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# Implementation of International Criminal Law in Swedish Legislation

- is Sweden able to prosecute Swedish soldiers  
stationed abroad for the most serious crimes?

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# Summary

The thesis aims to investigate whether Sweden is able to prosecute Swedish soldiers stationed abroad for genocide, crimes against humanity and war crimes. Sweden is currently reforming its armed forces and will continue sending more soldiers to armed conflicts abroad. Sweden is also a state party to the ICC and therefore has an obligation to be the primary actor in prosecution of such crimes with a Swedish connection, and to have an adequate legislation to do so. As Sweden is a dualist country, it needs to implement the international norms into Swedish legislation before Swedish courts can judge according to them.

Swedish law provide far-reaching jurisdiction for Swedish soldiers stationed abroad, which does enable Swedish courts to address all alleged crimes committed by such persons.

However, there are substantial flaws in Swedish legislation on genocide, crimes against humanity and war crimes. Genocide has a different definition in Swedish law than in the ICC. Swedish legislation only covers one of five types of conduct listed as genocide by the ICC. It also fails to recognise rape, assault, gross assault, forces sterilisation and forced abortions as conduct that could constitute genocide. There is no specific prohibition of crimes against humanity in Swedish law. All aspects of war crimes are criminalised in very wide, far-reaching provision, which are questionable in terms of the principle of legality.

The three crimes have been implemented in very varied ways, which result in inconsistencies in modes of liability and punishment.

A new act on international crimes was proposed in 2002, which would have elevated Swedish legislation on the three crimes up to the standard of the ICC.

As of now, it cannot be said that Sweden is able to prosecute members of their armed forces, or anyone else, for genocide, crimes against humanity or war crimes to the standards set by international criminal law, or the ICC.



# Abbreviations

ICC	The International Criminal Court
ICJ	International Court of Justice
ICRC	The International Committee of the Red Cross
ICTR	The International Criminal Tribunal for Rwanda
ICTY	The International Criminal Tribunal for former Yugoslavia
UN	The United Nations

# 1 Introduction

## 1.1 Subject and aim

The aim of this thesis is to analyse the current status of implementation of international criminal law into Swedish national legislation to find whether or not Sweden is able to prosecute Swedish soldiers stationed abroad for genocide, crimes against humanity and war crimes in accordance with the standards set by the ICC.

As the ICC has begun functioning as a court, international criminal law is moving forward with giant leaps. The world is presented with a permanent institution to end impunity for violations of international criminal law. However, the ICC cannot address all cases around the world and national jurisdictions are therefore assigned with primary responsibility for prosecuting these violations. The ICC may only step in if the national jurisdiction is unable or unwilling to genuinely prosecute or investigate the case. At this point in time, it is important to examine national legislation to see whether they have the capability to live up to these obligations or not.

Being Swedish, it was natural for me to choose to analyse Swedish legislation. As Sweden is a peaceful country (it has not been at war for over 200 years), my attention was drawn to Swedish participation in armed conflict abroad. I chose to focus on the increasing number of Swedish soldiers stationed in areas where genocide, crimes against humanity and war crimes may occur. Although I have full respect for the peacekeeping mission sent abroad, I believe this may be the most probable situation where a Swedish citizen may be actively involved in war crimes etc.

## 1.2 Structure

The thesis will begin with some background information, which will comprise of information on the Swedish armed forces, jurisdictional principles in Swedish law and what other possible institutions may address alleged crimes by Swedish soldiers. As this thesis may be interesting to non-Swedish readers, I have inserted a brief introduction to Swedish law, although the information is on a very basic level.

Chapter three really contain the main issue, the analysis of Swedish implementation of genocide, crimes against humanity and war crimes. Swedish legislation is compared to that of the ICC and the differences are highlighted.

In the analysis section, I lift out some particularly interesting shortcomings in Swedish law. In the end, I sum up my findings in the conclusion.



## **1.3 Methods and material**

The main part of analysis will be based on legislative texts, mainly comparing Swedish criminal law with the ICC Statute. Naturally, other international treaties as well as preparatory works will play an important role. When official translations of Swedish legislation are available, I will use the English version of the title. When no translation has been found, I will use the Swedish title.

The analysis of the text of the acts, ordinances and statutes should be complemented with a discussion of relevant case law. As there currently is no Swedish case law on the crimes at hand, I analyse some cases of previous and current criminal investigations.

For examples of international criminal law, case law of the ICTR and ICTY will be used, as they present the most important, recent, existing case law in international criminal law.

