trafficking pursuant to Penal Code, Ch. 2, Sect. 3 (7).

Transnational crime - Firearms

Sweden is not a party to the 2001 Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the UN Convention against Transnational Organized Crime. However, it signed the treaty on January 10, 2002.⁶⁵ This protocol, which incorporates all of the jurisdictional requirements of the UN Convention against Transnational Organized Crime (Art. 1 (2)), requires states parties to define certain firearms offences as crimes under national law (Art. 5).

Sweden has not expressly authorized its courts to exercise universal jurisdiction over firearms offences.

Nuclear terrorism

Sweden has signed but not ratified the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism.⁶⁶ This treaty requires states parties to define acts of nuclear terrorism as a crime under national law (Arts. 5 and 6), to establish jurisdiction over persons suspected of such financing who are present in its territory if they are not extradited (Art. 9 (4)), to take measures to ensure presence for prosecution or extradition (Art. 10 (1) and (2)) and to submit the cases to the competent authorities if they are not extradited (Art. 11 (1)).

Some, or all, of the conduct falling within the definition of nuclear terrorism under this treaty would be subject to universal jurisdiction under the 2003 Terrorism Act. For crimes falling

⁶⁴ *Ibid.*, Annex II.

⁶⁵ U.N. G.A. Res. 55/255, 8 June 2001 (http://www.unodc.org/pdf/crime/a_res_55/255e.pdf).

⁶⁶ U.N. G.A. Res. 59/290, 13 April 2005 (<http://www.un.org/Depts/dhl/resguide/r59.htm>).

under this act, universal jurisdiction is authorized under Penal Code Ch. 2, Sect. 3 (6).

Prevention of terrorism

Sweden signed the 2005 Council of Europe Convention on the Prevention of Terrorism (No. 196) on 16 May 2005, but it has not yet ratified it.⁶⁷ This treaty requires states parties to define public provocation to commit a terrorist offence, recruitment and training for terrorism, and other offences related to terrorism as crimes under national law (Art. 5, 6, 7 and 9), to establish jurisdiction over persons suspected of such attacks who are present in its territory if they are not extradited (Art. 14), to take measures to ensure presence for prosecution or extradition and to submit the cases to the competent authorities if they are not extradited (Art. 18).

Some, or all, of the conduct constituting terrorism under this treaty would be subject to universal jurisdiction under the 2003 Terrorism Act. For crimes falling under this act, universal jurisdiction is authorized under Penal Code Ch. 2, Sect. 3 (6).

The proposal by the Commission on International Criminal Law would not change the rules relating to jurisdiction over the above-mentioned crimes.

4.3. CRIMES UNDER INTERNATIONAL LAW

Swedish courts may exercise universal jurisdiction over genocide and war crimes. However, they cannot exercise universal jurisdiction over other crimes under international law, including crimes against humanity, torture, extrajudicial executions and enforced disappearances. They may exercise universal jurisdiction over some conduct amounting to such crimes, but only as ordinary crimes, subject to all the restrictions on the exercise of such jurisdiction, including statutes of limitation and prohibitions of retroactive criminal law.

4.3.1. WAR CRIMES

Sweden is a party to the four Geneva Conventions of 1949 and its Protocols I and II. It has been a party to the Rome Statute since its coming into force in 2002. Sweden has not expressly defined grave breaches of the Geneva Conventions and of Protocol I as crimes in the Penal Code. However, it has identified a broad range of war crimes in international and non-international armed conflict, including serious violations of international humanitarian law, as crimes under national law over which its courts can exercise universal jurisdiction.

Swedish courts can exercise universal jurisdiction over certain war crimes defined in treaties to which Sweden is a party and in customary international humanitarian law that have been committed in international and non-international armed conflict. War crimes are covered by the term "crime against international law" (*folkrättsbrott*), defined in Penal Code Ch. 22, Sect. 6, which is listed as one of the crimes that can be prosecuted on the basis of jurisdiction provided for in Penal Code, Ch. 2, Sect. 3 (6). Despite the title of the crime,

⁶⁷ Council of Europe Convention on the Prevention of Terrorism, available at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=196&CM=8&DF=11/11/2008&CL=ENG>.

which would suggest that crimes under international law generally are included, Penal Code Ch. 22, Sect. 6 is limited to violations of international humanitarian law. As noted below, the provision does not expressly list all war crimes, but the use of the word “include” makes clear that the list of crimes is not exhaustive.⁶⁸ The phrase, “an infraction of a generally recognized principle or tenet relating to international humanitarian law”, includes general principles of law in addition to rules of customary international humanitarian law. Therefore, Swedish courts probably can exercise universal jurisdiction over any serious war crime.

Nevertheless, the failure to provide a more comprehensive list of war crimes will require the prosecution to demonstrate that war crimes not listed are a violation of international humanitarian law. The provision is limited to “serious violations” and contains a number of examples of such serious violations.⁶⁹ The provision leaves some doubt as to which crimes other than the ones enumerated would constitute serious violations. The Court in the *Arklöv* case (see Section 9 below) looked for guidance on this matter to the provisions of the Geneva Conventions defining serious crimes, as well as the conclusion of the ICRC study on customary humanitarian law on what constitutes a serious violation. Nevertheless, if it falls outside of the scope of the “crime against international law”, some conduct amounting to a war crime can alternatively be prosecuted as an ordinary crime (see Section 4.1 above).

A “crime against international law” under Swedish law is defined in Penal Code Ch. 22, Sect. 6 as follows:

“A person guilty of a serious violation of a treaty or agreement with a foreign power or an infraction of a generally recognised principle or tenet relating to international humanitarian Law concerning armed conflicts shall be sentenced for *crime against international Law* to imprisonment for at most four years. Serious violations shall be understood to include:

1. use of any weapon prohibited by international law,
2. misuse of the insignia of the United Nations or of insignia referred to in the Act on the Protection of Certain International Medical Insignia (Law 1953:771), parliamentary flags or other internationally recognised insignia, or the killing or injuring of an opponent by means of some other form of treacherous behaviour,
3. attacks on civilians or on persons who are injured or disabled,
4. initiating an indiscriminate attack knowing that such attack will cause exceptionally

⁶⁸ The Swedish language version is even clearer on this point; it states that crimes that are considered to be serious are “*bland andra*”, for which the closest English translation would be “amongst others”. That other crimes than those expressly listed can be prosecuted under this section has also been confirmed in the *Arklöv* case (see Sect. 9 below).

⁶⁹ Note that the English language version leaves some doubt as to whether this requirement applies both to violations of treaty law and customary law. However, it is clear from the Swedish language version of the law that both types of violations must be serious.

heavy losses or damage to civilians or to civilian property,

5. initiating an attack against establishments or installations which enjoy special protection under international law,
6. occasioning severe suffering to persons enjoying special protection under international law; coercing prisoners of war or civilians to serve in the armed forces of their enemy or depriving civilians of their liberty in contravention of international law; and
7. arbitrarily and extensively damaging or appropriating property which enjoys special protection under international law in cases other than those described in points 1-6 above.

If the crime is gross, imprisonment for at most ten years, or for life shall be imposed. In assessing whether the crime is gross, special consideration shall be given to whether it comprised a large number of individual acts or whether a large number of persons were killed or injured, or whether the crime occasioned extensive loss of property.

If a crime against the international law has been committed by a member of the armed forces, his lawful superior shall also be sentenced in so far as he was able to foresee the crime but failed to perform his duty to prevent it."

4.3.2. CRIMES AGAINST HUMANITY

Sweden has been a party to the Rome Statute since its entry into force on 1 July 2002. Article 7 of the Rome Statute defines a broad range of acts as crimes against humanity.⁷⁰

⁷⁰ The most widely accepted and recent definition of crimes against humanity is in Article 7 of the Rome Statute. The definition in Article 7 (1), supplemented by Article 7 (2) and (3), which provide more detailed definitions, of a crime against humanity is

"any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

Sweden is not a party to the 1973 Convention on the Suppression and Punishment of the Crime of *Apartheid*. However, the crime of apartheid is contained in Article 7 of the Rome Statute. Therefore as a party to the Rome Statute, Sweden has recognized in its preamble that it has obligations in relation to the investigation and prosecution of this crime.⁷¹

Sweden has not defined any crimes against humanity as crimes under national law. However, Swedish courts can exercise universal jurisdiction over some acts amounting to crimes against humanity when they constitute ordinary crimes (subject to the dual criminality restrictions discussed above in Section 4.1), or, if committed during an armed conflict, when they constitute a “crime against international law”, pursuant to Penal Code, Ch. 22, Sect. 6.⁷²

4.3.3. GENOCIDE

Sweden has been a party to the 1948 Convention for the Prevention and Punishment of the Crime of Genocide (1948 Genocide Convention) since 1952. Swedish courts can exercise universal jurisdiction over most conduct amounting to genocide. The Act on Punishment for the Crime of Genocide (*Lag (1964:169) om straff för folkmord*) (1964 Genocide Act) covers certain acts of genocide. However, as discussed below in Section 6.1, the definition is not fully consistent with the definition in Article II of the 1948 Genocide Convention, which is incorporated in Article 6 of the Rome Statute, and it may, therefore, leave gaps in protection. It also does not include all forms of accessory liability listed in Article III of the Genocide Convention. According to the Swedish Genocide Act, a person convicted of genocide shall be sentenced to imprisonment for at least four years and at most ten years, or for life. Genocide can, therefore, be prosecuted on the basis of universal jurisdiction as provided in Penal Code

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- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
 - (i) Enforced disappearance of persons;
 - (j) The crime of apartheid;
 - (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”

⁷¹ Convention for the Prevention and Punishment of the Crime of Apartheid (http://untreaty.un.org/English/CTC/CTC_02.asp), U.N. G.A. Res. 3068 (XXVIII), 30 Nov. 1973 (entered into force 18 July 1976). The treaty requires states parties to take legislative or other measures necessary to suppress the crime against humanity of apartheid as practiced in Southern Africa (Art. IV (a)), obligates them to adopt legislative and judicial measures to bring to justice “in accordance with their jurisdiction” those responsible for this crime whether or not such persons are residents or nationals of the state party or another state or are stateless (Art. IV (b)) and permits the courts of any state party which acquires jurisdiction over a person suspected of this crime to try that person (Art. V).

⁷² According to Friman, “[m]ost of the acts covered by [Article 7 of] the [Rome] Statute constitute serious (ordinary) crimes, for example, murder, assault, unlawful coercion, kidnapping or rape.” Friman, *supra*, n. 24, at 141 (footnote omitted).

Ch. 2, Sect. 3 (7), without requiring that the suspect be present and without any dual criminality requirement (see Section 4.1 above).

Genocide is defined under the Swedish 1964 Genocide Act as:

“1. A person who commits a crime, for which the law prescribes imprisonment for four years or more, against a national, ethical, racially determined or religious group, with intent to destroy the group, in whole or in part, shall be sentenced for genocide to imprisonment for a fixed term of not less than four and at most ten years, or for life.

2. Attempt, preparation or conspiracy to commit genocide, and any failure to reveal such a crime, shall be adjudged in accordance with the provisions of Ch. 23 of the Penal Code.”

4.3.4. TORTURE

Sweden has been a party to the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) since January 8, 1986. This treaty requires states parties to define acts of torture as a crime under national law (Art. 4), to establish jurisdiction over persons suspected of committing acts of torture who are present in its territory if they are not extradited (Art. 5 (2)), to take measures to ensure presence for prosecution or extradition (Art. 6 (1) and (2)) and to submit the cases to the competent authorities if they are not extradited (Art. 7 (1)).

Sweden has not defined torture as a crime in the Penal Code although many acts of torture can be prosecuted as ordinary crimes.⁷³

4.3.5. EXTRAJUDICIAL EXECUTIONS

Extrajudicial executions, which are “unlawful and deliberate killings, carried out by order of a government or with its complicity or acquiescence”, constitute “fundamental violations of human rights and an affront to the conscience of humanity”.⁷⁴ UN standards provide that all states must ensure that all persons found in territory subject to their jurisdiction who are suspected of such crimes are either prosecuted in their own courts or are extradited to face trial elsewhere.⁷⁵

⁷³ See the discussion of Sweden’s continuing failure to define torture as a crime under national law in Section 6.1 below.

⁷⁴ Amnesty International, *14-Point Program for the Prevention of Extrajudicial Executions*, AI Index: POL 35/002/1993 (1993). For a discussion of universal jurisdiction over extrajudicial executions, see Amnesty International, *Universal jurisdiction: The duty of states to enact and implement legislation - Ch. Eleven (Extrajudicial executions)*, AI Index: 53/014/2001, September 2001 (<http://web.amnesty.org/library/index/engior530142001?OpenDocument>).

⁷⁵ UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, ECOSOC Res. 1989/65, 24 May 1989, Prin. 18: “Governments shall ensure that persons identified by the investigation as having participated in extra-legal, arbitrary or summary executions in any territory under their jurisdiction are brought to justice. Governments shall either bring such persons to justice or cooperate to extradite any such persons to other countries wishing to exercise jurisdiction.

There is no crime in Swedish law of extrajudicial execution. Such killings can only be prosecuted as an ordinary crime of murder on the basis of universal jurisdiction under Penal Code Ch. 2, Sect. 3 (as a crime with a minimum penalty of four years of imprisonment, or, if committed during an armed conflict, as a “crime against international law”). Jurisdiction based on these provisions is not subject to the requirement of dual criminality (see Section 4.1 above), yet as an ordinary crime, it would be subject to other restrictions, such as statutes of limitations (see Section 6 below).

4.3.6. ENFORCED DISAPPEARANCES

Sweden has signed, but, as of 1 December 2008, had not yet ratified the Convention for the Protection of All Persons from Enforced Disappearance. This treaty requires states parties to define enforced disappearance as a crime under national law (Arts. 3, 4 and 6),⁷⁶ to establish jurisdiction over persons suspected of enforced disappearance who are present in its territory if they are not extradited (Art. 9 (2)), to take measures to ensure presence for prosecution or extradition (Art. 10 (1) and (2)) and to submit the case to the competent authorities if they are not extradited (Art. 11 (1)).

However, some acts of this complex crime can be prosecuted under the Swedish Penal Code on the basis of universal jurisdiction over an ordinary crime, such as kidnapping pursuant to Penal Code Ch. 4, Sect. 1 (see Section 6.1 below). Kidnapping carries a minimum penalty of four years’ imprisonment, so it would not be subject to the requirement of dual criminality (see Section 4.1 above), yet as an ordinary crime, it would be subject to other restrictions, such as statutes of limitations.

4.3.7. AGGRESSION

The crime under international law of planning, preparing, initiating or waging aggressive war has been recognized as a crime under international law since it was incorporated in the Nuremberg Charter in 1945.⁷⁷ It is expressly listed as a crime in Article 5 of the Rome Statute over which the International Criminal Court shall exercise jurisdiction once a provision is adopted defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.⁷⁸ Sweden, however, has not defined the

This principle shall apply irrespective of who and where the perpetrators or the victims are, their nationalities or where the offence was committed.”.

⁷⁶ The Convention has defined enforced disappearance in Article 2 as

“the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law”.

⁷⁷ Charter of the International Military Tribunal, annexed to the London Agreement (Nuremberg Charter), 8 Aug. 1945, Art. 6 (a) (“CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing[.]”)

⁷⁸ Rome Statute, Art. 5 (2).

planning, preparation, initiation or waging of an aggressive war as a crime under national law.⁷⁹

⁷⁹ It has been argued that the crime under international law of planning, preparing or waging aggressive war can in Sweden be prosecuted under the “crime against international law” in its Penal Code on the ground that aggression constitutes a serious violation of international humanitarian law. Whether a Swedish court would accept this interpretation remains to be seen since the crime of aggression is normally considered to be a violation of *jus ad bellum*, not a violation of *jus in bello* (now international humanitarian law).

5. CIVIL JURISDICTION OVER TORTS

In criminal cases Swedish courts may exercise universal civil jurisdiction over a private claim for reparations in consequence of an offence, if both the private claim is conducted in conjunction with a prosecution and the court has universal criminal jurisdiction over the underlying offence. However, there is no provision in Swedish law expressly authorizing a Swedish court to exercise universal civil jurisdiction in civil proceedings. A victim or someone acting on his or her behalf can, in certain circumstances, institute a private prosecution. There are a number of restrictions on civil claims in criminal proceedings, including the limited scope of reparations which may be awarded.

A preliminary note on the right to reparations

The right of victims and their families to recover reparations for crimes under international law, whether during peace or armed conflict, has been confirmed in provisions of a number of international instruments adopted since the Convention against Torture was adopted nearly a quarter century ago in 1984. These instruments do not restrict this right geographically or abrogate it by state or official immunities. They include the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,⁸⁰ the 1998 Rome Statute of the International Criminal Court⁸¹ and two instruments adopted in April 2005 by the Commission on Human Rights. The first of these two instruments, the UN Basic Principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and international humanitarian law (Van Boven-Bassiouni Principles),⁸² was adopted in December of that year by the UN General Assembly and the second was the UN Updated set of principles for the protection and promotion of human rights through action to combat impunity (Joinet-Orentlicher Principles).⁸³ Both instruments, which were designed to reflect international law obligations, have been cited by Pre-Trial Chamber I of the International Criminal Court in its determination that the harm suffered by victims of crimes under international law includes emotional suffering and economic loss.⁸⁴

⁸⁰ GA Res. 40/34, 29 Nov. 1985.

⁸¹ Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference on the Establishment of an International Criminal Court, Rome UN Doc A/CONF.183/9*, 17 July 1998, as corrected by the *process-verbaux* UN Doc C.N.577.1998.TREATIES-8, 10 November 1998, and UN Doc C.N.604.1999.TREATIES-18, 12 July 1999, Art. 75. Its reach is potentially universal as the Security Council can refer a situation involving crimes in any state to the Prosecutor.

⁸² UN Comm'n Hum. Rts Res. E/CN.4/2005/35, 13 April 2005; GA Res. A/RES/60/147, 16 Dec. 2005.

⁸³ UN Comm'n Hum. Rts Res. E/CN.4/2005/81, 15 April 2005.

⁸⁴ *Situation of the Democratic Republic of the Congo*, Decision on the Applications for Participation in

Both instruments also recognize that there are five forms of reparations: restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition. Most recently, the UN Human Rights Council adopted by consensus the International Convention for the Protection of All Persons from Enforced Disappearance with a very broad definition of the right to reparations and referred it to the UN General Assembly for adoption at its 61st session in 2006.⁸⁵ This right is inherent in the right to a remedy, as guaranteed in Article 2 of the International Covenant on Civil and Political Rights (ICCPR), adopted four decades ago in 1966.⁸⁶ Indeed, the international community recognized the rights of victims to civil recovery directly against foreign states for war crimes a century ago in Article 3 of the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land.⁸⁷

5.1. LEGISLATION PROVIDING FOR UNIVERSAL JURISDICTION OVER TORTS IN CIVIL CASES

There is no legislation expressly providing for universal civil jurisdiction in civil proceedings.⁸⁸ International conventions generally regulate the area. Within the EU, the jurisdiction in civil proceedings is regulated by the Brussels I regulation,⁸⁹ and for certain other European countries, the Lugano Convention is applied.⁹⁰ However, these instruments do not apply to

the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Case No. ICC-01/04, Pre-Trial Chamber I, 17 January 2006, para. 115.

⁸⁵ UN Human Rights Council Res. A/HRC/1/L.2), 29 June 2006, Art. 24.

⁸⁶ See Human Rights Committee, General Comment No. 31, UN Doc. CCPR/C/21/Rev.1/Add.13 (no suggestion that the right to a remedy under the ICCPR is geographically restricted).

⁸⁷ 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, *reprinted in* Adam Roberts & Richard Guelff, *Documents on the Laws of War* 67 (Oxford: Oxford University Press 3rd ed. 2000); Hisakazu Fujita, Isomi Suzuki and Kantato Nagano, *War and the Rights of Individuals, Renaissance of Individual Compensation*, Nippon Hyoron-sha Co. Ltd. Publishers (1999), expert opinions by Frits Kalshoven 31; Eric David 49; Christopher Greenwood 59.

⁸⁸ There is no distinction between a civil or criminal court in Sweden. Criminal and civil cases are handled by the same courts. However, different rules and procedures apply.

⁸⁹ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation) (<http://europa.eu/scadplus/leg/en/lvb/l33054.htm>). It supersedes the Brussels Convention of 1968, which was applicable between the Member States before the Regulation entered into force; but the Convention continues to apply with respect to those territories of Member States which fall within the territorial scope of the Convention and which are excluded from the Regulation pursuant to Article 299 of the Treaty. Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (http://curia.europa.eu/common/reccdoc/convention/en/c-textes/_brux-textes.htm). The complex relationship between the Brussels Convention, Brussels Regulation I and Lugano Convention, their scope and their serious flaws, particularly with concerning reparations to victims of human rights violations and of violations of international humanitarian law, are outside the scope of this paper.

⁹⁰ Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters (Lugano Convention) (<http://curia.europa.eu/common/reccdoc/convention/en/c-textes/lug-idx.htm>).

civil claims made in criminal proceedings.⁹¹

5.2. LEGISLATION PROVIDING FOR RAISING CIVIL CLAIMS IN CRIMINAL CASES INITIATED BY A PROSECUTOR OR INVESTIGATING JUDGE

According to Swedish law, a Swedish court may, under certain conditions, exercise civil jurisdiction over a private claim in consequence of an offence if the court can also exercise criminal jurisdiction over the offence. A private claim that otherwise would not be under civil jurisdiction may this way come under a court's jurisdiction if it can exercise criminal jurisdiction. Thus, Swedish courts can exercise universal civil jurisdiction over torts based upon the crimes under international law over which they have universal criminal jurisdiction, but not over torts based on other human rights violations or abuses.

The Code of Judicial Procedure, Ch. 22, Section 1, provides:

"A[n] action against the suspect or a third person for a private claim in consequence of an offence may be conducted in conjunction with the prosecution of the offence. When the private claim is not entertained in conjunction with the prosecution, an action shall be instituted in the manner prescribed for civil actions".

The Code of Judicial Procedure, Ch. 22, Section 2, provides:

"When a private claim is based upon an offence subject to public prosecution, the prosecutor, upon request of the aggrieved person, shall also prepare and present the aggrieved person's action in conjunction with the prosecution, provided that no major inconvenience will result and that the claim is not manifestly devoid of merit. If the aggrieved person desires to have his claim entertained together with the prosecution, he shall notify the investigation leader or the prosecutor of the claim and state the circumstances upon which it is based. During the inquiry of an offence, if the investigation leader or the prosecutor finds that a private claim may be based upon the offence, he shall, if possible, notify the aggrieved person in sufficient time prior to the institution of the prosecution."

According to the Law on Legal Representation for Victims (1988:609, *lag om målsägandebiträde*), victims have a right to a legal representative if the alleged act may lead to imprisonment. The legal representative helps the victim to raise the claim before and during a trial, and to appeal the judgment if necessary. The Law on Legal Representation for Victims was invoked in the *Arklöv* case, but not in the *GAM/Ache* case, the *Abdi Qeybdiid* case or the *Snowflake* case (see the discussion of jurisprudence in Section 9 of this paper). In the *Arklöv* case the victims had legal representatives, and 11 victims were awarded reparation for damages for a total of 2,271,900 Swedish Crowns.

⁹¹ Although Sweden is a party to the European Convention on the International Validity of Criminal Judgments (ETS No. 70), the drafters of the Convention decided to exclude "the enforcement of that part of a criminal judgment which decided on requests for damages". Explanatory Report, 3 (<http://conventions.coe.int/Treaty/en/Reports/Html/070.htm>).,

If the prosecution is withdrawn or dismissed, the court, on request of a party, shall direct that the action for private claims be disposed of as a separate case in the manner prescribed for civil actions.⁹² However, if the claim is disposed of as a separate civil case, in certain circumstances the court may no longer be able to exercise jurisdiction since the claim is no longer in conjunction with a prosecution of the offence. However, the question of civil remedies may be determined regardless of whether it is found that the act charged is not punishable under penal law.⁹³

In addition, the victim may support a prosecution that has been commenced by a prosecutor by posing questions to the accused and witnesses, adjusting the description of the criminal act and presenting views on the punishment to be invoked.⁹⁴

5.3. PRIVATE PROSECUTIONS BY VICTIMS OR OTHERS ACTING ON THEIR BEHALF, *ACTIONS CIVILES OR ACTIO POPULARIS*

Sweden permits a private prosecution by a victim, provided the victim has reported the offence to a prosecutor and the prosecutor has declined to act. The Code of Judicial Procedure, Ch. 20, Sect. 8, provides:

“The aggrieved person may not institute a prosecution for an offence falling within the domain of public prosecution unless he has reported the offence for prosecution and the prosecutor has decided not to institute a prosecution.”

According to the Code of Judicial Procedure, Ch. 20, Section 3, all offences, other than those expressly excluded, fall within the domain of public prosecution. Only a very few offences not relevant to this paper are excluded from the domain of public prosecution.

According to Penal Code, Ch. 2, Sect. 5, prosecution for a crime committed outside of Sweden may be instituted only on the authority of the Government or a person designated by the Government (the Prosecutor-General).⁹⁵ There does not appear to be any written criteria for prosecutors clarifying when a decision can be made denying prosecution.

5.4. RESTRICTIONS ON PRIVATE PROSECUTIONS AND CIVIL CLAIMS PROCEDURES

According to the Code of Judicial Procedure, a private claim in a criminal case may be disposed of as a separate case in the manner prescribed for civil actions if further joint

⁹² Code of Judicial Procedure, Ch. 22, Sect. 6.

⁹³ *Ibid*, Sect. 7.

⁹⁴ Ch. 20, Sect. 8 of the Code of Judicial Procedure, therefore, provides:

“When a prosecutor has instituted a prosecution, the aggrieved person may support the prosecution; he may also appeal to a superior court.”

⁹⁵ The Prosecutor-General (*riksåklagaren*), *Förordning (1993:1467) med bemyndigande för riksåklagaren att förordna om väckande av åtal i vissa fall*.

adjudication would cause major inconvenience.⁹⁶ Restrictions on private prosecutions have been described above in Section 5.3.

There are no significant procedural restrictions regarding victims raising private claims in civil cases, although such claims cannot be made on the basis of universal jurisdiction, but only in the context of a criminal proceeding. A private claim, even if it is in consequence of an offence, does not require an approval by a prosecutor in a civil case.

Perhaps the most significant restriction on civil claims is the limited scope of remedies that can be awarded against a convicted person in comparison with the right of victims under international law and standards to five forms of reparations: restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition. In contrast, Swedish courts can only award compensation against a defendant and, to the limited extent that the Swedish state does not fully provide for rehabilitation, they can require the convicted person to pay the difference. Although some of these forms of reparation could only be provided by the state where the crime occurred or the convicted person's state, and, therefore, not be possible to include in a Swedish court judgment in a criminal case, some of these forms of reparations could be provided by the convicted person, such as providing satisfaction in the form of an apology to the victim or to the victim's family.

⁹⁶ Code of Judicial Procedure, Ch. 22, Sect. 2.

6. OBSTACLES TO THE EXERCISE OF CRIMINAL OR CIVIL JURISDICTION

Sweden has failed to define many crimes under international law as crimes under national law. The rules of superior responsibility are inconsistent with international law. In addition, there are a number of defences in Swedish law that are broader than defences permitted under international law with respect to crimes under international law or which should be applicable to such crimes. There are also a number of other serious obstacles in Swedish law to prosecuting persons suspected of crimes under international law, based on universal jurisdiction, including statutes of limitations, the requirement of dual criminality for certain crimes and the requirement in most cases of obtaining authorization from a political official to initiate a prosecution for crimes under international law based on universal jurisdiction.

6.1. FLAWED OR MISSING DEFINITIONS OF CRIMES UNDER INTERNATIONAL LAW, PRINCIPLES OF CRIMINAL RESPONSIBILITY OR DEFENCES

Many crimes under international law are not defined as crimes under Swedish law. The principle of superior responsibility and some defences applicable under the national law to crimes under international law are inconsistent with international law and the struggle to end impunity for such crimes. Unfortunately, proposals by the Commission in 2002, which have yet to be properly considered by the government, are not sufficient to bring Swedish law into line with Sweden's obligations under international law and could lead to persons being improperly acquitted for conduct that is a crime under international law.

Definitions of crimes - general

Generally, definitions of crimes under international law are either missing in the Swedish Penal Code or are inconsistent with international law.

As indicated above (see Section 4.3.3) the definition of genocide is very different from the one in Article II of the Genocide Convention and in Article 6 of the Rome Statute, which may leave gaps that would be inconsistent with international law. Regarding war crimes, most fall under the "crime against international law", Ch. 22, Sect. 6 of the Penal Code (see Section 4.3.1). However, this provision leaves some doubt as to its scope. In addition, as noted above, many crimes under international law have not been defined as crimes under Swedish law. These include crimes against humanity, torture, extrajudicial executions and enforced disappearances. Instead, persons in Sweden suspected of such crimes can only be prosecuted for ordinary crimes and if the conduct amounts to an ordinary crime. Although some of the conduct amounting to crimes under international law can be prosecuted as ordinary crimes, this alternative is not entirely satisfactory as it leaves gaps where conduct amounting to crimes under international law is not subject to criminal responsibility under

national law. Moreover, a prosecution based on universal jurisdiction for ordinary crimes could be barred under the restrictions applicable to such crimes, in particular, the requirement of dual criminality (see Sections 4.1 above and 6.4 below). In addition, conviction for an ordinary crime, even when it has common elements, does not convey the same moral condemnation as if the person had been convicted of the crime under international law and does not necessarily involve as severe a punishment.

The fundamental distinction between crimes under international law, which are an attack on the entire international community, and ordinary crimes under national law, which are a concern of the state where the crime was committed, was vividly demonstrated in the decision by the International Criminal Tribunal for Rwanda (ICTR) in 2006, to refuse to transfer a case involving charges of genocide to Norway, where the accused would have faced only a charge of murder as an ordinary crime. The Trial Chamber explained:

“In this case, it is apparent that the Kingdom of Norway does not have jurisdiction (*ratione materiae*) over the crimes as charged in the confirmed Indictment. In addition, the Chamber recalls that the crimes alleged – genocide, conspiracy to commit genocide and complicity in genocide – *are significantly different in term of their elements and their gravity from the crime of homicide*, the basis upon which the Kingdom of Norway states that charges may be laid against the Accused under its domestic law. The Chamber notes that the crime of genocide is distinct in that it requires the ‘intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such’. This specific intent is not required for the crime of homicide under Norwegian criminal law. Therefore, in the Chamber’s view, the *ratione materiae* jurisdiction, or subject matter jurisdiction, for the acts alleged in the confirmed Indictment does not exist under Norwegian law. Consequently, Michel Bagaragaza’s alleged criminal acts cannot be given their full legal qualification under Norwegian criminal law, and the request for the referral to the Kingdom of Norway falls to be dismissed.”⁹⁷

The Appeals Chamber affirmed, stating that it fully appreciated that

“...Norway’s proposed prosecution of Mr. Bagaragaza, even under the general provisions of its criminal code, intends to take due account of and treat with due gravity the alleged genocidal nature of the acts underlying his present indictment. However, in the end, *any acquittal or conviction and sentence would still only reflect conduct legally characterized as the ‘ordinary crime’ of homicide. . . . Furthermore, the protected legal values are different*. The penalization of genocide protects specifically defined groups, whereas the penalization of homicide protects individual lives.”⁹⁸

⁹⁷ *Prosecutor v. Bagaragaza*, Decision on the Prosecution Motion for Referral to the Kingdom of Norway – Rule 11 bis of the Rules of Procedure and Evidence, Case No. ICTR-2005-86-11 bis, Trial Chamber, 19 May 2006, para. 16 (emphasis added).

⁹⁸ *Prosecutor v. Bagaragaza*, Decision on Rule 11 bis Appeal, Case No. ICTR-05-86- AR11 bis, Appeals Chamber, 30 August 2006, para. 16 (emphasis added).

Definitions of crimes - genocide

As already mentioned, the crime of genocide under international law has been defined as a crime in the 1964 Genocide Act (quoted above in 4.3.3). However, the definition is not in accordance with definitions in the Genocide Convention or the Rome Statute. For example, instead of listing the five acts that constitute genocide in Article II of the Genocide Convention, Swedish law specifies that any crime for which the law provides imprisonment for four years or more when committed with genocidal intent constitutes genocide. Although the category of crimes is broader in some respects than the five acts listed in Article II of the Genocide Convention,⁹⁹ some of the acts listed in that article may not constitute a crime under Swedish law subject to a penalty of four or more years' imprisonment. Although most of the acts listed in Article II of the Genocide Convention would carry a sufficient penalty under Swedish law to be subject to universal jurisdiction (Murder (Penal Code, Ch. 3, Sect. 1); Manslaughter (Penal Code, Ch. 3, Sect. 2); Kidnapping (Penal Code, Ch. 4, Sect. 1); Gross rape (Penal Code, Ch. 6, Sect. 1) etc), there may be gaps that will not become apparent until a prosecution is attempted. However, a conviction based on an ordinary crime would be qualified as genocide under Swedish law.

In addition, not all forms of accessory liability for genocide listed in Article III of the Genocide Convention are included.¹⁰⁰ For example, direct and public incitement to commit

⁹⁹ Article II of the Genocide Convention reads:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

¹⁰⁰ Article III of the Genocide Convention provides that both genocide and ancillary forms of genocide are punishable:

"The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;

genocide has been omitted. Since genocide rarely occurs without incitement of others to commit this crime, this omission is a particularly serious omission.

Genocide would be defined as a crime in the proposed Act on International Crimes Ch. 2, Sect. 1-2, according to the proposal of the Commission on International Criminal Law¹⁰¹. The drafters of the proposal assert in the report, that they intended for the definition to match the definitions of the Rome Statute and the Genocide Convention.¹⁰² The *travaux préparatoires* form an important part of the interpretation of Swedish law and, thus, this assertion would be considered compelling evidence that this provision was consistent with the definition in Article II, but it would not address the omission of a provision expressly defining ancillary forms of genocide as crimes. The proposal would still fall short of Sweden's obligations under the Rome Statute and the Genocide Convention.

Definitions of crimes - war crimes

There is no crime in the Penal Code called war crimes. However, as mentioned above, there is a crime called "crime against international law" in Penal Code, Ch. 22, Sect. 6 (quoted above in Section 4.3.1). This crime has a very wide definition, referring to international humanitarian law in general. It may, therefore, be difficult to apply for judges who are not experts in international humanitarian law. In addition, there is a possibility that the structure of the provision, containing merely a reference to international law, is at odds with general principles of legal certainty under Swedish law. Although Ch. 22, Sect. 6 "has been drafted to meet Sweden's obligations under the four Geneva Conventions and their Protocols, the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and different treaties on prohibition of certain types of weapons",¹⁰³ it is to be regretted that this provision does not expressly mention which treaties and rules of customary international law are covered. As a result, there may be some doubt as to which war crimes can be prosecuted under the provision. Some clues as to which violations of international humanitarian law are to be considered "serious" can be found in the *Arklöv* case discussed below in Section 9.

Definitions of war crimes would be included in Ch. 4 of the proposal of the Commission on International Criminal Law.¹⁰⁴ The definition of the crime largely follows the definition in the Rome Statute. In fact, in the commentary to the proposal, the authors frequently refer to the Rome Statute or case law from other tribunals, indicating that the provision has been drafted

(e) Complicity in genocide."

¹⁰¹ SOU 2002:98, p 26.

¹⁰² SOU 2002:98, p 358.