## **1.4 Limitations and definitions**

The title of this thesis spell out the main limitation. It would have been impossible to analyse the full scope of implementation of international criminal law on Swedish legislation with all its implications. I have therefore chosen to focus on the issue on Swedish law applicable on Swedish soldiers stationed abroad. This also adds an interesting angle to the subject at hand.

However, another limitation has caused more consideration, and this is the definition of international criminal law. A precise definition of international criminal law has not been agreed upon. Suggestions range from including all international treaties dealing with criminal law to the three crimes addressed by the ICTR, ICTY and ICC, that is, genocide, crimes against humanity and war crimes. I chose to limit the analysis to these three crimes, and to the version of these crimes found in the ICC Statute. I found it to be interesting to compare Swedish law to that of the ICC, as the ICC challenges national jurisdictions with the ICC's potential jurisdiction when national jurisdictions are "unable or unwilling".

It should be added that the ICC also aims at prosecuting the crime of aggression in the future. As there is no definition of this yet in the ICC Statute, I chose to leave this crime outside the scope of the analysis.

The term 'ICC Statute' has been used instead of the term 'Rome Statute', to ensure optimal comprehension.



## 2 Background

### 2.1 Increased involvement of Swedish Armed Forces in armed conflicts abroad

The Swedish Armed Forces is currently undergoing the largest process of change in modern history. To adapt to rapidly changing international context, the Swedish defence is transforming from a large defence system against invasion to a smaller, mobile and flexible defence aimed at defending Swedish territory as well as participating in international missions.<sup>1</sup> The process started in 1999<sup>2</sup> and is now in its second phase, where international missions will play an increasing role.<sup>3</sup>

While Sweden is continuing to pursue its policy of non-participation in military alliances,<sup>4</sup> it also co-operates in EU military matters and is a member of Partnership for Peace.<sup>5</sup>

There are around 950 Swedish soldiers currently stationed in foreign missions headed by the UN or the OSCE in Europe, Africa and Asia.<sup>6</sup> Each mission needs to be approved by the government in accordance with law.<sup>7</sup> Law prescribes that troops only be sent abroad for the purpose of fending off the risk of an armed conflict, stop an armed conflict in progress, supervise peace agreements or cease-fires or provide conditions for lasting peace and security through humanitarian work in relation to an armed conflict.<sup>8</sup>

Although the aims of the mission make it unlikely that Swedish soldiers would be directly involved in violations of international criminal law, the nature of the conflicts often have the result that the troops are in the close proximity to such violations. The mere presence in an armed conflict also invites the possibility of such violations.

An interesting example is the Swedish soldiers stationed in Congo under UN mandate during the 1960's, as the Congo was at the verge of civil war.

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<sup>1</sup> See official website of the Swedish armed forces, [www.mil.se](http://www.mil.se), last visited 26 August 2006.

<sup>2</sup> See commission reports Prop. 1998/99:74, "Förändrad omvärld omdanad försvar" and prop. 1999/2000:30, "Det nya försvaret".

<sup>3</sup> See Prop. 2004/05:5 "Vårt framtida försvar", p. 69 and *Ny struktur för ökad säkerhet - nätverksförsvar och krishantering, Försvarspolitisk rapport från Försvarsberedningen*, Försvarsberedningen, 30 August 2001, p. 140.

<sup>4</sup> *Sweden's Security Policy*, Ministry of Foreign Affairs, 11 February 2002, available at <http://www.regeringen.se/sb/d/1991/a/30235>, last visited 26 August 2006.

<sup>5</sup> [www.mil.se](http://www.mil.se).

<sup>6</sup> *Ibid.*

<sup>7</sup> Lag (1999:568) om utlandsstyrkan inom Försvarsmakten.

<sup>8</sup> *Ibid.*, §1.

All UN troops, including the Swedes, were heavily criticised for excessive violence and there were allegations of war crimes being committed.<sup>9</sup>

## 2.2 Relevant institutions of international criminal law

There are a number of somewhat inter-related institutions which may exercise jurisdiction in case of a crime against international criminal law. This section will discuss the three most relevant institutions, which may have jurisdiction over Swedish soldiers stationed abroad and the hierarchy and relationship between them.

### 2.2.1 National courts

Traditional positivist state-centred legal theory in international law have in recent times been complemented with legal theories introducing a more complex model of international law and a wider range of international actors.<sup>10</sup> Nevertheless, state sovereignty is still a cornerstone of international law and states remain important actors.<sup>11</sup>

In international criminal law, states are actors in terms of negotiating and ratifying treaties of international criminal law, such as the Geneva conventions, the Genocide convention and the ICC Statute. Many of these treaties provide obligations for states to implement the norms of the treaty, for example by criminalising the conduct, prosecuting or extraditing the accused perpetrators and providing legal assistance to other states.<sup>12</sup> These obligations result in that a large part of the enforcement of international criminal law is carried out on a national level.