¹⁰³ Friman, *supra*, n. 24, at 141 (citing Government Bill (proposal) 1985/86:9; Report of the Parliamentary Standing Committee on Justice 1985/86:JuU24).

¹⁰⁴ SOU 2002:98 p 27.

with this treaty and jurisprudence in mind. However, the structure is different, making a comparison challenging. For non-international conflicts, the authors have made the definition wider. In addition, the drafters have left out the requirement in the Rome Statute regarding illegal weapons that they are the “subject of a comprehensive prohibition and are included in an annex to this Statute”. Thus, it seems the definition in the proposal is slightly wider than that in the Rome Statute.

Definition of crimes – crimes against humanity

As noted in Section 4.3.2 above, Sweden has not defined crimes against humanity as crimes in the Penal Code. Some crimes against humanity can be prosecuted as ordinary crimes. However, as illustrated above (for example, by the ICTR in its decision in the *Bagaragza* case regarding the crime of genocide), prosecution of persons for ordinary crimes rather than for crimes under international law does not fully reflect the moral condemnation attached and, in some cases, the punishment.

According to the proposal of the Commission on International Criminal Law, crimes against humanity would be defined in Ch. 3.¹⁰⁵ The definition corresponds to that of the Rome Statute, and although the structure and wording are different, it probably would fulfil Sweden’s obligations under international law. A definitive interpretation, however, will have to await a judicial determination in a criminal proceeding.

Definition of crimes – torture

As noted in Section 4.3.4, there is no crime in Swedish law called torture.¹⁰⁶ However, the Swedish government has argued on a number of occasions that most acts of torture can be prosecuted on the basis of universal jurisdiction as ordinary crimes, or, if committed during an armed conflict, as a “crime against international law”.¹⁰⁷ It reiterated this view most recently in its fifth report to the Committee against Torture, declaring that “[i]t is the understanding of the Swedish Government that the Swedish legislation meets the standards of the Convention in all aspects”, and claiming that this view was “shared by the Committee”.¹⁰⁸ In support of its position, the Swedish delegation cited the proposals and conclusions reached by the Swedish Commission on International Criminal Law, which considered the question whether existing Swedish criminal legislation was appropriate to

¹⁰⁵ *Ibid.* p. 26.

¹⁰⁶ Third periodic reports of States parties due in 1996, Addendum: Sweden, 9 August 1996, U.N. Doc. CAT/C/34/Add.4, 28 November 1996, paras. 7 to 17; Fourth periodic reports of States parties due in 2000, Addendum, 21 August 2000, U.N. Doc. CAT/C/55/Add. 3, 3 October 2000, paras. 78; Fifth periodic reports of States parties due in 2004, 23 December 2005, U.N. Doc. CAT/C/SWE/5, 10 February 2006, paras. 10 to 20.

¹⁰⁷ See each of the reports cited in the previous footnote for Sweden’s position that all conduct amounting to torture can be prosecuted in Sweden even though the crime of torture is not expressly included in the Penal Code.

¹⁰⁸ Fifth periodic report of Sweden, *Supra note* 106, para. 10.

punish acts of torture, especially when committed abroad.¹⁰⁹ It stated that the Commission in its November 2002 report:

“shared the conclusion that Swedish legislation was in full accord with the obligations under the Convention. The Commission deliberated about introducing a defined crime of torture. For several reasons this was not done. First of all, the Commission found that the basic structure of the Swedish criminal legislation, made it difficult to fit in a new crime of torture defined according to the Convention. The Commission held that this could lead to cases of considerable overlapping and uncertainty as to the scope of the provision. This would be the case even more so in the future, since the proposed *Act on International Crimes* contains provisions on torture as a war crime or crime against humanity. The Commission also underlined that the word “torture” is used in the Swedish *Penal Code* in the provision on *unlawful coercion* (Ch. 4, Section 4) with a more far-reaching scope than according to the definition under the Convention.”¹¹⁰

However, the Committee against Torture, the expert body established under the Convention against Torture to monitor implementation of that treaty, has repeatedly given authoritative interpretations that the failure to define torture as a crime under national law is in breach of Sweden’s obligations under the Convention against Torture.¹¹¹ In its most recent conclusion on this point in June 2008 it stated:

“Notwithstanding the State party’s assertion that under the Swedish Criminal Code all acts that may be described as “torture” within the meaning of article 1 of the Convention are punishable, the Committee regrets that the State party has not changed its position with regard to the incorporation into domestic law of the crime of torture as defined in article 1 of the Convention. (arts. 1 and 4)[.]”¹¹²

The Committee then made the following recommendation:

“The State party should incorporate into domestic law the crime of torture and adopt a definition of torture that covers all the elements contained in article 1 of the Convention.

¹⁰⁹ According to the proposal of the Commission on International Criminal Law conduct falling within the definition of torture in the UN Convention against Torture would fall under the provisions granting universal jurisdiction. SOU 2002:98, p. 170.

¹¹⁰ *Ibid.*, para. 20 (citing the Commission’s report *International Crimes and Swedish Jurisdiction* (Swedish Government Official Report 2002:98) proposing a new *Act on International Crimes*, introducing new and elaborated provisions on criminal responsibility for genocide, crimes against humanity and war crimes.).

¹¹¹ See, for example, Conclusions and recommendations of the Committee against Torture: Sweden, U.N. Doc. A/522/44 (no date), paras. 223-224; Conclusions and recommendations of the Committee against Torture: Sweden, U.N. Doc. CAT/C/CR/28/6, 6 June 2002.

¹¹² Concluding observations of the Committee against Torture – Sweden, U.N. Doc. CAT/C/SWE/CO/5, 4 June 2008, para. 9.

By naming and defining the offence of torture in accordance with the Convention as distinct from other crimes, the Committee considers that States parties will directly advance the Convention's overarching aim of preventing torture, *inter alia*, by alerting everyone, including perpetrators, victims, and the public, to the special gravity of the crime of torture and by improving the deterrent effect of the prohibition itself."¹¹³

As of 1 December 2008, Sweden had not yet implemented the recommendation of the UN Committee against Torture.

Definition of crimes – extrajudicial executions

As noted above in Section 4.3.5, Sweden has not defined extrajudicial execution as a crime in the Penal Code, although this crime under international law could be prosecuted as murder under Penal Code Ch. 3, Sect. 1. Since murder carries a minimum penalty of four years' imprisonment, it would not be subject to the requirement of dual criminality, but it would be subject to other limitations applicable to ordinary crimes. The Swedish Commission on International Criminal Law has not proposed defining extrajudicial execution as a crime.

Definition of crimes – enforced disappearances

As noted above in Section 4.3.6, enforced disappearance is not defined as a crime in the Penal Code, although some aspects of this crime might be prosecuted as kidnapping under Penal Code Ch. 4, Sect. 1.¹¹⁴ Since kidnapping carries a minimum penalty of four years' imprisonment, it would not be subject to the requirement of dual criminality, but it would be subject to other limitations applicable to ordinary crimes. The Commission on International Criminal Law has not proposed defining individual cases of enforced disappearance that are not part of a widespread or systematic attack on a civilian population as a crime under national law.

Principles of criminal responsibility

There are a number of differences between principles of criminal responsibility in Swedish law and in the Rome Statute and other international law. Nevertheless, in spite of these differences, the Commission on International Criminal Law believed that Swedish principles of criminal responsibility would not result in a substantially narrower criminal responsibility, apart from the principle of superior responsibility.¹¹⁵ The principle of superior responsibility in Swedish law is considerably weaker than the principle in Articles 86 (2) and 87 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of

¹¹³ *Ibid.*

¹¹⁴ Penal Code, Ch. 4, Sect. 1 provides:

"A person who seizes and carries off or confines a child or some other person with intent to injure him or her in body or health, shall be sentenced for *kidnapping* to imprisonment for a fixed period of at least four and at most ten years, or for life."

¹¹⁵ SOU 2002:98, Ch. 12.

Victims of International Armed Conflicts (Protocol I),¹¹⁶ Article 6 of the International Law Commission's 1996 Draft Code of Crimes against the Peace and Security of Mankind¹¹⁷ and Article 28 of the Rome Statute,¹¹⁸ which itself falls short of other international law in some

¹¹⁶ Paragraph 2 of Article 86 (Failure to act) of Protocol I reads:

- “1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.
2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.”

Article 87 (Duty of commanders) of Protocol I reads:

- “1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.
2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.
3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.”

¹¹⁷ Article 6 (Responsibility of superiors) of the Draft Code of Crimes, which was intended to apply both to international and national courts, states:

“The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had reason to know, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all necessary measures within their power to prevent or repress the crime.”

¹¹⁸ Article 28 (Responsibility of commanders and other superiors), which largely reflects customary international law, but falls short by articulating a lesser standard of criminal responsibility for civilian superiors and applies only in trials in the International Criminal Court, provides:

“In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

regards. This principle is incorporated into the definition of a “crime against international law” in Penal Code Ch. 22, Sect. 6, and applies only to war crimes. Ch. 22, Sect. 6 states:

“If a crime against the international law has been committed by a member of the armed forces, his lawful superior shall also be sentenced in so far as he was able to foresee the crime but failed to perform his duty to prevent it.”

Although this provision applies equally to civilian and military superiors, it restricts criminal responsibility to the limited situations where the superior “was able to foresee the crime but failed to perform his duty to prevent it”, when international law also imposes criminal responsibility on superiors who fail to repress the commission of crimes and when they fail to submit the matter to the competent authorities for investigation and prosecution.¹¹⁹ The Commission on International Criminal Law has recommended that that superior responsibility for the crimes contained in the proposed Act on international crimes be expanded to be more consistent with the provisions in the Rome Statute.¹²⁰ However, this recommendation would

- (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
 - (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
- (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
- (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
 - (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
 - (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.”

¹¹⁹ Rome Statute, Art. 28.

¹²⁰ SOU 2002:98, p 329. Chapter 5 of the report proposed that superiors would be responsible in the following circumstances:

- “1. if the superior avoids taking possible measures that are necessary or reasonable [to prevent] the crimes which are committed by those within the superior’s control . . . he or she is considered a perpetrator of the crime.
- 2. if the superior intentionally or by gross negligence does not exercise supervision over staff directly under his or her control, the superior is responsible for negligent exercise of supervision if the subordinate commits a crime that the superior should have foreseen and has been unable to prevent.” (Translation by Amnesty International)

not be sufficient, since, as indicated above, the Rome Statute falls short of customary international law.

In at least one respect, Swedish principles of criminal responsibility are stronger than in the Rome Statute. Swedish courts have jurisdiction over persons under the age of 18.¹²¹

Defences

As discussed below, there are a number of defences in Swedish law that are broader than defences permitted under international law with respect to crimes under international law, such as the defence of superior orders, or which could lead to impunity for the worst imaginable crimes, such as duress and necessity.

Defences – superior orders

There is a defence of superior orders in national law in the Penal Code, Ch. 24, Sect. 8 to any crime:

“An act committed by a person on the order of someone to whom he owes obedience shall not result in his being liable to punishment, if in view of the nature of the obedience due, the nature of the act and the circumstances in general, it was his duty to obey the order.”

This defence has been contrary to international law since Nuremberg, although it may properly be taken into account in mitigation of punishment.¹²² This defence has been excluded in numerous international instruments for more than half a century, including the Nuremberg Charter, Allied Control Council Law No. 10, the ICTY Statute, the ICTR Statute, the Regulation establishing the Special Panels for East Timor and the Cambodian Law establishing the Extraordinary Chambers.¹²³ The Commission on International Criminal Law

Chapter 3 proposed that “Negligence to report a crime” would be a crime, if there was a “reasonable suspicion” that someone under another’s control has committed a crime.

¹²¹ The age of criminal responsibility under Penal Code, Ch. 1, Sect. 6 is 15 years, but the penalties differ for persons under the age of 21.

¹²² Amnesty International, *The international criminal court: Making the Right Choices – Part I: Defining the crimes and permissible defences*, AI Index: IOR 40/01/1997, 1 January 1997, Sect. VI.E.6.

¹²³ Charter of the International Military Tribunal, annexed to the London Agreement (Nuremberg Charter), 8 Aug. 1945, Art. 8 (“The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.”); Allied Control Council Law No. 10, Punishment of persons guilty of war crimes, crimes against peace and against humanity (Allied Control Council Law No. 10), 20 Dec. 1945, Art.II (4) (b) (“The fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation.”), (published in the Official Gazette of the Control Council for Germany, No. 3, Berlin, 31 Jan. 1946); ICTY Statute, Art. 7 (4) (“The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.”); ICTR

recommended that, although there are differences between the rules in the Rome Statute and the Swedish Penal Code, the rules generally applicable to defences in Swedish criminal law (Penal Code Ch. 24) also apply for genocide, crimes against humanity and war crimes. The Commission found that the difference would, in practice, be very small since the Swedish rule contains a weighing of interests, and, therefore, the scope for applying this defence in cases of international crimes would be very limited. However, the differences mean that persons on trial in Sweden could have impunity for the worst imaginable crimes in the world based on a plea that they merely were following orders.

Defences – mistake of fact and ignorance of the law

Regarding mistake of fact, there is no particular rule in Swedish law, but the mental requirement of the crime being committed “intentionally” would be decisive, as in the defence of mistake of fact in Article 32 (1) of the Rome Statute.¹²⁴ The defence of ignorance of the law in Swedish law is broader than the defence of mistake of law in Article 32 (2) of the Rome Statute. Article 32 (2) excludes the defence of mistake of law, except to the extent that it negates the mental element of the crime.¹²⁵ In contrast, Penal Code Ch. 24, Sect. 9 provides:

“An act committed by a person labouring under a misapprehension concerning its permissibility shall not result in his being liable to punishment if the mistake arose by reason of an error in the proclamation of the criminal provision or if, for other reasons, it was manifestly excusable.”

The term “manifestly” usually indicates a very high threshold in Swedish law. Nevertheless, it appears to permit the defence in at least some circumstances where it would be barred

Statute, Art. 6 (4) (“The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.”); Draft Code of Crimes against the Peace and Security of Mankind, Art. 5; UNTAET Regulation 2000/15 (establishing the Special Panels for Serious Crimes, Dili, East Timor), 6 June 2000, Sect. 21; Statute of the Special Court for Sierra Leone (Sierra Leone Statute), Art. 6 (4); Cambodian Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 Oct. 2004 (NS/RKM/1004/006), Art. 29. Although Article 33 of the Rome Statute permits the defence of superior orders, it is narrowly circumscribed, applicable only to trials in the International Criminal Court and contrary to every other international instrument adopted, including instruments subsequently adopted, such as the Statute of the Special Court for Sierra Leone and the Cambodian Extraordinary Chambers Law.

¹²⁴ Article 32 (1) of the Rome Statute reads: “A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.” For Amnesty International’s view on the scope of this defence, see *Making the Right Choices – Part I*, *supra*, note 122, Sect. VI.E.6.

¹²⁵ Article 32 (2) of the Rome Statute states:

“A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime or as provided for in article 33.”

under the Rome Statute, although there is no known court decision addressing this point.¹²⁶ The Commission on International Criminal Law has recommended that no change be made in this regard, and, thus, the risk of a narrower criminal responsibility under Swedish law than under the Rome Statute remains.

Defences – insanity and mental disease or defect

There appears to be no express defence of insanity, mental disease or defect in Swedish law, so a defence based on any of these conditions would have been made on the ground that the person concerned did not have the requisite mental element. In contrast, the ground for excluding criminal responsibility because of a mental disease or defect is spelled out in Article 31 (1) (a) of the Rome Statute.¹²⁷ The Commission on International Criminal Law did not find that the law needed to be altered in order for it to be more consistent with the Rome Statute because the Swedish law today contains a stricter criminal liability and, therefore, there would be no risk that acts criminal under the Rome Statute would be legal under Swedish law.¹²⁸

Defences – intoxication

The defence of intoxication in Swedish law is significantly more limited than the defence of intoxication excluding criminal responsibility in Article 31 (1) (b) of the Rome Statute.¹²⁹ In contrast to the exception in the Rome Statute, Penal Code Ch. 1, Sect. 2 (2) excludes

¹²⁶ For Amnesty International's views on the scope of this defence, see *Making the Right Choices – Part I*, *supra*, note 122, Sect. VI.E.6.

¹²⁷ Article 31 (1) (a) provides that

“[i]n addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

(a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law[.]”

¹²⁸ SOU 2002:98, p 335-336.

¹²⁹ Article 31 (1) (b) of the Rome Statute states that

“[i]n addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

...

(b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court[.]”

voluntary intoxication as a defence in all circumstances.¹³⁰ The Commission on International Criminal Law did not find that Swedish law needs to be changed in this area, although it refers to another proposal for change of the law in this area as more consistent with the Rome Statute.¹³¹ This recommendation, if adopted, would still satisfy Sweden's obligations under international law as the current law provides for stricter liability than under the Rome Statute and there would be no risk of acts criminalized under the Statute being legal under Swedish law.

Defences – compulsion, duress and necessity

As Amnesty International has argued, compulsion, duress and necessity should not be defences to crimes under international law, but should simply be grounds for mitigation of punishment.¹³² However, in a regrettable political compromise, Article 31 (1) (d) of the Rome Statute permits, in strictly limited circumstances and only in trials before the International Criminal Court, defences of duress in response to threats from another person and of necessity (called "duress") in response to threats from circumstances beyond a person's control.¹³³ Chapter 23, Sect. 4 of the Swedish Penal Code has a defence of necessity (including duress) that is much broader in that it includes dangers to property and other important legal interests:

"An act by a person, in cases other than those described previously in this Chapter, if committed out of necessity, constitutes a crime only if it is indefensible having regard to the nature of the danger, the injury caused to another and to the circumstances in general. Necessity exists when a danger threatens life, health, property or some other important interest protected by the law."

¹³⁰ Penal Code Ch. 1, Sect. 2 (2) states: "If the act has been committed during self-induced intoxication or if the perpetrator has in some other way himself brought about the temporary loss of the use of his senses, this shall not cause the act to be considered non-criminal." See also Friman, *supra*, n. 24 at 142.