The enforcement of international criminal law through national legislation has been referred to as an indirect enforcement system.<sup>13</sup> The system presupposes that states not only act within their country, but also extend the scope to cooperation with other states.<sup>14</sup> In fact, international cooperation primarily dealt with extradition from the time from Hugo Grotius (who inspired the maxim *aut dedere aut judicare* in 1634) to the 20<sup>th</sup> century.<sup>15</sup>

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<sup>9</sup> *Den svenska insatsen i Kongo*, Världskulturmuseet, available at <http://www.varldskulturmuseet.se/smvk/jsp/polopoly.jsp?d=1086&a=4670&p=0>, last visited 18 August 2006.

<sup>10</sup> M. Shaw, *International Law* (Cambridge University press, Cambridge, 2003), pp. 120 – 124.

<sup>11</sup> C. Warbrick, 'States and Recognition in International Law', in M. Evans (Ed.), *International Law* (Oxford University Press, Oxford, 2003) p. 205.

<sup>12</sup> M. Cherif Bassiouni, *Introduction to International Criminal Law* (Transnational Publishers, New York, 2003) p. 19.

<sup>13</sup> *Ibid.*, p. 333.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*, pp. 334-335.

The effectiveness of international cooperation is only as effective as each national legal system.<sup>16</sup>

In a sense, national and international law work together in a form of cross-fertilisation, states negotiating international law and then being affected by it and often having to adapt to it.<sup>17</sup>

As Sweden has ratified a number of instruments containing such obligations, Sweden has an important role in investigating and prosecuting potential violations of the instruments, including violations committed by Swedish soldiers abroad. Chapter 2.2.3 will examine the specific obligations arising out of the ICC Statute and chapter 2.3 will go into detail of in what ways Sweden may exercise jurisdiction.

## 2.2.2 *Ad hoc* tribunals

*Ad hoc* tribunals are very relevant to modern international criminal law, as the most notable present examples; the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for former Yugoslavia (ICTY) have developed a large part of modern jurisprudence.

The ICTY and ICTR were both established by the UN Security Council, acting under Chapter VII of the UN Charter.<sup>18</sup> Both were established for a specific armed conflict, which had occurred, the armed conflicts in Rwanda and in former Yugoslavia, with a clear temporal and territorial jurisdiction.<sup>19</sup> The ICTY and ICTR both have concurrent jurisdiction with the national courts of Rwanda and former Yugoslavia.<sup>20</sup> This means that both national courts and the Tribunal may investigate and prosecute the accused. In case of conflict, the Tribunal is entitled to take over the case and may exercise supremacy toward the national court.<sup>21</sup> These *ad hoc* Tribunals are examples of direct systems of enforcement of international criminal law, although dependent on states for enforcement of their orders and judgements.<sup>22</sup>

It is unsure whether more clear-cut UN *ad hoc* Tribunals will be established, considering the issues of funding and the emergence of the ICC. Since the two Tribunals were established, only mixed tribunals have been established

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<sup>16</sup> *Ibid.*, p. 333.

<sup>17</sup> Bassiouni, 2003, *supra* note 12, p. 15.

<sup>18</sup> See UN Security Council resolutions 808(1993) 22 February 1994, 827(1993) 25 May 1994, 955(1994) 8 November 1994.

<sup>19</sup> See for example, Statute for the International Criminal Tribunal for former Yugoslavia (ICTY Statute) art. 8, Statute of the International Criminal Tribunal for Rwanda (ICTR Statute) art. 1.

<sup>20</sup> ICTY Statute art. 9(1), ICTR Statute art. 8(1).

<sup>21</sup> ICTY Statute art. 9(2), ICTR Statute art. 8(2).

<sup>22</sup> Bassiouni, 2003, *supra* note 12, p. 18f.

in various co-operations between the UN and national jurisdictions.<sup>23</sup> It may be assumed that the likelihood of Swedish soldiers abroad being subject to examination by an *ad hoc* Tribunal acting with supremacy in regards to Swedish courts is minimal.