¹³¹ SOU 2002:98, p 335.

¹³² *Making the right choices*, *supra*, n. 122, Sect. VI.E.3 and 4.

¹³³ Article 31 (1) (d) of the Rome Statute provides that

"[i]n addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

...

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

- (i) Made by other persons; or
- (ii) Constituted by other circumstances beyond that person's control."

The Commission on International Criminal Law has recommended that the current law should be applied also in relation to crimes under international law.¹³⁴ Although the current provisions relating to these defences are wider than that in the Rome Statute, the Commission found that the requirement of proportionality would substantially limit its scope for application, making its application narrower than the defence in the Rome Statute. The prospect that these defences can be applied for crimes under international law is nevertheless unsatisfactory for the reason that it leaves a risk that criminal responsibility under Swedish law would be narrower than that under the Rome Statute. This is because it would continue to permit compulsion, duress and necessity to be defences to the worst imaginable crimes, instead of simply being factors that can be taken into account in mitigation of punishment.

Defences – defence of person or property

As Amnesty International has explained, self-defence and defence of others can be defences to crimes under international law in certain limited circumstances, but only when the response is reasonable and proportionate and, if deadly force is used, only when retreat is not possible.¹³⁵ Unfortunately, in another political compromise, the Rome Statute provides very broad defences of self, others and property, but these defences apply only in trials before the International Criminal Court.¹³⁶ However, Swedish law in some respects contains an even broader definition of self-defence in a range of circumstances without strict limits of reasonableness and proportionality and a duty to retreat if possible:

- “1. An act committed by a person in self-defence constitutes a crime only if, having regard to the nature of the aggression, the importance of its object and the circumstances in general, it is clearly unjustifiable. A right to act in self-defence exists against,
1. an initiated or imminent criminal attack on a person or property,
 2. a person who violently or by the threat of violence or in some other way

¹³⁴ SOU 2002:98, pp 336-337.

¹³⁵ Amnesty International, *Making the right choices*, *supra*, n. 122, Sect. VI.E.5.

¹³⁶ Article 31 (1) (c) of the Rome Statute provides that

“[i]n In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

...

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph[.]”

- obstructs the repossession of property when caught in the act,
3. a person who has unlawfully forced or is attempting to force entry into a room, house, yard or vessel, or
 4. a person who refuses to leave a dwelling when ordered to do so."¹³⁷

The Commission on International Criminal Law has recommended that the law above be applied also in relation to crimes under international law, claiming that it would in practice very seldom be applied in these cases because of its requirement of proportionality. This recommendation, if adopted, would not satisfy Sweden's obligations under international law because it leaves a risk that the defence is applied beyond what would be consistent with the Rome Statute and it does not include such requirements as the impossibility of retreat. It is difficult to imagine a situation in which committing genocide, crimes against humanity or war crimes would be justifiable in self-defence or in defence of property.

6.2. PRESENCE REQUIREMENTS IN ORDER TO OPEN AN INVESTIGATION OR REQUEST EXTRADITION

There is no formal requirement that a suspected perpetrator be present in Sweden in order to open an investigation. However, Code of Judicial Procedure, Ch. 23, Sect. 1, provides that:

"[a] preliminary investigation shall be initiated as soon as due to a report or for other reason there is cause to believe that an offence subject to public prosecution has been committed. A preliminary investigation need not be initiated if it is manifest that it is not possible to investigate the offence."

Thus, Sweden is able to open an investigation immediately as soon as it learns that a person suspected of genocide or other crimes under international law is on his or her way to Sweden or about to change planes at a Swedish airport. There is no need to wait until the suspect has entered the country on a visit that would be too short to permit an investigation to be completed and an arrest warrant issued and implemented. The absence of a presence requirement also means that Sweden can accept cases transferred by the ICTY or ICTR more easily by completing an investigation before the transfer and issuing an arrest warrant before the transfer. If Sweden were able to request extradition of a person suspected of a crime committed abroad (see below in Section 7), the absence of a presence requirement would mean that it could also help shoulder the burden when other states fail to fulfil their obligations to investigate and prosecute crimes under international law. Indeed, this possibility was envisaged as an essential component of the enforcement provisions of the four 1949 Geneva Conventions, each of which provide that any state party, regardless whether a suspect had ever been in its territory, as long as it "has made out a *prima facie* case", may request extradition of someone suspected of grave breaches of those Conventions.¹³⁸ If the

¹³⁷ Sect. 1, Law 1994:458.

¹³⁸ First Geneva Convention, Art. 49; Second Geneva Convention, Art. 50; Third Geneva Convention, Art. 129; Fourth Geneva Convention, Art. 146.

presence of the suspected perpetrator were to be necessary for an effective investigation in a particular case and the person cannot be extradited to Sweden, it is very unlikely that a prosecutor would decide to open an investigation.

6.3. STATUTES OF LIMITATIONS APPLICABLE TO CRIMES UNDER INTERNATIONAL LAW

Statutes of limitations apply to certain crimes under international law and to civil claims in civil proceedings.

Statutes of limitations applicable to crimes

Statutes of limitations for crimes under international law are prohibited under customary international law.¹³⁹ Although there are no special statutes of limitation under Swedish law expressly applicable to crimes under international law, general statutory limitations do apply to war crimes (“crimes against international law”) and genocide, as well as to other crimes under international law when they are prosecuted as ordinary crimes under Swedish law. It appears that there are no tolling principles in the Penal Code that would suspend application of the statute of limitations, for example, during a period when it was not possible for the victim to report the crime to the police or prosecutor.¹⁴⁰ Victims of crimes abroad or members of their family will be often be unable to report a crime to the police or prosecutor in the state where the crime occurred until they arrive in another country, Sweden, which might well be long after the statute of limitations had elapsed in Sweden.

Sweden is not a party to either UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (UN Convention on Statutory Limitations) or to the European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes (CETS No. 82).¹⁴¹ However, with regard to genocide, crimes against humanity and war crimes committed after 1 July 2002, it is in breach of its obligations under Article 29 (Non-applicability of statute of limitations) of the Rome Statute, which states: “The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.”¹⁴² It is also in breach of its obligations under the

¹³⁹ See, for example, Ruth Kok, *Statutory Limitations in International Criminal Law* (TMC Asser Press, The Hague, 2007); Amnesty International, *The Prohibition of Statutory Limitations for Crimes under International Law* (forthcoming 2009).

¹⁴⁰ The Penal Code, Ch. 6, Sections 1 to 4 and 6 provide that when the victim is a child under the age of 15, the statute of limitations does not begin to run until the victim reaches the age of majority.

¹⁴¹ When the UN Convention on Statutory Limitations was adopted, Sweden made a special statement that it was not compatible with the Swedish Constitution. SOU 2002:98, p 349.

¹⁴² See William A. Schabas, ‘Article 29 (Non-applicability of statute of limitations)’, in Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article* (Munich: Verlag C.H. Beck oHG, Oxford: Hart Publishing & Baden-Baden: Nomos Verlagsgesellschaft mbH & Co. KG 2nd ed. 2008) 848 (‘A State Party to the *Statute* whose legislation allowed prosecutions of these crimes to become time-barred would be in breach of the instrument. . . In most States, judges might even apply article 29 directly in order to supersede contrary penal legislation.’).

Convention against Torture. In its most recent conclusion on this point in June 2008 the Committee against Torture noted with concern that since acts of torture could only be prosecuted under other provisions of the Swedish Penal Code, they were subject to a statute of limitations, which

“may prevent investigation, prosecution and punishment of these grave crimes, in particular when the punishable act has been committed abroad. Taking into account the grave nature of acts of torture, the Committee is of the view that acts of torture cannot be subject to any statute of limitations. (arts. 1, 4 and 12)[.]”¹⁴³

Therefore, the Committee recommended that Sweden

“should review its rules and provisions on the statute of limitations and bring them fully in line with its obligations under the Convention so that acts of torture, attempts to commit torture, and acts by any person which constitute complicity or participation in torture, can be investigated, prosecuted and punished without time limitations.”¹⁴⁴

The statute of limitations in Penal Code, Ch. 35, Sect. 1 provides that:

“No sanction may be imposed unless the suspect has been remanded in custody or received notice of prosecution for the crime within:

1. two years, if the crime is punishable by at most imprisonment for one year,
2. five years, if the most severe punishment is imprisonment for more than one but no more than two years imprisonment,
3. ten years, if the most severe punishment is imprisonment for more than two but no more than eight years,
4. fifteen years, if the most severe punishment is imprisonment for a fixed term of more than eight years,
5. twenty-five years, if life imprisonment can be imposed for the crime.

If an act includes several crimes, then, regardless of what is stated above, a sanction may be imposed for all of the crimes, provided that a sanction can be imposed for any one of them.”

These limitations are applicable to all crimes, including the crime of genocide and the “crime against international law”.

¹⁴³ Concluding observations of the Committee against Torture – Sweden, U.N. Doc. CAT/C/SWE/CO/5, 4 June 2008, para. 10.

¹⁴⁴ *Ibid.*

A report commissioned by the government in 2007 proposed to change the law, which would remove all statutes of limitations concerning more serious crimes, such as murder, genocide and gross “crime[s] against international law”.¹⁴⁵ The government is planning to present a proposal for a new bill on the issue in 2010.¹⁴⁶ However, the proposal of 2007 is seriously flawed in three respects. First, it would not apply to all war crimes, but only to the most serious ones. Second, it would not necessarily apply to other crimes under international law (only if these fall under the ordinary crimes of murder or manslaughter). Third, the government proposal would apply prospectively only, even though statutes of limitations are essentially procedural, not substantive, and, therefore, do not fall within the prohibition of retroactive criminal law and even though this prohibition does not apply to conduct that was a crime under international law at the time it occurred.¹⁴⁷ The proposal in the report has been referred for consideration to relevant state agencies, authorities and organizations. In the International Crimes and Swedish Jurisdiction report there is a proposal that limitations should be removed for nearly all of the crimes covered by the proposed law on crimes under international law, but not for “less serious war crimes”.¹⁴⁸

Statutes of limitation applicable to torts

Sweden has a statute of limitations, the Prescriptions Act, barring the filing of civil claims after a certain period.¹⁴⁹ According to Section 2 of this Act, such claims are time-barred ten years after the claim arose. However, a civil claim filed in connection with a criminal proceeding is not time-barred until the statute of limitations for the underlying crime has expired, unless there is a judgment relating to the crime. In that case, the civil claim is barred one year after the judgement, unless the main rule of ten years would be more generous.¹⁵⁰ As with crimes, there appears to be no relevant tolling principle with regard to civil claims.

¹⁴⁵ “Period of Limitation for Serious Crimes” (translation by Amnesty International), Ds 2007:1, <http://www.regeringen.se/sb/d/8588/a/75917>.

¹⁴⁶ *När mordaren inte fälls*, *Fokus*, 11 September 2008, <http://www.fokus.se/2008/09/nar-mordaren-inte-falls/>.

¹⁴⁷ See, for example, Universal Declaration of Human Rights, Art. 11 (2): “No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed”; ICCPR, Art. 15 (2): “Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations”; and European Convention on Human Rights, Art. 7 (2): “This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according the general principles of law recognized by civilized nations”.

¹⁴⁸ SOU 2002:98.

¹⁴⁹ *Preskriftionslag* (1981:130).

¹⁵⁰ *Ibid*, Sect. 3.

6.4. DUAL CRIMINALITY

As discussed in some detail in Section 4, dual criminality (a requirement that the act be subject to criminal responsibility both under the law of the place where it was committed and under Swedish law) does *not* apply to crimes where the minimum punishment prescribed for the crime in Swedish law is imprisonment for four years, or to crimes otherwise listed in Penal Code, Ch. 2, Sect. 3 (see Section 4.1 above). However, this dual criminality requirement *does* apply when jurisdiction is based on the active personality principle (Penal Code, Ch. 2, Section 2 (1)) and otherwise when the jurisdiction is based on the residence or presence of the perpetrator in Sweden (Ch. 3, Sect. 3 (2-3a), with exceptions listed below in the first group of examples. Under Swedish law, dual criminality means that the act abroad must be a crime under both the Swedish Penal Code and under the law of the place where it occurred.

In summary, the dual criminality requirement *does not* apply to:

- Any crime with a minimum punishment of four years' imprisonment or more (Penal Code Ch. 2, Sect. 3 (7), including
 - Murder (Penal Code, Ch. 3, Sect. 1);
 - Manslaughter (Penal Code, Ch. 3, Sect. 2);
 - Kidnapping (Penal Code, Ch. 4, Sect. 1);
 - Gross rape (Penal Code, Ch. 6, Sect. 1);
 - Gross rape of a child (Penal Code, Ch. 6, Sect. 4);
 - Gross robbery (Penal Code, Ch. 8, Sect. 6);
 - Gross arson (Penal Code, Ch. 13, Sect. 2);
 - Gross devastation endangering the public (Penal Code, Ch. 13, Sect. 3);
 - Gross spreading of poison or a contagious substance (Penal Code, Ch. 13, Sect. 7); and
 - Armed threat against the legal order (Penal Code, Ch. 18, Sect. 3).
- The crimes of hijacking, maritime or aircraft sabotage, airport sabotage, an attempt to commit such crimes, a crime against international law, unlawful dealings with chemical weapons, unlawful dealings with mines, false or careless statement before an international court or the crime of terrorism as provided in Section 2 of the Act on Punishment of the Crime of Terrorism (2003:148) or attempt to commit such crime and crimes referred to in Section 5 of that law. (Penal Code, Ch. 2, Sect. 3 (6)).
- Crimes committed in the course of duty outside the Realm by the following persons regardless of nationality: members of the armed forces, a person employed in a foreign

contingent of the Swedish armed forces and an employee of the Swedish police, customs authority or coast guard exercising cross-border duties. (Penal Code, Ch. 2, Sect. 3 (2-3a)),

- Sex crimes committed against minors (Penal Code, Ch. 2, Sect. 2 (4)).
- A crime committed in an area not belonging to any state and directed against a Swedish citizen, a Swedish association or private institution. (Penal Code, Ch. 2, Sect. 3 (5)).
- A crime committed that is a crime against the Swedish nation, a Swedish municipal authority or other assembly, or against a Swedish public institution. (Penal Code, Ch. 2, Sect. 4)).
- The crime of female genital mutilation (Act Prohibiting Female Genital Mutilation (1982:316), Sect. 3).
- Certain fishing regulations (Fishing Act (1993:787)).
- Certain crimes within the economic zone of Sweden (Act on the Economic Zone of Sweden (1992:1140), Sect. 17).

However, the dual criminality requirement *does* apply to:

- Jurisdiction based on active personality (Penal Code, Ch. 2, Sect. 2 (1); and,
- apart from the examples listed above in the first group, when the crime has been committed outside of Sweden by a foreigner (Penal Code, Ch. 2, Sects. (1) to (3):
 - “1. by . . . an alien domiciled in Sweden
 - 2. by an alien not domiciled in Sweden who, after having committed the crime, has become a Swedish citizen or has acquired domicile in the Realm or who is a Danish, Finnish, Icelandic, or Norwegian citizen and is present in the Realm, or
 - 3. by any other alien, who is present in the Realm, and the crime under Swedish Law can result in imprisonment for more than six months.”

6.5. IMMUNITIES

With regards to immunities of foreign officials, the Penal Code, Ch. 2, Sect. 7, provides that:

“In addition to the provisions of this Chapter on the applicability of Swedish law and the jurisdiction of Swedish courts, limitations resulting from generally recognised fundamental principles of public international law or from special provisions in agreements with foreign powers, shall be observed.”

Immunities are, accordingly, regulated through a reference to international law. There is no convincing basis in customary international law to accord immunity of state officials while in office when committing genocide, crimes against humanity and war crimes. Instruments adopted by the international community show a consistent rejection of immunity from

prosecution for crimes under international law for any government official since the Second World War.

Those instruments articulated a customary international law rule and general principle of law. Indeed, several of the international instruments adopted over the past half century were expressly intended to apply to national courts, including the 1945 Allied Control Council Law No. 10, the 1946 General Assembly resolution on the affirmation of the principles of international law recognized by the Charter of the Nuremberg Tribunal, the 1950 Nuremberg Principles prepared by the International Law Commission, the Draft Code of Offences against the Peace and Security of Mankind of 1954 and the 1991 and 1996 Draft Codes of Crimes against the Peace and Security of Mankind. Moreover, even the international instruments establishing international criminal courts envisaged that the same rules of international law reiterated in those instruments applied with equal force to prosecutions by national courts.¹⁵¹

Regarding the immunity of Swedish officials, rules are found in the Constitution and the Act (1976:661) on Immunity and Privileges in Certain Cases.

The Commission did not recommend any substantial changes in these provisions concerning immunities (adding to the reference to principles of international law, also limits on Swedish jurisdiction following from treaties).¹⁵²

6.6. BARS ON RETROACTIVE APPLICATION OF INTERNATIONAL CRIMINAL LAW IN NATIONAL LAW OR OTHER TEMPORAL RESTRICTIONS

States have recognized for at least six decades that the prohibition of retroactive criminal laws does not apply to national criminal legislation enacted after the relevant conduct became recognized as criminal under international law.¹⁵³

Retroactive application of criminal law generally is prohibited under Ch. 2, Sect. 10 of the Instrument of Government¹⁵⁴ and Sect. 5 of the Law (1964:163) on the introduction of Penal Code.¹⁵⁵ It is not entirely clear whether prohibitions of the retroactive application of criminal

¹⁵¹ For further analysis on this point, see Amnesty International, Universal Jurisdiction: *Belgian court has jurisdiction in Sharon case to investigate 1982 Sabra and Chatila killings*, AI Index: EUR 53/001/2002, 1 May 2002.

¹⁵² Chapter 21, Sec. 11 of the Commission's report is similar to the current law.

¹⁵³ Article 11 (2) of the 1948 Universal Declaration of Human Rights declares:

"No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."

¹⁵⁴ "No punishment may be invoked for an act for which no punishment was proscribed at the time of the act."