### 2.2.3 The ICC

The ICC was established as a permanent international institution by treaty to investigate and prosecute the most serious crimes of international concern.<sup>24</sup> This means the ICC is an international and not supranational body.<sup>25</sup> The ICC Statute,<sup>26</sup> which entered into force in June 2002, is binding on the current 100 member states (including Sweden)<sup>27</sup>. The jurisdiction extends primarily to the territory and nationals of state parties<sup>28</sup>, but there are provisions whereby the UN Security Council may refer situations regarding non-state parties to the Courts attention.<sup>29</sup> Non-state parties may also consent to ICC jurisdiction.<sup>30</sup>

One of the central features of the ICC is that its jurisdiction is complementary to national jurisdictions. This means that if a member state has initiated an investigation or prosecution of a matter, the ICC may not address it.<sup>31</sup> The drafters of the ICC Statute aimed for the ICC to supplement national jurisdiction, which represents a reversal of the *ad hoc* tribunals system of superiority.<sup>32</sup>

There are limits to the principle of complementarity. If the national courts are unable or unwilling to genuinely carry out investigation or prosecution of the case, the case is admissible for ICC jurisdiction.<sup>33</sup>

Inability is an objective criterion.<sup>34</sup> Article 17(3) clarifies that when determining inability, the court shall consider “whether, due to a total or

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<sup>23</sup> I. Bantekas and S. Nash, *International Criminal Law* (Cavendish Publishing, London, 2003), p. 397, G. A. Knoops, *An Introduction to the Law of International Criminal Tribunals* (Transnational Publishers, New York, 2003), p. 11.

<sup>24</sup> Bassiouni, 2003, *supra* note 12, p. 499.

<sup>25</sup> *Ibid.*, p 499.

<sup>26</sup> ICC Statute (Rome Statute), A/CONF.183/9 of 17 July 1998, in force 1 July 2002.

<sup>27</sup> ICC home page: <http://www.icc-cpi.int/asp/statesparties.html>, last visited 18 August 2006.

<sup>28</sup> ICC Statute art. 12.

<sup>29</sup> See ICC Statute, art. 13.

<sup>30</sup> ICC Statute art. 12(2), 12(3).

<sup>31</sup> See Preamble, Arts. 1, 12-15, 17-18 of the ICC Statute. See also, J. K. Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law' 1 *Journal of International Criminal Justice* (2003) p. 86.

<sup>32</sup> M. Bergsmo and O. Triffterer. 'Preamble', in O. Triffterer (Ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Note*, (Nomos, Baden-Baden, 2006) p. 15.

<sup>33</sup> ICC Statute, Art 17(1).

<sup>34</sup> J. T. Holmes, 'Complementarity: National Courts Versus the ICC', in A. Cassese, P. Gaeta and J. Jones (Eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, Oxford, 2002) p. 677.

substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”

In the drafting process, several definitions of ‘total or substantial collapse’ were suggested, for example the fact that the national judicial system could not address the extent and scope of the crimes. In the end, the term was left undefined.<sup>35</sup> Scholars still find the inability criterion to be applicable when states do not have an adequate legislation covering the crimes in the ICC Statute, or providing a substantially lower penalty.<sup>36</sup>

From the ordinary meaning of the text in article 17(3), as well as the drafting history and aim of the principle of complementarity, it seems clear that inadequate or non-existing national legislation on genocide, crimes against humanity and war crimes can be considered an inability to investigate and prosecute. This may lead to the ICC seizing a case, which would otherwise have been addressed in a national jurisdiction.

Unwillingness is a subjective criterion.<sup>37</sup> The ICC Statute emphasise that unwillingness may occur when a state have investigated or prosecuted in a manner which is intended to shield the accused from prosecution by the ICC, when there is unjustifiable delay of proceedings or lack of impartiality and independence of the court.<sup>38</sup>

If all states are able and willing to investigate and prosecute the crimes described in the ICC Statute, the ICC would theoretically be left with no cases. States have responded to the complementarity of the ICC by adopting national legislation on international criminal law and regularly undertake reviews of legislative gaps.<sup>39</sup> This may be a result of states willingness to prosecute its own citizens, or a reluctance of being found unable or unwilling to do so.<sup>40</sup>

It is important to note that the ICC Statute does not explicitly state that states must adopt corresponding national legislation.<sup>41</sup> Some provisions in the ICC Statute are already established by treaty or customary international law, such as torture and genocide, and contain inherent obligation for the state to implement prohibitions of the crime in national legislation.<sup>42</sup>

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<sup>35</sup> J. T. Holmes, ‘The Principle of Complementarity’, in R. S. Lee, *The International Criminal Court, The making of the Rome Statute* (Kluwer Law International, The Hague, 1999) p. 49.

<sup>36</sup> Kleffner, 2003, supra note 31, p. 87.

<sup>37</sup> Ibid.