¹⁵⁵ Sect. 5 provides: "No one can be sentenced for a crime for which there was no provision at the time of the crime".

law in the Instrument of Government would also extend to the retrospective incorporation of crimes under international law into Swedish law. The 2002 Commission report assumed that the general bar on retroactive application of criminal law in the Instrument of Government has the consequence that the principle applies also to international criminal law.¹⁵⁶ However, the abovementioned provisions do not expressly state that acts have to be punishable by Swedish law, thus leaving room for doubt.

Article 7 of the European Convention on Human Rights, which was incorporated into Swedish law in 1994, expressly states:

- “1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.”

Article 15 of the ICCPR, to which Sweden has been a party since 1976, contains a similar provision.¹⁵⁷

Thus, nothing in either article prevents Sweden from enacting legislation incorporating crimes under international law into Swedish law and permitting prosecutions for those crimes committed prior to the legislation entered into force, but after they were recognized as crimes under international law.

6.7. NE BIS IN IDEM

The principle of *ne bis in idem* (that one cannot be tried twice for the same crime) is applicable, apart from internal court decisions, also to rulings by courts of most European countries. However, it appears that the principle would not apply in Sweden to foreign judgments where this would result in impunity from a criminal prosecution.

¹⁵⁶ SOU 2002:98 p. 322.

¹⁵⁷ Article 15 of the ICCPR reads:

“(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”

The prohibition of double jeopardy (*ne bis in idem*) is a fundamental principle of law recognized in international human rights treaties and other instruments, including the ICCPR, the American Convention on Human Rights, Additional Protocol I and constitutive instruments establishing the ICTY, ICTR and the Special Court for Sierra Leone.¹⁵⁸ However, apart from the vertical exception between international courts and national courts, the principle only prohibits retrials after an acquittal by the same jurisdiction.¹⁵⁹ This limitation on the scope of the principle can serve international justice by permitting other states to step in when the territorial state or the suspect's state fails to conduct a fair trial.

The Swedish Code of Judicial Procedure, Ch. 30, Sect. 9, provides that “[o]nce the time for ordinary means of appeal has expired, the issue of the defendant's criminal liability for the act which was determined by the judgement may not be taken up again for adjudication.” This rule reflects the prohibition of *internal* double jeopardy (the *ne bis in idem* principle). The Swedish Commission on International Criminal Law analyzed whether the principle, as formulated in the Code of Judicial Procedure applies to foreign judgments and concluded that it applies only to Swedish judgments.¹⁶⁰

However, at the present time, as an exception to this general rule, the principle *ne bis in idem* applies to a large extent even to judgments from certain other states. In connection with the Swedish accession to the 1970 European Convention on the International Validity of

¹⁵⁸ ICCPR, Art. 14 (7); American Convention on Human Rights, Art. 8 (4); Additional Protocol I, Art. 75 (4) (h); ICTY Statute, Art. 10 (1); ICTR Statute, Art. 9 (1); Statute of the Special Court for Sierra Leone, art. 9.

¹⁵⁹ The Human Rights Committee has concluded that Article 14 (7) of the ICCPR "does not guarantee *non bis in idem* with regard to the national jurisdictions of two or more States. The Committee observes that this provision prohibits double jeopardy only with regard to an offence adjudicated in a given State." *A.P. v. Italy*, No. 204/1986, 2 November 1987, 2 Selected Decisions of the Human Rights Committee under the Optional Protocol 67, UN Doc. CCPR/C/OP/2, UN Sales No. E.89.XIV.1. This was also recognized during the drafting of Article 14 (7) of the ICCPR. See Marc J. Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff 1987), pp. 316-318; Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein: N.P. Engel 1993), pp. 272-273; Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon Press 1991).

The Trial Chamber in the *Tadić* case reached the same conclusion:

"The principle of *non-bis-in-idem*, appears in some form as part of the international legal code of many nations. Whether characterized as *non-bis-in-idem*, double jeopardy or autrefois acquit, autrefois convict, this principle normally protects a person from being tried twice or punished twice for the same acts. This principle has gained a certain international status since it is articulated in Article 14 (7) of the International Covenant on Civil and Political Rights as a standard of fair trial, but it is generally applied so as to cover only double prosecution in the same State."

Prosecutor v. Dusko Tadic, Case No IT-94-1-A, July 15, 1999.

¹⁶⁰ 2002:98, part 1, pp. 104-6.

Criminal Judgments (Criminal Judgment Convention) a provision was introduced in Penal Code, Ch. 2, Sect. 5 (a). According to this provision, a person may not be prosecuted for an act when

“the question of responsibility for [the] act has been determined by a judgement which has entered into legal force pronounced in a foreign state where the act was committed, or by a foreign state in which the [Criminal Judgment Convention] was in force.”

This provision applies if the person has been acquitted, if he or she has been declared guilty of the crime without a sanction being imposed, if the sanction imposed has been enforced in its entirety or enforcement is in process, or if the sanction imposed has lapsed under the law of the foreign state. In the second paragraph of the provision, there are certain exceptions.¹⁶¹

Despite the apparently unequivocal wording of Penal Code, Ch. 2, Sect. 5 (a), the assessment of the Commission on International Criminal Law was that, for crimes under international law, Sweden may be under a duty to prosecute regardless of the nationality of the perpetrator and the place where the act was committed.¹⁶² According to the Commission this would also mean that Sweden cannot respect a judgment from a court in another country concerning crimes under international law if the act is subject to impunity in the country where the judgment was delivered.¹⁶³

However, a Swedish court cannot exercise jurisdiction under any exceptions to this provision unless the Prosecutor-General gives permission for it to do so. Penal Code, Ch. 2, Sect. 5 (a) (3) provides that

“[i]f the question of responsibility for an act has been determined by a judgement pronounced by a foreign state and no impediment to legal proceedings exists by reason of what has been previously stated in this Section, the act may be prosecuted in [Sweden] only by order of the Government or a person authorized by the Government.”¹⁶⁴

According to a 1993 government decree, the government has authorized the Prosecutor-General to decide upon these cases.¹⁶⁵

¹⁶¹ The provision does not “apply to a crime under Section 1 [committed in Sweden] or Section 3, points 4 [committed abroad against a Swedish institution], 6 [certain treaty crimes committed abroad] and 7 [crimes committed abroad with a minimum four year-sentence], unless legal proceedings in the foreign state were instituted at the request of a Swedish authority.” Penal Code, Ch. 2, section 5 (a) (2).

¹⁶² SOU 29002:98, p 105.

¹⁶³ *Ibid.*

¹⁶⁴ Penal Code, Ch. 2, Sect. 5 (a) (3).

¹⁶⁵ 1993:1467, Sect. 1 (3).

6.8. POLITICAL CONTROL OVER DECISIONS TO INVESTIGATE AND PROSECUTE

Despite the general obligation to prosecute (see Section 2.4 above), the potentially wide jurisdiction of Swedish courts is limited by Penal Code, Ch. 2, Sect. 5 (2), according to which prosecution of most crimes committed outside of Sweden may be instituted only following the authorization by the government or a person designated by the government. However, the same provision, excludes the following crimes from this requirement:

- "False or careless statement before an international court, or crimes committed:
1. on a Swedish vessel or aircraft or by the officer in charge or some member of its crew in the course of duty,
 2. by a member of the armed forces in an area in which a detachment of the armed forces was present,
 3. in the course of duty outside the Realm by a person employed by a foreign contingent of the Swedish armed forces,
 4. in Denmark, Finland, Iceland or Norway or on a vessel or aircraft in regular commerce between places situated in Sweden or one of the said states, or
 5. by a Swedish, Danish, Finnish, Icelandic or Norwegian citizen against a Swedish interest."

The government has authorized the Prosecutor-General to grant leave for prosecution for crimes committed outside Swedish territory by a Swedish citizen or a foreigner domiciled in Sweden.¹⁶⁶ In other cases, the issue is reviewed by the Ministry of Justice and the decision is made by the cabinet. There are no formal rules governing under which circumstances a leave shall be granted, and, thus, the decision is left to the unfettered discretion of the authorities. The Ministry of Justice handles only two or three cases of granting leave for prosecution per year and there is no well-established practice for the making of such decisions.¹⁶⁷

In its 2002 report, the Commission on International Criminal Law suggested that the decision to give authorisation to prosecute should be taken by the Prosecutor-General, an independent official,¹⁶⁸ instead of the government, except in politically sensitive cases.¹⁶⁹ Although a narrowing of the area of political interference is a step in the right direction, it would not be

¹⁶⁶ Government regulation 1993:1467.

¹⁶⁷ Information provided to AI by email 3 October 2008.

¹⁶⁸ The Prosecutor-General is appointed by the Government but is an independent official (he or she is employed under a "*fullmakt*", letter of attorney (Code of Judicial Procedure Ch 7 Sect. 3, which grants him or her special powers and protection vis-à-vis the government).

¹⁶⁹ SOU 2002:98.

sufficient. There should be no political interference in the process of justice whatsoever.¹⁷⁰

6.9. RESTRICTIONS ON THE RIGHTS OF VICTIMS AND THEIR FAMILIES

As noted above in Section 5.4, victims are not able to obtain the full range of reparations against convicted persons to which they are entitled under international law. However, they have a number of rights with respect to participation in criminal proceedings. Victims have a right to a legal representative if the alleged act may lead to imprisonment (under the Law (1988:609) on Legal Representation for Victims). There is no provision granting victims additional information in comparison to the general public. However, if the proceedings are closed, victims can still attend the hearing.¹⁷¹ Victims have a right to participate in the proceedings and they may examine the defendant and witnesses.¹⁷²

As mentioned above (see Section 5.2), the Code of Judicial Procedure, Ch. 22, Sect. 1, provides that an action against the suspect or a third person for a private civil claim in consequence of an offence may be conducted in conjunction with the prosecution of the offence.

6.10. AMNESTIES

Amnesties and similar measures of impunity for crimes under international law are prohibited under international law.¹⁷³

There is no legislative provision on amnesties relevant to crimes under international law. Occasionally, the police and the parliament grant “amnesties” for persons who hand in small firearms. However, it is not clear what effect, if any, a foreign amnesty for a crime under international law would have on a prosecution in a Swedish court.

¹⁷⁰ Political decisions to prosecute could, in some instances, be inconsistent with the UN Guidelines on the Role of Prosecutors. For example, Guideline 12 (a) requires prosecutors to “perform their duties fairly”; Guideline 13 requires prosecutors to “[c]arry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination”; Guideline 13 (b) requires prosecutors to “[p]rotect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect” and Guideline 14 states that “[p]rosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.”

¹⁷¹ There is no provision which expressly states that the victim has the right to attend, but it is obvious that such a right exists from other provisions. For example, according to Code of Judicial Procedure, Ch. 20, Sect. 8, the victim may support the prosecution, which includes the right to examine witnesses and the accused.

¹⁷² Code of Judicial Procedure, Ch. 37, section 1.

¹⁷³ See, for example, Amnesty International, *Sierra Leone: Special Court for Sierra Leone: denial of right to appeal and prohibition of amnesties for crimes under international law*, AI Index: AFR/012/2003, 31 October 2003.

7. EXTRADITION AND MUTUAL LEGAL ASSISTANCE

7.1 EXTRADITION

As discussed below, there are a number of obstacles to extradition and mutual legal assistance that may limit Sweden's ability to provide effective cooperation with other states in the investigation and prosecution of crimes under international law. Requests by Sweden for extradition from other countries are generally regulated by bilateral or multilateral treaties, but they can be made even in the absence of a treaty. There are three separate laws governing extradition from Sweden to Nordic countries, other European countries¹⁷⁴ and all other countries. These laws also contain a number of significant obstacles to extradition and to mutual legal assistance.

Extradition to Sweden

Within the EU, the making of requests by Sweden for surrender of a person is regulated by the European Arrest Warrant through its implementing regulation.¹⁷⁵ Otherwise, extradition requests are made in accordance with Government regulation 1982:306.¹⁷⁶ Regarding countries outside of the EU or the Nordic countries, requests are made by the Prosecutor-General. For extradition from a Nordic country, requests can be made by a prosecutor or the police. If the extradition concerns the implementation of a punishment for which the person has already been sentenced, a request can be made directly by the relevant authorities for enforcing the punishment.

Sweden does not require that there be a treaty with another state for it to extradite a person to that state. However, as many other states have such a requirement for the extradition of persons to Sweden, it is party to several extradition treaties, such as the European Convention on Extradition and its protocols,¹⁷⁷ and bilateral treaties with the USA,¹⁷⁸ Australia¹⁷⁹ and

¹⁷⁴ Within the EU, the European Arrest Warrant has replaced extradition.

¹⁷⁵ The warrant has been implemented through Government regulation, *förordningen (2003:1178) om överlämning till Sverige enligt en europeisk arresteringsorder*,

¹⁷⁶ *Förordningen (1982:306) med vissa bestämmelser om utlämning för brott*.

¹⁷⁷ *Europeiska utlämningskonventionen den 13 december 1957 (SÖ 1959:65, SÖ 1967:46, prop. 1958:139), tilläggsprotokoll till europeiska utlämningskonventionen den 15 oktober 1975 (SÖ 1976:27), andra tilläggsprotokollet till den europeiska utlämningskonventionen den 17 mars 1978 (SÖ 1979:13, prop. 1978/79:80)*.

Canada,¹⁸⁰ as well as numerous multilateral treaties containing extradition and mutual legal assistance provisions.¹⁸¹

Extradition from Sweden

Extradition from Sweden is regulated by three different acts, depending on the origin of the extradition request:

- for requests from outside of the EU or the Nordic Countries, the *Extradition of Criminal Offences Act* (1957 Extradition Act)(1957:668);
- the *Act (1959:254) on Extradition for Criminal Offences to Denmark, Finland, Iceland and Norway* (1959 Nordic Extradition Act) (applicable primarily to requests from Norway and Iceland); and
- the *Act (2003:1156) on Surrender From Sweden According to the European Arrest Warrant* (2003 European Arrest Warrant Act) (applicable to requests from within the EU).

Separate rules apply to cooperation with international courts.

The 1957 Extradition Act, applying to all countries outside the EU or Nordic countries, builds, to a large extent, on the Council of Europe 1957 Convention on Extradition. It contains a prohibition on the extradition of Swedish citizens and a requirement of dual criminality, as well as a requirement that the crime carries a certain minimum punishment in Swedish law. Furthermore, a person may not be extradited for political or military offenses, or when this would be contrary to certain minimum humanitarian standards. Finally, no extradition may be granted if a sentence has been issued in Sweden for the crime, or if the crime in Swedish law has been barred under the statute of limitations. The Government makes decisions on extraditions according to the Act.¹⁸²

¹⁷⁸ *Konventionen 1961 med Amerikas Förenta Stater om utlämning* (SÖ 1963:17, prop. 1962:40) - tilläggskonvention den 14 mars 1983 (SÖ 1984:34, prop. 1982/83:156).

¹⁷⁹ *Utlämningsfördrag med Australien den 20 mars 1973* (SÖ 1974:3, SÖ 1985:64, SÖ 1989:49, prop. 1973:89).

¹⁸⁰ *Överenskommelse med Kanada om utlämning* (SÖ 1976:30, SÖ 1980:21, SÖ 2001:42).

¹⁸¹ Other treaties to which Sweden is a party to that relate to extradition issues include: the 1963 on Offences and Certain Other Acts Committed on Board Aircraft, the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, the 1977 European Convention on the Suppression of Terrorism, the 1984 Convention Against Torture, 1988 United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the 1997 International Convention for the Suppression of Terrorist Bombing.

¹⁸² See Sections 7.1.1 to 7.3.5 below.

The 1959 Nordic Extradition Act has been adopted through Nordic cooperation, with similar legislation in each country. As Denmark and Finland are members of the EU, the EU Arrest Warrant applies in relation to them, unless they specifically state that a request is made under the Nordic Act. Accordingly, the Nordic extradition act applies primarily in relation to Iceland and Norway.¹⁸³ The act generally contains fewer impediments to the extradition of persons than the 1957 Extradition Act, applicable to other countries. For example, there is no requirement of dual criminality, and a Swedish citizen may be extradited under certain conditions. Generally, the Prosecutor-General decides whether to grant extradition according to the Act.¹⁸⁴

According to the 2003 European Arrest Warrant Act, a decision to surrender a person to an EU country is made by a district court. The act for which the request is made must be subject to a minimum punishment of one year or more, or if a person has been sentenced, the sentence must be at least four months' imprisonment. As a general rule, the requirement of dual criminality applies. No surrender can take place if the person has been sentenced already in Sweden or if prosecution of the crime has been barred under the Swedish statute of limitations.¹⁸⁵

7.1.1. INAPPROPRIATE LIMITS ON SWEDISH EXTRADITION REQUESTS

There appear to be no inappropriate limits on the making of extradition requests in Swedish law, but the numerous bilateral extradition treaties have not been analyzed.

7.1.1.1. POLITICAL CONTROL OVER THE SWEDISH EXTRADITION REQUESTS

Under the regulations regarding the making of extradition requests (see Section 7.1 above), there can be no political interference in the question of whether to make an extradition request.

7.1.1.2. PRESENCE AND SWEDISH EXTRADITION REQUESTS

There is no requirement that a suspect ever have been in Sweden at any time in order for Sweden to make an extradition request (see Section 6.2 above).