<sup>38</sup> ICC Statute art. 17(2)(a).

<sup>39</sup> Kleffner, 2003, supra note 31, p. 88.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid., p. 89.

<sup>42</sup> See for example, Convention on the Prevention and Punishment of the Crime of Genocide, Adopted by Resolution 260 (III) A of the U.N. General Assembly on 9 December 1948. (Genocide Convention) art. 5, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Adopted and opened for signature,

However, other provisions in the ICC Statute are innovations of the Statute, and for these the obligation to implement may seem unclear.

The obligation to implement the ICC Statute is indirect. It is not explicit in the text, but the principle of complementarity presupposes that the member states have implemented corresponding legislation. Article 17, examined above, provides the ICC with jurisdiction if the member state has insufficient legislation. This is both a clever use of the “shame-factor” as well as an indirect obligation on the state to implement the norms of the ICC Statute.

As the ICC Statute does not include a formal obligation on incorporation, it is likely the member states have quite a wide margin of appreciation in incorporating the crimes of the ICC into its national legislation. The Swedish experts of the subject have declared they do not consider Sweden to need to adopt identical legislation as the ICC.<sup>43</sup>

As Sweden is a state party to the ICC Statute, its soldiers may fall under ICC jurisdiction, even when operating abroad. Sweden is then under an obligation to seize the case and should have the necessary legislation to cope with such a task. If Sweden does not have the necessary legislation in place, it will most likely be considered unable to investigate and prosecute the case and the ICC may seize the case instead. This would be most unfortunate, as Sweden has been a strong supporter of the ICC, and criticised situations where States have avoided ICC jurisdiction when sending peacekeeping troops through the UN system.<sup>44</sup>

The purpose of this thesis is to investigate whether Sweden really is able to investigate and prosecute cases of genocide, crimes against humanity and war crimes to the standards of the ICC. The subject of this analysis is therefore based on the interesting relationship between ICC and member states.

## 2.3 How Sweden has jurisdiction over Swedish soldiers abroad

There are a number of established principles of jurisdiction in international law, describing over whom states may extend and enforce its laws.<sup>45</sup> Two of these general principles are relevant to the case of Sweden’s prosecution of Swedish soldiers who have committed crimes abroad, and this chapter will only focus on these two principles, under international and Swedish law.

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ratification and accession by General Assembly resolution 39/46 of 10 December 1984 (Torture Convention), art. 4.

<sup>43</sup> See Commission report SOU 2002:98, p. 306.

<sup>44</sup> See for example the pressrelease Utrikesdepartementet, *Anna Lindh beklagar FN-beslut om Internationella brottmålsdomstolen*, 13 juli 2002, available at <http://www.regeringen.se/sb/d/774/a/6382>, last visited 28 August 2006.

<sup>45</sup> Bantekas and Nash, 2003, *supra* note 31, p. 143.



## 2.3.1 The active nationality principle

### 2.3.1.1 International law

The active nationality principle (sometimes referred to as the personality principle)<sup>46</sup> is an undisputed right under international law.<sup>47</sup> It allows states to apply national law on its nationals, wherever they are.<sup>48</sup>

One difficult aspect of this principle is that there is no coherent, universally accepted definition of nationality under international law.<sup>49</sup> As nationality essentially concerns the relationship between the state and its inhabitants, the issue of determining nationality has been left to the states to decide.<sup>50</sup> However, while granting nationality is a matter for national law, the application and recognition of nationality in international fora have been examined in international law. The most notable case is the *Nottebohm* case, where the ICJ concluded in 1955 that nationality must entail a genuine and close link between the individual and the national state together with reciprocal rights and duties, at least when it comes to the issue of diplomatic protection.<sup>51</sup>

Civil law countries (including Sweden) have used the active nationality principle rather frequently, while common law countries generally reserve the use of it for the most severe crimes.<sup>52</sup>

Until recently, states generally used the active nationality principle to protect state interests from being harmed abroad, but the increased awareness of human rights violation and the measures against international crimes have revived the use of the principle.<sup>53</sup> The emergence of the ICC has aided this development, as states prefer to prosecute their own nationals rather than extraditing them to an international institution.<sup>54</sup>

### 2.3.1.2 Swedish law

The Swedish Penal Code<sup>55</sup> provide for jurisdiction in accordance with the active personality principle in Chapter 2.

The general rule in Section 2 provide that Swedish courts have jurisdiction under Swedish law for acts committed abroad by Swedish citizens, persons

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<sup>46</sup> *Ibid.*, p. 151.