7.1.2. INAPPROPRIATE BARS TO GRANTING EXTRADITION REQUESTS

There are a limited number of bars to the granting of an extradition (or surrender) request according to the acts relating to the Nordic countries or the EU, and more important obstacles in the law regarding extradition to other countries. Perhaps most importantly, a Swedish national may not be extradited according to the 1957 Extradition Act (Sect. 2). There is also a requirement of dual criminality,¹⁸⁶ and of a certain degree of seriousness of

¹⁸³ The Nordic extradition regime is to be replaced by a Nordic Arrest Warrant, which is an improved version of the European Arrest Warrant. The new instrument has not yet been implemented in all Nordic states, including Sweden.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ Sect. 4.

the crime.¹⁸⁷ Another bar applies when there is an ongoing criminal proceeding in Sweden.¹⁸⁸

The 2003 European Arrest Warrant Act contains a requirement of dual criminality and bars to extradition when such would contravene provisions on immunity and privileges.¹⁸⁹

7.1.2.1. POLITICAL CONTROL OVER THE GRANTING OF EXTRADITION REQUESTS

According to the 2003 European Arrest Warrant Act, the granting of extradition is decided by a district court.¹⁹⁰ With regards to requests from other Nordic countries, a prosecutor generally decides on the issue.¹⁹¹ However, decisions whether to extradite to countries other than EU or Nordic countries are made by political officials in the Government, not by an independent court or prosecutor.¹⁹²

7.1.2.2. NATIONALITY

The 1957 Extradition Act, applicable to countries outside of the Nordic countries or the EU, bars the extradition of Swedish nationals.

¹⁸⁷ Considering the seriousness of the crimes covered in this paper, this should not be an obstacle. Section 4 provides:

“Extradition may be granted only if the act for which it is requested holds a minimum penalty of one year of imprisonment by Swedish law. The same section bars extradition of a person that has been sentenced for the act in the requesting state if the sentence of deprivation of liberty is less than four months”.

¹⁸⁸ Section 11 provides:

“A person who is being prosecuted in Sweden for another offence, for which imprisonment is prescribed, or who has been sentenced to imprisonment or some other form of institutional custody, may not be extradited so long as that impediment prevails. The same shall apply if a preliminary investigation has been instituted with reference to an offence as aforesaid. Notwithstanding the provisions of the first paragraph, a person may be extradited to stand trial for the act for which the foreign state has requested extradition, subject to the condition that he shall subsequently be surrendered to a Swedish authority in accordance with that which the Government decides. (SFS 1975:292)”

¹⁸⁹ Sect. 2 and 4.

¹⁹⁰ 2003 European Arrest Warrant Act, Ch.5, Sect.1.

¹⁹¹ 1959 Nordic Extradition Act, Sect. 15.

¹⁹² The 1957 Extradition Act, Sect. 1, provides that a person, in another state, who is a suspect, accused or convicted for a criminal act in that state and is present in Sweden, may be extradited to that state after a decision by the government. However, the Extradition Act also provides that contested extradition requests be subject to determination by the Supreme Court and, if the Court decides that extradition may not be granted, the government may not overrule that determination. *Ibid.*, Sects. 15, 17-18 and 20.

In the 1959 Nordic Extradition Act, a national can be extradited under certain conditions.¹⁹³

According to the 2003 European Arrest Warrant Act, if a Swedish national to be surrendered requests that any sentence imposed in the requesting state be served in Sweden, the person may not be surrendered unless this request is granted by the requesting state.¹⁹⁴ If a Swedish national whose surrender is requested for the execution of a sentence demands that the sanction is enforced in Sweden, surrender may not be granted.¹⁹⁵

7.1.2.3. DUAL CRIMINALITY AND TERRITORIAL JURISDICTION

Section 4 of the 1957 Extradition Act, applying to countries other than EU or Nordic, provides that extradition may be granted only if the act for which it is requested holds a minimum penalty of one year of imprisonment by Swedish law.

The 2003 European Arrest Warrant Act contains a requirement of dual criminality (with certain exceptions)¹⁹⁶ and excludes extradition where the Act has been statute barred in Swedish law (see Section 7.1.2.8 below).¹⁹⁷

The 1959 Nordic Extradition Act contains a requirement that the crime for which the extradition is requested must hold a punishment of at least four years' imprisonment for a Swedish citizen to be extradited, unless the person has been present in the requesting country for at least two years.¹⁹⁸

7.1.2.4. POLITICAL OFFENCE

The 1957 Extradition Act bars extradition for political offences.¹⁹⁹ Political offences are not defined in that act.²⁰⁰ However, the scope of this statutory exception has been developed in

¹⁹³ Sect. 2.

¹⁹⁴ 2003 European Arrest Warrant Act, Ch. 3, Sect. 2. The second paragraph contains an exemption for persons who have lived in the requesting country for at least two years.

¹⁹⁵ Sect 6.

¹⁹⁶ Sect. 2.

¹⁹⁷ Sect. 5(6).

¹⁹⁸ Sect. 2.

¹⁹⁹ Sect. 6:

"Extradition may not be granted for a political offence. If the act also constitutes a non-political offence, extradition may be granted for that offence, provided, in the particular case, the act is predominantly of a non-political nature. The first paragraph does not apply where rejection on this ground would be contrary to an international agreement applying between Sweden and the requesting state. (SFS 2003:1158)"

²⁰⁰ There is no internationally accepted definition of the term. A leading authority on extradition has stated:

Swedish jurisprudence.²⁰¹ Although there is no exception in the 1957 Extradition for crimes under international law generally, there are two exceptions to this bar that might preclude its application to crimes under international law. First, this act expressly states that the first paragraph of Section 6 ‘does not apply where rejection on this ground would be contrary to an international agreement applying between Sweden and the requesting state.’²⁰² Such agreements include the Genocide Convention, which expressly states that genocide is not a political crime for the purposes of extradition, and the 1997 International Convention for the Suppression of Terrorist Bombings and the 1999 International Convention for the Suppression of the Financing of Terrorism. In addition to genocide, it can be argued that when the political offence is also a crime under international law, it fits the exception for offences that are predominantly non-political. Moreover, other treaties implicitly exclude this possibility by imposing a try or extradite obligation with respect to the crime.²⁰³ Although not directly addressing this question, the 1950 Convention relating to the Status of Refugees (Article 1F) excludes from its application persons suspected of crimes under international law.²⁰⁴

“Even though widely recognized, the very term ‘political offence’ is seldom defined in treaties or national legislation, and judicial interpretations have been the principle source for its meaning and its application. This may be due to the fact that whether or not a particular type of conduct falls within that category depends essentially on the facts and circumstances of the occurrence. Thus, by its very nature it eludes a precise definition, which could constrict the flexibility needed to assess the facts and circumstances of each case.”

M. Cherif Bassiouni, International Extradition: United States Law and Practice, Oxford University Press – Oceana, 5th ed. 2007), p.653 (footnotes omitted).

²⁰¹ See, for example, the Supreme Court’s decision of 10 June 2008 in Case No. Ö1684-08 (*Högsta domstolens beslut den 10 juni 2008 i mål Ö1684-08*) (extradition to the Russian Federation denied).

²⁰² 1957 Extradition Act, Sect. 6,

²⁰³ Genocide Convention, art. VII (“Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.”). Other treaties implicitly do so by imposing an extradite or try obligation (see treaties discussed in Section 4.2 above.).

²⁰⁴ Article 1.F reads:

“The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.”

7.1.2.5. MILITARY OFFENCE

The 1957 Extradition Act bars extradition for certain military offences.²⁰⁵ However, such offenses would not include extraditable offences, such as crimes under international law. There is no such bar in either the 1959 Nordic Extradition Act or the 2003 European Arrest Warrant Act.

7.1.2.6. *NE BIS IN IDEM*

According to Sect. 10 of the 1957 Extradition Act, a person may not be extradited if a judgment in respect of the alleged offence has been rendered in Sweden concerning that for the person at hand, or if a waiver of prosecution has been made.²⁰⁶ The principle applies equally to judgments in other countries under certain conditions.²⁰⁷

²⁰⁵ Sect 5:

“Extradition may not be granted for acts mentioned in the provisions of Ch. 16 of the Penal Code relating to offences committed by members of armed forces or of Ch. 21 of the Penal Code or of the Total Defence Service Act (1994:1809). In derogation of the foregoing, if the act also constitutes an offence which is otherwise extraditable, the person may be extradited for that offence. (SFS 1994:2066)“.

²⁰⁶ Sect. 10:

“If judgment in respect of the alleged offence has been rendered in Sweden regarding the person for whom extradition is requested, or if a decision has been made for waiver of prosecution in accordance with Ch. 20, Section 7 of the Swedish Code of Judicial Procedure or corresponding provision in another enactment, extradition may not be granted for that offence.”

²⁰⁷ Sect. 10 (2):

“If the question of liability for the offence has been adjudicated by a judgment having legal force pronounced in a state other than the state requesting extradition, and if the offence was committed in the former state or if that state has acceded to the European Convention on Extradition of 13 December 1957 or an agreement as referred to in Ch. 2, Section 5 a, fourth paragraph of the Penal Code or has concluded a special agreement with Sweden on extradition for criminal offences, the person for whom extradition is requested may not be extradited for that offence,

1. if he or she has been acquitted,
2. if he or she has been found guilty of the offence but no sanction has been imposed,
3. if the sentence passed has been served in its entirety or is still being served, or
4. if the sanction imposed has lapsed according to the law of the state where the judgment was entered.

The third paragraph shall not apply to offences committed in the state requesting extradition or against that state or against an assembly or a public institution in that state, nor to an offence referred to in Ch. 2, Section 3, item 6 or 7 of the Penal Code, unless proceedings for the purpose of conducting a criminal prosecution have taken place at the request of the state

The 1959 Nordic Extradition Act contains, in Sect. 5, a prohibition against extradition if the person has been sentenced for the same crime in Sweden.

In addition, the 2003 European Arrest Warrant Act contains rules relating to the principle of *ne bis in idem*, applying both to judgements within the EU and in other countries.²⁰⁸

7.1.2.7. NON-RETROACTIVITY

Nothing in the 1957 Extradition Act, 1959 Nordic Extradition Act and 2003 European Arrest Warrant Act expressly prohibits extradition when the conduct in the extradition request, although criminal under Swedish law at the time of the request, was not criminal under Swedish law when it occurred.

7.1.2.8. STATUTES OF LIMITATION

According to the 1957 Extradition Act, extradition is barred where the offence would be time-barred according to Swedish law.²⁰⁹

The 1959 Nordic Extradition Act does not expressly address this question.

The 2003 European Arrest Warrant Act bars surrender when punishment for the act is barred by a statute of limitations or the punishment can no longer be imposed under Swedish law.²¹⁰

7.1.2.9. AMNESTIES, PARDONS AND SIMILAR MEASURES OF IMPUNITY

The 1957 Extradition Act and the 1959 Nordic Extradition Acts are silent on this question.

The 2003 European Arrest Warrant Act bars surrender where the act is covered by a pardon or similar decision.²¹¹

7.1.3. SAFEGUARDS

There are several provisions in Swedish law that are intended to protect the rights of the suspects, including the right to fair trial, the right to be free from torture or other ill-treatment and the right to life, as well as provisions regarding humanitarian concerns and ensuring that only the crimes mentioned in the extradition request are prosecuted. However, the scope of these provisions is not always clear.

7.1.3.1. FAIR TRIAL

which requested extradition or after the person for whom extradition has been requested has been extradited from that state for the purpose of criminal prosecution. (SFS 2003:1158)"

²⁰⁸ Sect. 5 (2-4).

²⁰⁹ Sect. 10: "Extradition may further not be granted if a penalty for the offence would be time-barred according to Swedish law."

²¹⁰ Sect. 5 (6).

²¹¹ Sect. 5 (1).

There are several provisions designed to protect the right to fair trial, both for persons being brought for trial and those whose extradition is requested to serve a sentence in a foreign country.

Section 9 of the 1957 Extradition Act provides that:

“If the person for whom extradition is requested has been sentenced for the act in the foreign state, his extradition may not be granted unless the judgment is substantiated by the supporting documentation and does not give rise to a serious objection in other respects”.

Human rights concerns, as well as political concerns may possibly qualify as “serious objections”. However, since the phrase is not defined, it is also possible that it could be interpreted in a way that would permit a denial of extradition for political reasons.²¹² In addition, Sections 7 and 8 of the 1957 Extradition Act bar extradition where the person would risk specific persecution or it would be “manifestly incompatible with basic standards of humane treatment”. There is no similar provision in the 1959 Nordic Extradition Act.

The 2003 European Arrest Warrant Act contains special conditions relating to extraditions for execution of sentences given after trials *in absentia*.²¹³ Furthermore, the Act contains a general bar against extradition whenever it would contravene Sweden’s obligations under the European Convention on Human Rights or its protocols.²¹⁴

As the European Convention on Human Rights applies as law in Sweden,²¹⁵ any obstacle this convention may pose to the transfer of a person to risk of facing an unfair trial has to be respected in all cases.²¹⁶

7.1.3.2. TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

The European Convention on Human Rights is directly enforceable as law in Sweden and this

²¹² Sect. 9.

²¹³ Ch.3, Sect.1:

“Surrender for execution of a custodial sentence or detention order imposed following a trial that was held in the requested person’s absence, and without him or her being summoned personally or otherwise informed of the time and place of the trial, may be approved only if the issuing judicial authority provides a guarantee that the requested person will be given the opportunity of a retrial in the issuing Member State, and to be judged there following a trial at which he or she is able to be present”.

²¹⁴ Sect. 4 (3).

²¹⁵ *Lag (1994:1219) om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna.*

²¹⁶ See the Supreme Court’s decision of 13 September 2007 in Case No. Ö3088-07 (*Högsta domstolens beslut den 13 september 2007 i mål Ö3088-07*) (extradition to Albania denied).

has been interpreted by the European Court of Human Rights to include the principle of *non-refoulement*. Accordingly, Sweden may not extradite someone to a country where the person would face substantial risk of torture or other inhumane or degrading treatment or punishment.²¹⁷ The 1957 Extradition Act contains provision barring extradition at risk of persecution on certain grounds or when it would be contrary to basic standards of humane treatment.²¹⁸ The 2003 European Arrest Warrant Act contains a similar specific provision.²¹⁹ These provisions may be applicable in cases of risk of torture or ill-treatment.

7.1.3.3. Death penalty

Section 12 (3) of the 1957 Extradition Act specifically states that “a person who is extradited may not have the death penalty imposed for the offence”.

Since all the Nordic countries have abolished the death penalty, it was not necessary to include a bar in the 1959 Nordic Extradition Act in those cases where there was a risk of the death penalty.

The 2003 European Arrest Warrant Act bars extradition when it would contravene Sweden's obligations under the European Convention on Human Rights or its protocols.²²⁰ This applies as a general rule for extraditions also in other cases, as the Convention is applicable as law in Sweden.

7.1.3.4. HUMANITARIAN CONCERNS

Section 8 of the 1957 Extradition Act contains a provision barring extradition

“where in a particular case, in view of the youth, state of health or any other personal circumstances of the person concerned, due account also being taken of the nature of the act and the interests of the foreign state, it is considered to be manifestly incompatible with basic standards of humane treatment.”

Otherwise, any obstacle in the European Convention on Human Rights to an extradition applies. The 1959 Nordic Extradition Act and the 2003 European Arrest Warrant Act do not have any similar provisions.

7.1.3.5. SPECIALITY

As a general rule, the 1957 Extradition Act, bars prosecution for any previous crime or

²¹⁷ This principle applies with equal force to deportations as an alternative to extradition. However, this safeguard has not always been fully respected with respect to deportations. Amnesty International, *Sweden: The case of Mohammed El Zari and Ahmed Agiza: violations*, AI Index: EUR 42/001/2006, 27 November 2006.

²¹⁸ Sect. 7 and 8.

²¹⁹ Sect. 4 (3).

²²⁰ Sect. 4 (3).

execution of a previous judgment, other than those stated in the request.²²¹ The 1959 Nordic Extradition Act and the 2003 European Arrest Warrant Act do not have any similar provisions.

7.2. MUTUAL LEGAL ASSISTANCE

Provisions regulating legal assistance between courts and prosecutors are contained primarily in the International Legal Assistance in Criminal Matters Act (Legal Assistance Act).²²² Sweden does not, as many other states do, require a mutual legal assistance agreement with another state for it to grant assistance in criminal cases. Such requirements may, however, bar assistance from other countries to Swedish courts and prosecutors. As explained below in Section 7.2.2, in certain circumstances, there are provisions with bars to assistance that are improper when a crime under international law is involved, such as dual criminality, national security and political offences.

A request for assistance from an EU or Nordic country can be directed directly to a court or prosecutor (the same follows from certain bilateral agreements). Requests from other countries should be directed to the Ministry of Justice, which will forward it to relevant authorities.²²³

In general, the same rules that apply to Swedish pre-trial investigations, according to the

²²¹ Sect. 12:

“When extradition is granted the following conditions, when applicable, shall be prescribed:

1. Except with special consent in accordance with Section 24, the person extradited may not be prosecuted or punished in the foreign state for any other offence committed prior to his extradition or, except in cases referred to in Section 13, second paragraph, be extradited to another state, unless he has failed, although unimpeded from so doing, to leave the country within forty-five days after the trial and after serving the sentence or other penalty imposed on him for the offence with respect to which he was extradited, or has returned to the said country after having left it.
2. A person extradited may not be prosecuted for the offence in a court which has only been given ad hoc or emergency powers to try such cases. The government, however, may grant exemptions from this provision where it is considered compatible with legal security to do so.”

Section 12 a provides:

“Where provided by an international agreement which is binding on Sweden, the person extradited may, in addition to that provided by Section 12, first paragraph, item 1, be prosecuted or punished for another offence which he or she committed before being extradited, provided he or she has consented thereto.”

SFS 2003:1158.

²²² 2000:562.

²²³ Ch. 2, Sect. 3 and 6.

Code of Judicial Procedure, apply to the granting of legal assistance.²²⁴

Swedish courts and prosecutors may request legal assistance from other states according to the provisions of the Legal Assistance Act, Ch. 3. Depending on agreements between Sweden and the relevant country, the request should be made either directly by the authorities handling the case, or separately forwarded by the Ministry of Justice.

There are specific acts regulating the cooperation with international courts.

Sweden is party to a number of multilateral and bilateral treaties relating to mutual legal assistance.²²⁵

7.2.1 UNAVAILABLE OR INADEQUATE PROCEDURES

There do not appear to be any unavailable or inadequate procedures in legislation, but bilateral mutual legal assistance treaties have not been analyzed for this paper.

7.2.2 INAPPROPRIATE BARS TO MUTUAL LEGAL ASSISTANCE

For assistance to be granted to countries outside of the EU, Norway or Iceland, there is a requirement of dual criminality (i.e. the act to be investigated must be punishable under Swedish law), applicable to certain more intrusive investigative measures.²²⁶

The court or prosecutor handling the issue may refuse assistance when the requirement of dual criminality is not satisfied. The Legal Assistance Act also lists grounds on which the Government may refuse a request for assistance; for example, if granting assistance would pose a “danger to the security of the realm”, be in conflict with general principles of law, involve certain political or military offences, if it would be contrary to the principle of *ne bis in idem* or, if “the circumstances are otherwise such that the request should not be granted”.²²⁷ Some of these provisions appear to be very broad and, therefore, susceptible to misuse, for example, ‘danger to the security of the realm’ and ‘the circumstances are

²²⁴ Ch. 2, Sect. 1.

²²⁵ These include: The European Convention of 20 April 1959 on Mutual Legal Assistance in Criminal Matters (Government Bill 1961:48 and 1975:53 and 1991/92:46), The supplementary protocol to the European Convention on Mutual Legal Assistance in Criminal Matters of 17 March 1978 (Government Bill 1978/79:80), The 1985 agreement with Hungary on Mutual Legal Assistance in Criminal Matters (Government Bill 1985/86:8), The UN Convention of 1988 against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Government Bill 1990/91: 127), The European Convention of 8 November 1990 on laundering, search, seizure and confiscation of the proceeds from crime (Government Bill 1995/96:49), The Schengen Convention (1998:49), The Agreement with Canada on Mutual Legal Assistance in Criminal Matters (15 February 2000) (Government Bill 1999/2000:61), The Agreement with Australia on Mutual Legal Assistance in Criminal Matters (18 December 1998) (Government Bill 1999/2000:61), The Convention of 29 May 2000 on mutual legal assistance in criminal matters between EU Member States and Protocol of 16 October 2001 on the Convention on Mutual Legal Assistance in Criminal Matters between EU Member States.

²²⁶ Ch. 2, Sect. 2.

²²⁷ Ch. 2, Sect. 14.

otherwise such that the request should not be granted'. However, the drafting history minimizes this danger by suggesting that the latter term is to be interpreted restrictively.²²⁸

7.2.3. SAFEGUARDS

In contrast to the human rights safeguards in the three extradition acts, there appear to be no similar express safeguards in the Legal Assistance Act that would prohibit the provision of mutual legal assistance, for example, where it could lead to the imposition of the death penalty, but this bar probably would be included in the reference to general principles of law and in the phrase "the circumstances are otherwise such that the request should not be granted".

²²⁸ The drafting history, which in Sweden is considered to be of great weight in interpreting statutes, indicates that it is to be restrictively interpreted. See Government Bill – Proposition – 1999/2000:61, pp. 194-195.

8. SPECIAL POLICE OR PROSECUTOR UNIT

After noting that up to 1500 persons suspected of genocide, crimes against humanity, war crimes, torture and other crimes under international law may be hiding in the country²²⁹ and realizing the difficulties of handling these complex investigations within the ambit of ordinary police authorities, a working group was set up to review the current system in 2006. The findings of the working group were published in a report in January 2007, which suggested establishing a specialised unit within the National Criminal Police, as well as specialized prosecutors within the International Public Prosecution Office in Stockholm.²³⁰ On 5 September 2007, the National Police Board decided to establish a War Crimes Unit within the National Criminal Police.²³¹

The Swedish National Criminal Police's War Crimes Unit (Unit) was launched on 1 March 2008. Its mandate lasts until further notice and covers war crimes, crimes against humanity and genocide. The performance of the Unit will be subject to a review after three years in operation.²³²

The Unit consists of nine investigators²³³ with a budget of 9 million Krona (SEK) (approximately 960.000€) and it is connected to specific prosecutors within the Stockholm International Prosecutor's Office. In addition, the Migration Board has appointed a contact person for a closer cooperation between the Unit and the International Prosecution Office.

As of November 2008, the Unit had received approximately 50 reports on suspected crimes under international law. Fifteen cases were then under investigation. Because of the

²²⁹ *Internationella Förbrytare i Sverige, Att spåra upp, utreda och lagföra förövare av folkmord, brott mot mänskligheten, krigsförbrytelser och vissa andra grova internationella brott*, joint report by the International Prosecutor's Office, the Police and the Migration Board, January 26, 2007, page 44.

²³⁰ *Ibid.*

²³¹ EU Update on International Crimes, Redress and FIDH, Issue 4, Summer 2008, "Interview with Mr. Isaksson, Detective Superintendent of the Swedish National Criminal Police War Crimes Unit".

²³² *Ibid.*

²³³ 1 Detective Superintendent, 1 Detective Inspector Intelligence, 6 Detective Inspectors, investigation, 1 Analyst and 1 Administration assistant. Email from Detective Superintendent, Ingemar Isaksson 26 September 2008, on file with Amnesty International.

particular immigration flows to Sweden, the cases generally relate to the former Yugoslavia and Iraq. A majority of cases brought to the attention of the Unit have been through reports from the immigration authorities (approximately 70% of cases), but there have also been complaints from individuals and from authorities in other countries.²³⁴ In their investigations, the Unit regularly travels to pursue investigations on the territory of other states (after being granted permission from that state).²³⁵ The Detective Superintendent of the Unit, Ingemar Isaksson states that they would not normally launch a full investigation without an indication that the offender is in Sweden and, subsequently, can be put to trial in a Swedish Court.²³⁶ However, he indicated that he does not exclude the Unit from initiating an investigation in a situation where it received an alert of an impending visit to Swedish territory of a person suspected of the crimes under the mandate of the Unit.²³⁷

As of 1 December 2008, the Police Unit had no website of its own. Their activities are discussed (in Swedish) in the yearly report of the National Criminal Investigation Department.²³⁸ The International Prosecution Offices have separate websites²³⁹ They do not publish their own reports of their activities, but annual reports are published for the whole of the Swedish prosecution offices.

²³⁴ EU Update on International Crimes, Redress and FIDH, Issue 4, Summer 2008, “Interview with Mr. Isaksson, Detective Superintendent of the Swedish National Criminal Police’s War Crimes Unit”.

²³⁵ Email from Detective Superintendent, Ingemar Isaksson, 26 September 2008 (on file with Amnesty International).

²³⁶ *Ibid.*

²³⁷ Email from Detective Superintendent, Ingemar Isaksson, 24 November 2008 (on file with Amnesty International).

²³⁸ For their report of 2007, see <http://www.polisen.se/mediaarchive/4347/3474/3928/RKP07.pdf>.

²³⁹ <http://aklagare.episerverhotell.net/In-English/About-us/International-prosecution-operations/>.

9. JURISPRUDENCE

Since the Second World War, there have been at least six public formal completed investigations of individuals concerning crimes under international law committed abroad, in addition to the 15 cases that were then under investigation by the Unit in November 2008. Prosecutors opened preliminary investigations in four of those cases, two of which led to trials and convictions. One of these trials was *in absentia* and in the other the accused was present. Three cases were based on universal jurisdiction. One case was, according to Amnesty International's classification, based on passive personality jurisdiction, although under the Swedish Penal Code jurisdiction based solely on the Swedish nationality of the victim is very narrow, and, thus, universal jurisdiction provisions were applied. One case was based on active personality jurisdiction, although the court also based its jurisdiction on a universal jurisdiction provision. In addition, there is one case of protective jurisdiction based on claims of espionage from a foreign country. In one case, civil claims based on a crime committed abroad were heard and damages awarded to 11 victims in a criminal proceeding.

9.1 UNIVERSAL JURISDICTION CASES

The six cases in which public formal investigations were completed are discussed below.

Sharon case

In 2002, the Social Democratic Youth filed a complaint with the Swedish police against Ariel Sharon based on his role in the Sabra and Chatila killings in Lebanon, claiming that the acts amounted to a "crime against international law" (Penal Code Ch.22, Sect. 6). The prosecutor found that Swedish Courts would have jurisdiction over the alleged crime, and that the acts described in the complaint would constitute sufficient reason to initiate an investigation into whether such a crime had been committed. However, he decided to discontinue investigations as he believed that no prosecution or sentence would materialize in the case. The reasons for his conclusion were the difficulties to obtain evidence without the support of Israeli authorities (He presumed he had little chance of acquiring such support, but apparently never tried to obtain it.). In addition, he found that there was no prospect of Sweden getting Sharon extradited to Sweden if the investigations were to have led to a trial.²⁴⁰ The decision to discontinue investigations was appealed, but the superior prosecutor (*överåklagare*) did not find any reason to change the decision.²⁴¹

The prosecutor in this case certainly gave up too quickly given the seriousness of the alleged

²⁴⁰ Prosecutor Thomas Lindstrand, decision on police complaint 0104-K 102-02, September 19, 2002, Dnr C9-1-842-02.

²⁴¹ Decision by Superior Prosecutor Björn Ericsson, November 14 2002, Dnr 100 2002/1158.

crimes in this case. Even assuming that the prosecutor's assessment that the prospects of eventually having a suspected criminal extradited and tried were slim had been correct, requests for legal assistance could have had positive effects for the cause of international justice, as they could have encouraged internal debate leading to an investigation and, if there was sufficient admissible evidence, trial in the suspect's country. In addition, it seems all means of gathering the needed information were not explored in this case. For example, in the *Hagelin* case (a passive personality case discussed below), the decision to issue an arrest warrant for Argentine Captain Alfredo Astiz was based almost exclusively on information gathered by the personnel at the Swedish Embassy. This possibility was not explored in the *Sharon* case.

GAM/Ache case

In February 2004, a Swedish prosecutor initiated a preliminary investigation directed at the leaders of the separatist movement, the Free Aceh Movement, Gerakan Aceh Merdeka (GAM) in Aceh, Indonesia. Several leaders of GAM were living in Sweden. The Indonesian government had for a long time accused leaders of GAM of planning and directing terrorist crimes in Aceh from the GAM headquarters in Sweden and submitted a complaint with extensive information to the Swedish police.

The Swedish prosecutor found cause to believe that acts amounting to "crimes against international law" (war crimes) had been committed and, therefore, initiated investigations against three of the GAM leaders (Hasan di Tiro, Malik Mahmud and Zaini Abdullah). The investigation included material from Indonesian authorities, and twenty persons were interrogated in Sweden and Indonesia by Swedish authorities. As a result, two members of the GAM leadership living in Sweden were arrested in the summer of 2004 (investigations against the third, Hasan di Tiro, were closed due to his poor health).²⁴² They were not suspected of committing the acts themselves, but were suspected in their capacity as leaders of those GAM members who allegedly had committed the acts amounting to "crime against international law".²⁴³

A request for detention was made by the prosecutor, but after the detention hearing the court found that there was no probable cause to suspect them of the alleged crimes. The court rescinded the arrest order. On 22 April 2005, the preliminary investigation was discontinued on the ground that the evidence was insufficient to prosecute the two suspects.²⁴⁴

This was the first time in at least half a century that an investigation regarding "crime against international law" resulted in a application for detention. The investigations appear to have been thorough and involved cooperation from the territorial state, Indonesia.

²⁴² Prosecutor Thomas Lindstrand, decision K 012-04, July 15, 2004, Dnr C9-691-03.

²⁴³ Prosecutor Thomas Lindstrand, decision April 22, 2005, Dnr C9-1-691-03.

²⁴⁴ *Ibid.*

Somali police chief case

In October 2005, Abdi Qeybdiid, a Somali police chief in Mogadishu, was in Sweden to attend an international conference in Lund and was recognized by a Somali refugee, who filed a police complaint claiming that Abdi Qeybdiid had led a militia during the civil war. As a consequence, Abdi Qeybdiid was arrested, suspected of having committed genocide in Somalia. The international prosecutor's office initiated a preliminary investigation into the matter.²⁴⁵

The international prosecutor's office requested that the Gothenburg District Court would detain Abdi Qeybdiid on the grounds that there was probable cause to suspect him of genocide. However, the request was turned down by the court, since the suspicions did not reach the level of "probable cause".²⁴⁶ Abdi Qeybdiid was released and not prosecuted. Unfortunately, the prosecutor's request for detention only alleged the crime of genocide, and not the easier to prove charges of "ordinary" murder or "crime against international law", which probably was one important reason for why the court turned down the request.

Snowflake case

Russian Lieutenant-General Vjatjeslav Sucharev participated in the international defence exercise "Snowflake", in Sweden in January 2006. During this exercise, the Swedish Helsinki Committee for Human Rights filed a report with the police, and claimed he and his military unit were responsible for war crimes and crimes against humanity in Chechnya.²⁴⁷

After informal contacts between the Prosecutor-General and the government, the international prosecutor's office dropped the case and decided not to open an investigation.²⁴⁸ The grounds for the decision were that the prosecutor found strong reasons to presume that Sucharev held immunity on the basis of principles of international law²⁴⁹

²⁴⁵ Chief Prosecutor Mats Sällström, decision on complaint K166567-05, November 10, 2005, dnr 409A-497-05.

²⁴⁶ *Göteborgs Tingsrätt, Mål nr. B 10096-05*, October 10 2005.

²⁴⁷ *Anmälan om folkrättsbrott enligt 22 kapitlet 6 Brotsbalken*, Swedish Helsinki Committee for Human Rights, January 23 2006, shc.mediaonweb.org/attachment/000000234.pdf.

²⁴⁸ Chief Prosecutor Thomas Häggström, decision on complaint 509A06000018, January 26 2006, Dnr 509A-19-06.

²⁴⁹ The prosecutor contended:

"According to my opinion strong reasons speak in favor of the Russian official holding immunity from criminal prosecution during the time he is in Sweden in his quality of participant in the joint rehearsal "Snowflake". He has come to Sweden after above-mentioned decision by the Swedish Government. Such immunity rests on generally accepted principles of international law. Immunity is an obstacle to start an investigation and to use any measures of force proscribed in penal law." (translation by Amnesty International).

(see Section 6.5 above) and that the government was unlikely to give the necessary authorisation to prosecute (the requirement is stated in Penal Code Ch. 2, Sect. 7a).²⁵⁰ However, the prosecutor did not cite any authority for this proposition and there is nothing in the case to suggest there was any basis for a plausible claim of immunity.

9.2 PASSIVE PERSONALITY CASE

Lt. Astiz/Dagmar Hagelin case

The Swedish citizen, Dagmar Hagelin, disappeared during the military dictatorship in Argentina in 1977. In 2001, a Swedish prosecutor initiated investigations into the case,²⁵¹ based on universal jurisdiction provisions in the Penal Code (the provisions based solely on the Swedish nationality of the victim did not apply).²⁵² An international arrest warrant was issued and the government requested an extradition of the naval officer Alfredo Astiz from Argentina.²⁵³ The request was denied by Argentinean authorities and the crime was prescribed as Astiz had not been notified of the prosecution before 25 years had elapsed since the crime.²⁵⁴ At the time of the request, the Argentine authorities had already denied requests for extraditions from France and Spain for similar allegations, referring to "the territorial sovereignty of the law" and asserting that he should be tried within the

²⁵⁰ The prosecutor stated:

"The reported crimes have been committed in civil service of another country. In such a situation the legislator has decided that the issuing of an order of prosecution for the crime is a task for the Government, as proscribed in Ch. 2, Sect. 7a of the Penal Code. It is a matter of difficult assessments of a legal as well as a foreign policy nature. As of now, there is no possibility to obtain a preliminary decision from the Government whether such an order can be expected. An order to prosecute formally only concerns the issue whether to initiate a prosecution and not the decision of whether to open an investigation. This issue is, however, of outmost importance when deciding whether to open an investigation, since an investigation should not be initiated or be continued if there are not conditions at hand for the investigation to lead to a sentence. According to my view, it is not likely that an order of prosecution will be issued. With that premise, no investigation should be initiated." (translation by Amnesty International).

²⁵¹ Decision by Chief Prosecutor, Tomas Lindstrand, July 5 2001, (K 70494-01).

²⁵² As noted above in Section 3.2, the scope of passive personality jurisdiction in Sweden is very limited. Penal Code, Ch. 2, Sect. 3 (5) provides:

"Even in cases other than those listed in Section 2, crimes committed outside the Realm shall be adjudged according to Swedish law and by a Swedish court:

...

5. if the crime was committed in an area not belonging to any state and was directed against a Swedish citizen, a Swedish association or private institution ..."

²⁵³ Decision by Chief Prosecutor, Tomas Lindstrand, November 30 2001, C9-1-405-01.

²⁵⁴ Decision by Chief Prosecutor Thomas Lindstrand, 30 January, 2002, Dnr C9-1-405-01..

country.²⁵⁵ In 2003, the Argentine Supreme Court declared the amnesty laws protecting suspects such as Astiz unconstitutional and, therefore, a trial was initiated against the officer in Argentina, in which the disappearance of Hagelin was one of the charges against him. He has also been sentenced *in absentia* in France and Italy for crimes committed during the so-called Dirty War.

9.3 ACTIVE PERSONALITY CASE

The Arklöv case

Background

Jackie Arklöv, a Swedish citizen, went voluntarily to Bosnia and Herzegovina to participate in the armed conflict (he was later found to have had an unhealthy obsession with violence and sympathy for Nazi ideas), after having completed his military service in Sweden. On 8 September 1995, he was sentenced in a Bosnian court for war crimes including assault and torture of civilians and soldiers detained by the Croatian Defence Council (HVO), an armed group of the Croatian breakaway entity in Bosnia and Herzegovina. However, in 1996, he was released in an exchange of prisoners arranged by the International Committee of the Red Cross and returned to Sweden.