<sup>47</sup> See for example, V. Lowe 'Jurisdiction' in M. D. Evans (Ed.), *International Law* (Oxford University Press, Oxford, 2003), p. 339, I. Brown, *Principles of Public International Law* (Oxford University Press, Oxford, 2003), p. 301.

<sup>48</sup> Lowe, 2006, *supra* note 46, p. 339.

<sup>49</sup> Shaw, 2003, *supra* note 10, p. 585.

<sup>50</sup> See for example, Shaw, 2003, *supra* note 10, p. 584, Lowe, 2006, *supra* note, p. 340.

<sup>51</sup> *Nottebohm* case (Second phase), Judgment, ICJ Reports, 1955, p. 4.

<sup>52</sup> Shaw, 2003, *supra* note 10, p. 588,

<sup>53</sup> Bantekas and Nash, 2003, *supra* note 23, p. 152, Lowe, 2006, *supra* note 46, p. 341.

<sup>54</sup> Lowe, 2006, *supra* note 46, p. 342.

<sup>55</sup> Swedish Penal Code (SFS 1962:700)

domiciled in Sweden and in some cases persons present in Sweden, in cases of double criminality, that is, that the conduct is criminal by Swedish law and in the territory where it was committed.<sup>56</sup>

Section 3 introduced some interesting exceptions to the rule of double criminality. It extends jurisdiction under Swedish law in certain situations, even if the conduct is not criminalised in the territory where it was committed. Point 2 concerns acts by members of the Swedish Armed Forces in a territory where the Swedish Armed Forces is operating or anyone else in such territory, if the Swedish Armed Forces was there for a purpose other than for exercise. Point 3 concerns cases where the crime was committed in the course of duty outside Sweden by a person employed in a foreign contingent of the Swedish armed forces or a foreign contingent of the Swedish Police Force.

The difference between the two situations in point 2 and 3 may not be obvious at first glance. Section 3 is complex, as it has undergone at least 10 changes under the years.<sup>57</sup> Point 2 is applicable primarily in war, in an area where the Swedish armed forces are situated.<sup>58</sup> Point 3 regards the special case where Sweden sends a foreign contingent (“utlandsstyrka”) on for example peacekeeping operations.<sup>59</sup> The UN regularly signs agreements with states sending foreign contingents, whereby the states take sole responsibility to punish the soldiers for potential crimes. As Sweden enacted a law providing such disciplinary punishment,<sup>60</sup> point 3 was introduced to the Penal Code to provide the necessary jurisdiction.<sup>61</sup>

The first case concerning jurisdiction in accordance with Chapter 2, Section 3, was addressed by the Swedish Supreme court in 1981.<sup>62</sup> The case concerned a Swedish soldier stationed in Egypt on UN mission, who had a traffic accident while driving inebriated and without a driving licence. The Supreme Court interpreted “territory” in section 3 to include roads between the several Swedish contingents, disregarding the fact that the soldier was off duty and convicted the soldier for violations of the Swedish traffic regulations.

Section 5 of the Penal Code provides, as a general rule, that prosecution for offences committed abroad may only be initiated after authorisation by the Government or person designated by the government. This is due to the extensive jurisdiction provided by the Swedish Penal Code, in combination with a reluctance to extradite persons for prosecution elsewhere.<sup>63</sup> The

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<sup>56</sup> Penal Code chapter 2, section 2, para. 2.

<sup>57</sup> ‘2 Kap. Om tillämpligheten av svensk lag, supplement 4, juli 2000’, in L. Holmqvist *et al.* (Eds.) *Brottsbalken, En kommentar* (Norstedts Blå Bibliotek, Stockholm, 1998) (incl. Supplement 14, July 2005), section 2:12.

<sup>58</sup> *Brottsbalkskommentar*, 2005, *supra* note 56, section 2:29.

<sup>59</sup> *Ibid.*, section 2:29 *f*.

<sup>60</sup> Lag(1994:1811) om disciplinansvar inom totalförsvaret.

<sup>61</sup> *Brottsbalkskommentar*, 2005, *supra* note 56, section 2:29.

<sup>62</sup> NJA 1981, s. 864

<sup>63</sup> *Brottsbalkskommentar*, 2005, *supra* note 56, section 2:46.