The first Swedish investigation

Upon his return, an investigation was opened by a Swedish prosecutor and he was arrested by the District Court of Stockholm on 9 August 1996. A month later he was set free, but with travelling restrictions. The investigation was closed due to lack of evidence in January the following year.²⁵⁶

The second Swedish investigation

After several victims and witnesses had come forward in Sweden, the investigation was re-opened in 2004 by prosecutors Lise Tamm and Marie Lind Thomsen at the international prosecutor's office in Stockholm. According to one of the lawyers for the victims, Anne-Charlotte Westlund, the prosecutor was very active in driving the case forward and carried out thorough investigations in Bosnia with the consent of the Bosnian authorities. One of the prosecutors informed Amnesty International that they went to Bosnia to investigate the places where the crime was committed, hear victims and witnesses and obtain other evidence. They received considerable cooperation from Bosnian authorities throughout the investigation.

²⁵⁵ *Aftonbladet, Officeraren Astiz uppges gripen på svensk begäran, 28 Dec. 2001,* <http://www.aftonbladet.se/nyheter/article51404.ab>.

²⁵⁶ Stockholm District Court, December 18 2006, Case No. B 4084-04, p. 11.

Evidence at trial

Jackie Arklöv was charged with a “crime against international law” (war crime).²⁵⁷ At the trial before the District Court of Stockholm, Jackie Arklöv admitted to nearly all charges.²⁵⁸ Eleven victims and six witnesses were heard, in some cases, by video-link, and written medical statements were submitted in evidence.

Jurisdiction

The prosecutors argued that the court had jurisdiction on two grounds. First, the prosecutor noted that Jackie Arklöv was a Swedish citizen and that Swedish jurisdiction, thus, was established through Ch.2, Sect. 2 of the Penal Code, even though the crime had been committed abroad.²⁵⁹ In addition, regardless whether the accused was a Swedish citizen or not, the prosecutors argued that the court could try the case under the Penal Code Ch.2, Sect. 3 (6), a provision establishing universal jurisdiction for “crime against international law” (*folkrättsbrott*).²⁶⁰ The court agreed, stating: “The Court accepts what the prosecutor has adduced with regards to the jurisdiction of the Court. . .”²⁶¹

Applicable international law

The “crime against international law” refers to international humanitarian law (see Section 4.3 above), and, thus, the court had to establish what law was applicable to the case. The court found that common Article 3 of the Geneva Conventions applicable to non-international conflict applied to the conflict, and that many of the provisions applicable to international conflict were applicable as customary international law, citing the International Committee of the Red Cross study of International Humanitarian Law.²⁶²

The crime

Jackie Arklöv was found guilty of gross crimes against international law (Penal Code Ch.22,

²⁵⁷ *Ibid.*, p. 12.

²⁵⁸ *Ibid.*, pp. 29,31,41f, 49.

²⁵⁹ *Ibid.* p 12. The Swedish Penal Code, Ch. 2, Sect. 2, para. 1, provides for jurisdiction based on active personality:

“Crimes committed outside the Realm shall be adjudged according to Swedish law and by a Swedish court where the crime has been committed:
1. by a Swedish citizen ...”

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*, p. 52 (translation by Amnesty International).

²⁶² *Ibid.*, p. 56.

Sect. 6). The specific violations of international humanitarian law were:

- violations of common Article 3 of the Geneva Conventions (torture, degrading and inhumane treatment of detainees);
- Articles 4 (4 (plundering), 7 (denying the detainees health care) and Article 17 (forced displacement) of Protocol II to those conventions during non-international armed conflict.

The court also found him guilty of violations of customary international law governing non-international armed conflict, which are reflected in the following provisions of the Fourth Geneva Convention and Protocol I:

- Fourth Geneva Convention, Articles 33 and 95 (forcing the detainees to perform meaningless work), Article 78 (illegal detention of civilians) and
- Protocol I, Article 76 (assault of pregnant woman).

A “serious” violation?

Penal Code, Ch. 22, Sect. 6 requires that the violation of international law be “serious”. Although this provision does not expressly define the term “serious”, the court mentions that the provision of “crime against international law” lists a few examples of what is considered to be a serious violation, and states:

“A relevant example for this case is given in point 6, *inter alia*, to inflict serious suffering on persons protected under international law, or to deprive civilians of their freedom. Apart from this, the Court has to seek guidance for its decision in international humanitarian law”.²⁶³

The court concluded that serious violations of international humanitarian law included: intentional killing, torture, intentional infliction of severe suffering or severe harm of body and health, illegal deportation or removal and illegal detention.”²⁶⁴ However, citing the ICRC study, it also concluded that some violations of international humanitarian law, such as those prohibiting unpaid work by interned persons, were not serious for the purposes of Swedish law.²⁶⁵

²⁶³ *Ibid.*, p. 52, para. 2 (translation by Amnesty International).

²⁶⁴ *Ibid.*, p. 56, para. 2 (citing the Third Geneva Convention, art. 130; the Fourth Geneva Convention, art. 147; Protocol 1, art. 85; and the government report SOU 1984:56 page 248).

²⁶⁵ *Ibid.*, p. 57, para. 2. The court stated:

“The register prepared by the ICRC also contains a presentation of what should be considered *serious violations*. In rule 156 [of the ICRC Rules of Customary International Humanitarian Law] it states that serious violations of international humanitarian law are war crimes.

One crime or several?

The court found that multiple violations of humanitarian law in a single case together formed only a single crime against international law according to the Swedish Penal Code.²⁶⁶

Is the crime gross?

In its analysis whether the crime was to be considered “gross” for the purpose of determining the severity of the sentence), the court stated:

“According to the Penal Code Ch. 22, Sect. 6, when deciding whether the crime is gross, one shall particularly regard whether it has been carried out through a great number of different actions or whether many people have been killed or harmed or whether there has been widespread destruction of property as a result of the crime. . . The case concerns 11 victims that have been affected, in many cases very seriously, by the crime of Arklöv. That, for example, Topic [one of the victims] survived has even surprised an experienced doctor that has been able to follow the condition of Topic.”²⁶⁷

The court explained why the crimes in this case were not merely serious, but gross, and, therefore, subject to a more severe sentence:

“The crime includes a significant number of different acts, that each, in accordance with what has been stated above, must be characterized as serious violations of international law. Many people have been hurt, several very seriously, through the crime. The crime includes eviction of civilians in the form of so called ethnic cleansing and has a clearly systematic character, which has taken the form of, *inter alia*, uncontrolled violence and degrading treatment of people belonging to a certain ethnic group. For these reasons the

Thereafter, is a presentation that shows that deliberate violations of most of the rules of protection that have been presented normally constitute serious breeches. In several cases, as for example with regards to murder and torture, it seems a matter of course that the violation constitutes a serious one. In other cases the assessment must depend on the seriousness of the act in the particular case. That concerns, for example, violations of rule 95, about, *intern alias*, unpaid work as referred to above, where it is not given that every act that falls under the rule can be deemed a serious one. In this context there is reason to point out that some acts of course can include violations of several rules that affect the assessment of its degree of seriousness” (translation by Amnesty International).

²⁶⁶ *Ibid.*, p. 64. para.1. The court explained:

“From the technical form of the provision, it is clear that, in contrast to what is the case regarding the rules of the Penal Code relating to crimes against life and health, only *one* crime can be at hand even through the “criminality” has caused injury to many different persons at separate occasions...The prosecuted acts have been committed within the same military conflict, during a relatively concentrated period and within a rather limited geographical area. They have also been aimed at persons that have the same ethnical and religious background. Considering these circumstance, the Court shares the view of the prosecutor that it is one only crime.” (translation by Amnesty International).

²⁶⁷ *Ibid*, p 64 (Translation by Amnesty International).

Court shares the view of the prosecutor that the crime is to consider as gross.”²⁶⁸

Sentencing criteria

The court stated that there were no relevant precedents and that sentencing practice regarding ordinary crimes, such as assault, was not really relevant as, in this instance, the crime included several different elements. The court also examined sentences by the ICTY, but concluded that the tribunal applied different rules relating to punishments from those applicable to Swedish courts. After applying the rules of the Penal Code for determining sentences, the court found that (taking into account, for example, that Jackie Arklöv travelled voluntarily to take part in the fighting, was influenced by Nazi ideology and held a general contempt for people) the appropriate sentence would be eight years’ imprisonment. However, as Jackie Arklöv was already serving a sentence of life imprisonment for another crime, there was no need for a separate sentence.

Reparations

In the *Arklöv* case, the victims had legal representatives, and 11 victims were awarded reparation for damages for a total of 2 271 900 Swedish Crowns. As Arklöv lacked funds to pay the reparations, the victims tried to obtain funds from the Swedish government through the Crime Damage Act (*Brottsskadelagen*, 1978:413). As the crimes were committed outside of the country and the victims were not Swedish residents at the time of the crime, they were denied funds under that law.²⁶⁹

9.4 PROTECTIVE JURISDICTION

Herder case

An early case based on protective jurisdiction concerning the immunity of a foreign citizen was the *Herder* case. Hanswolf von Herder was a German citizen suspected of espionage against Sweden during the Second World War.²⁷⁰ The Supreme Court did not find Herder protected by rules concerning immunity. However, his conviction was reversed on appeal on the basis that espionage from a territory (Norway) belonging to a foreign power (Germany) against Sweden was not a violation of customary international law.

²⁶⁸ *Ibid.*

²⁶⁹ Fax received from the Swedish National Prosecutor’s Office, 18 December, 2008.

²⁷⁰ Supreme Court case no. NJA 1946 s. 65.

RECOMMENDATIONS

Sweden should take the following steps to ensure that it is not a safe haven for persons responsible for the worst possible crimes in the world.

Substantive law:

Ratify, without any limiting reservations, all treaties requiring states to extradite or prosecute crimes under international law, including:

Convention on the Non-Applicability of Statutory Limitations for War Crimes and Crimes against Humanity;

European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes (CETS No. 82); and

International Convention for the Protection of All Persons from Enforced Disappearance

Define crimes under international law as crimes under international law or amend definitions in the Penal Code, including:

genocide;

war crimes;

crimes against humanity;

torture;

extrajudicial executions; and

enforced disappearances,

to make them consistent with the strictest standards of international law.

Define principles of criminal responsibility in accordance with the strictest standards of international law and, in particular, incorporate command and superior responsibility for all crimes under international law and ensure that the same strict standards of criminal responsibility apply both to commanders and to other superiors.

Define defences in accordance with the strictest standards of international law and, in particular, amend the Penal Code to exclude as permissible defences for crimes under international law: superior orders, duress and necessity, but permit them to be taken into account in mitigation of punishment.

Jurisdiction:

Provide that courts have universal criminal jurisdiction over all conduct amounting to crimes under international law.

Provide that Sweden has an *aut dedere aut judicare* obligation to extradite a suspect in territory subject to their jurisdiction or submit allegations to the prosecution authorities for the purpose of prosecution.

Where Sweden has not yet defined conduct amounting to a crime under international law as a crime under national law, ensure that its courts can exercise universal criminal and civil jurisdiction over that conduct.

Establish clear criteria for decisions by the Prosecutor General acting pursuant to Penal Code, Ch. 2, Sect. 5 to authorize or deny permission for prosecution of foreigners for crimes committed outside Sweden that focus on sufficiency of evidence and exclude political considerations.

Swedish law enforcement and authorities:

Ensure that Sweden can open an investigation, issue an arrest warrant and seek extradition of anyone suspected of a crime under international law even if that suspect has never entered territory subject to Sweden's jurisdiction, by codifying the War Crimes Unit's position that it can act in cases where foreign law enforcement authorities inform Swedish authorities that a suspect is planning to visit Sweden and expand this position to include information from other reliable sources, such as victims or their families. In addition, to ensure that other states can effectively share the responsibility of investigating and prosecuting persons suspected of crimes under international law, make it clear that Sweden can open an investigation of a crime under international law committed abroad even when the suspects not present, either with a view to a possible prosecution in Sweden or to assist law enforcement officials in other states seeking to prosecute the suspect.

However, also ensure that the person suspected of such crimes is in Swedish territory subject to its jurisdiction a sufficient time before the start of a trial in order to prepare for trial.

Ensure that legislation provides that the first state to exercise jurisdiction, whether universal or territorial, to investigate or prosecute a person has priority over other states with regard to the crimes unless a second state can demonstrate that it is more able and willing to do so in a prompt and fair trial without the death penalty or other serious human rights violations.

Procedure related to suspects and accused:

Establish rapid, effective and fair arrest procedures to ensure that anyone arrested on suspicion of committing crimes under international law will appear for extradition, surrender or criminal proceedings in Sweden.

Ensure that the rights of suspects and accused under international law and standards related to a fair trial, including those reflected in Article 55 of the Rome Statute of the International

Criminal Court are fully respected at every stage of the proceedings.

Procedure related to victims:

Ensure that victims and their families are able to institute criminal proceedings based on universal jurisdiction over crimes under international law through private prosecutions, pursuant to the Code of Judicial Procedure, Ch. 20, Sect. 3.

Ensure that victims and their families are able to file civil claims to obtain all five forms of reparations (restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition) from persons responsible for crimes under international law in civil and in criminal proceedings based on universal jurisdiction over crimes under international law, to the extent that such awards can be enforced in Sweden.

Ensure that victims and their families are fully informed of their rights and of developments in all judicial proceedings based on universal jurisdiction concerning crimes under international law committed against those victims.

Removal of legal, practical and political obstacles:

Legal -

Amend Penal Code, Ch. 2, Sect. 7 to provide explicitly that any claimed state or official immunities will not be recognized with regard to crimes under international law.

Provide that statutes of limitation do not apply to prosecutions or civil proceedings concerning crimes under international law no matter when they were committed. Abolish any statutes of limitations that apply to crimes under international law no matter when they were committed.

Clarify that the interpretation of the Commission on International Criminal Law that the principle of *ne bis in idem* in the Penal Code, Ch. 2, Sect. 5a does not apply to proceedings in a foreign state concerning crimes under international law and ensure that the criteria applied by the Prosecutor-General when deciding pursuant to Penal Code Ch. 2, Sect. 5(a) (3), whether to authorize a prosecution are based primarily on the sufficiency of the evidence and exclude all political considerations.

Ensure that courts can exercise jurisdiction over all conduct that was recognized under international law as a crime at the time that it occurred even if it occurred before it was defined as crime under Swedish law.

Provide that amnesties and similar measures of impunity granted by a foreign state with regard to crimes under international law have no legal effect with respect to criminal or civil proceedings in Sweden.

Political -

Ensure that the criteria for deciding whether to investigate or prosecute crimes under

international law are developed in a transparent manner in close consultation with civil society, are made public, are neutral and exclude all political considerations.

Ensure that decisions to investigate or prosecute taken by prosecutors are in accordance with such neutral criteria, subject to appropriate review by courts, but not by political officials.

Ensure that decisions whether to extradite persons suspected of crimes under international law and to provide mutual legal assistance are made in accordance with neutral criteria and exclude all inappropriate criteria, such as the prohibition of the extradition of nationals (now found in the 1957 Extradition Act).

Ensure that the final decision whether to extradite or to provide mutual legal assistance is taken by an independent prosecutor or investigating judge, subject to judicial review, and not by a political official.

Practical –

Improvements in investigation and prosecution in the forum state –

Ensure that the police and prosecutors working on crimes under international law:

- have sufficient financial resources, which should be comparable to the resources devoted to other serious crimes, such as “terrorism”, organized crime, trafficking in persons, drug trafficking, cyber crimes and money laundering;
- have sufficient material resources;
- have sufficient, experienced, trained personnel;
- provide effective training on a regular basis of all staff in all relevant subjects, including international criminal law, human rights and international humanitarian law; and
- publish public and frequent reports on their activities.

Establish a special unit with sufficient staff and other resources to screen foreigners seeking to enter the state, including immigrants, visa applicants and asylum seekers, to determine whether they are suspected of crimes under international law, such a unit should be established.

Ensure that such a unit cooperates fully with police and prosecuting authorities in a manner that fully respects the rights of all persons to a fair trial, including the right not to be compelled to confess or to testify against oneself.

Ensure that all judges, prosecutors, defence lawyers and others in the criminal and civil justice systems dealing with crimes under international law are effectively trained in relevant subjects, including matters related to crimes of sexual violence and crimes against children.

Establish an effective victim and witness protection and support unit, based on the experience of such units in international criminal courts and national legal systems able to protect and support victims and witnesses involved in proceedings in the state, in foreign states and in international criminal courts, including through relocation.

Publish regularly public reports on the activities of the Special Police Unit investigating international crimes, and on the activities of the international prosecutor's offices.

Improvements in cooperation with investigations and prosecutions in other states

Ensure that there are no obstacles to requests through *commissions rogatoires* from foreign states for mutual legal assistance in investigating and prosecuting crimes under international law, provided that the procedures are fully consistent with international law and standards concerning the right to a fair trial and that cooperation is not provided when there is a risk that it could lead to the imposition of the death penalty, torture or other cruel, inhuman or degrading treatment or punishment or an unfair trial.

Ensure that other requests for mutual legal assistance by foreign states can be transmitted directly to the police, prosecutor or investigating judge directly, without going through cumbersome diplomatic channels, but ensure that such requests are refused when there is a risk that it could lead to the imposition of the death penalty, torture or other cruel, inhuman or degrading treatment or punishment or unfair trial.

Improve procedures in Sweden for conducting investigations abroad, including through the use of joint international investigation teams, with all the necessary areas of expertise.

Eliminate in law and practice any unnecessary procedural obstacles that would delay or prevent the introduction of admissible evidence from abroad. Exclude any evidence that cannot be demonstrated as having been obtained without the use of torture or other cruel, inhuman or degrading treatment.

Cooperate with Interpol in the maintenance of the database on crimes under international law.

Take steps, in cooperation with other states, to draft, adopt and ratify promptly a new multilateral treaty under Council of Europe providing for extradition of persons suspected of crimes under international law and mutual legal assistance with regard to such crimes, excluding inappropriate grounds for refusal and including bars on extradition and mutual legal assistance where there is a risk of the death penalty, torture or other ill-treatment, unfair trial or other serious human rights violations.

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