Office of the Prosecutor-General (Riksåklagaren) has been designated to make such authorisation.<sup>64</sup> However, there are important exceptions to this rule. According to chapter 2, section 5, paragraph 2, authorisation is not needed for prosecution of members of the armed forces in an area in which a detachment of the armed forces was present, or for acts committed in the course of duty abroad by a person employed by a foreign contingent of the Swedish armed forces.<sup>65</sup>

*In sum*, Chapter 2, Section 3, point 3 (and to some extent point 2) provide Swedish courts jurisdiction of cases of Swedish soldiers stationed abroad without the requirement of double criminality. Chapter 2, section 5, paragraph 2 provides that Swedish soldiers stationed abroad may be prosecuted without previous authorisation by the Office of the Prosecutor-General. Both provisions are exceptions to the main rule of caution when it comes to prosecution of cases which have occurred abroad. It seems special consideration has been given to ensure individual responsibility under Swedish law for soldiers stationed abroad.

## 2.3.2 The universality principle

### 2.3.2.1 International law

The universality principle is different to many other principles of jurisdiction as it requires no links between the state and the accused or the crime committed.<sup>66</sup> International recognition of universal jurisdiction covers two categories of crimes.

The first category includes crimes which are difficult to address through ordinary principles of jurisdiction due to its nature.<sup>67</sup> The only clear-cut example is piracy, one of the first crimes to be subject of universal jurisdiction, as the perpetrators are very mobile and may operate on international waters.<sup>68</sup>

The second category of cases includes crimes which are so heinous that they are offensive to the international community as a whole, and therefore all states may address them.<sup>69</sup> These crimes include genocide, crimes against humanity and serious war crimes.<sup>70</sup>

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<sup>64</sup> Förordning (1993:1467) med bemyndigande för Riksåklagaren att förordna om väckande om åtal i vissa fall.

<sup>65</sup> Swedish Penal Code, chapter 2, section 5, para. 2.

<sup>66</sup> Bantekas and Nash, 2003, *supra* note 23, p. 156.

<sup>67</sup> Lowe, 2006, *supra* note 46, p. 343. Bantekas and Nash, 2003, *supra* note 23, p. 156.

<sup>68</sup> *Ibid.*

<sup>69</sup> Shaw, 2003, *supra* note 10, p. 593, Lowe, 2006, *supra* note 46, p. 342, Bantekas and Nash, 2003, *supra* note 23, p. 156.

<sup>70</sup> *Ibid.*

### 2.3.2.2 Swedish law

Chapter 2, section 3, paragraph 6, of the Swedish Penal Code provide for universal jurisdiction for the following crimes<sup>71</sup>;

... hijacking, maritime or aircraft sabotage, airport sabotage, money laundering, an attempt to commit such crimes, crimes against international law<sup>72</sup>, unlawful dealings with chemical weapons, unlawful dealings with mines or false or careless statement before an international court or violations of the 2003 terrorist law<sup>73, 74</sup>.

In these cases, the Swedish Penal Code do not require any specific link to Sweden itself for a case to be tried in Swedish courts under Swedish law and does not provide any requirement of double criminality.

Another provision, in chapter 2, section 3, paragraph 7 of the Penal Code, provide jurisdiction for cases where the least severe punishment prescribed for the crime in Swedish law is imprisonment for four years or more.<sup>75</sup> For such crimes, no links to Sweden is required, either through nationality or territory, and the general rule of double-criminality is not applicable. This provision has the same effect as universal jurisdiction and the consequences of the provision is that this category of crimes may be prosecuted just as the crimes described above.<sup>76</sup> However, the provision is not based on universal jurisdiction. As the rule of double criminality was introduced in Swedish legislation, there was a concern that this would prevent prosecution of particularly offensive crimes. Therefore, this provision was created as a safeguard to enable prosecution of crimes which may fall in between the other jurisdictional provisions.<sup>77</sup>

As described in chapter 2.3.1.2., a general rule proscribes that an indictment for a crime committed outside Sweden may only be filed after authorisation by the government or a person authorised by the government.<sup>78</sup> One of the exceptions to this rule concern Swedish soldiers stationed abroad. This means that a Swedish soldier stationed abroad may be indicted for war crimes (currently named 'crimes against international law' in the Penal Code), but a civilian person (Swedish or foreign) may only be indicted for war crimes committed abroad after special authorisation.

Among the three crimes in question, only war crimes actually are covered by universal jurisdiction in Swedish law. However, genocide fall under the

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<sup>71</sup> Brottsbalkskommentar, 2005, *supra* note 56, section 2:33, commission report SOU 2002:98, pp. 101, 171.

<sup>72</sup> The term 'crimes against international law' in this provision is deceptive as it refers to the Penal Code, chapter 22, section 6, concerning serious violations of humanitarian law, and not to the full extent of crimes against international law. Chapter 22, section 6 will be examined in Chapter 3.3.

<sup>73</sup> Lag (2003:148) om straff för terroristbrott.

<sup>74</sup> Penal Code, chapter 2, section 3, para. 6.

<sup>75</sup> Penal Code, chapter 2, section 3, para. 7.

<sup>76</sup> SOU 2002:98, p. 172.

<sup>77</sup> SOU 2002:98, p. 102.

<sup>78</sup> Penal Code, chapter 2, section 5, para 2.

categories of crimes punishable by more than four years imprisonment, and therefore have equal applicability. The term “crimes against humanity” does not exist in Swedish law, as we will see below, but may fall under the same provision as war crimes. Although the legal reasoning behind the provisions does not follow international standards, the practical result is a legislative framework providing the jurisdiction to prosecute the three crimes in a manner required by international standards.

## 2.4 General introduction to Swedish law

### 2.4.1 The civil law tradition

Sweden was culturally isolated from continental European legal systems until 11<sup>th</sup> century, when traders and academia made an impact on Swedish society.<sup>79</sup> Since then, there has been a strong German-Roman influence.<sup>80</sup> In analyses of civil law traditions, Sweden is often described as part of the Scandinavian legal family. The Scandinavian countries have similar, although not identical, legislation, and work together through the Nordic Council to enact corresponding legislation.<sup>81</sup> It has also been argued that Sweden is a mixed system of civil law and common law traditions<sup>82</sup>, but it seems that the features of common law are few.<sup>83</sup>

Swedish courts strictly adhere to written law<sup>84</sup> and follow the legislative preparatory works faithfully.<sup>85</sup> Courts may also be influenced from precedents, especially from the Supreme Court.<sup>86</sup>

### 2.4.2 Swedish criminal law

The central Swedish legislation in criminal law is the Penal Code, which provides a catalogue of crimes as well as general principles. There is also independent criminal legislation referred to as special criminal law.<sup>87</sup>

Each criminal offence is provided with a scale of punishment, or a maximum punishment. Prison sentences can be a fixed number of years or life imprisonment. A fixed time may vary from 14 days to 10 years, or

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<sup>79</sup> S. Strömholm, 'General features of Swedish law' in M. Bogdan (Ed.), *Swedish Law in the New Millennium* (Norstedts Juridik, Stockholm, 2000), p. 32.

<sup>80</sup> H. Tiber, F. Sterzel and P. Cronhult, *Swedish law – a survey* (Juristförlaget, Stockholm, 1994), p. 38.

<sup>81</sup> *Ibid.*, S. Strömholm, 'General features of Swedish law' in M. Bogdan (Ed.), *Swedish Law in the New Millennium* (Norstedts Juridik, Stockholm, 2000), p. 40

<sup>82</sup> J. H. Merryman, *The Civil Law Tradition* (Stanford University Press, Stanford, 1985), p. 5.

<sup>83</sup> Strömholm, 2000, *supra* note 78, p. 41.

<sup>84</sup> Tiber *et al.*, 1994, *supra* note 79, p. 448.

<sup>85</sup> *Ibid.*, p. 449.

<sup>86</sup> *Ibid.*, p. 448.

<sup>87</sup> *Ibid.*, p. 450.

longer for multiple crimes or relapse into crime.<sup>88</sup> The courts usually use the lower end of the proscribed scale.<sup>89</sup> A person receiving a fixed number of years will receive conditional release after two thirds of the sentence.<sup>90</sup> A life sentence can be transformed to a fixed time after pardon by the Government.<sup>91</sup>

There are also the following sentences; conditional sentence, probation (with contractual care) and surrender for special care (psychological, abuse or social welfare).<sup>92</sup>

## 2.4.3 Sweden's ratification of international criminal law treaties and their impact

### 2.4.3.1 A dualist system

There are two main strains of thought when it comes to the relationship between international law and national law.<sup>93</sup>

Monism is when the state considers the rules and regulations contained in international treaties to be a part of the same entity as rules and regulations adopted in national legislations.<sup>94</sup> The international obligations would then be directly applicable in national courts.<sup>95</sup>

Dualism is the perception of international and national law as two separate entities, where international treaties etc. need to go through a special procedure, which may vary, to be incorporated into national law before being applicable by national courts.<sup>96</sup>

Sweden has drifted between these two perceptions. In the 18<sup>th</sup> century, Sweden adhered to monism by its constitution, as the international agreements reached by the King were published along national laws and applicable in the same manner.<sup>97</sup> As the legislative power was shifted to the Riksdag (parliament) and the King lost political power, this practice ended and dualism gradually emerged, although the constitution is silent on the matter.<sup>98</sup> A number of important cases during 1970s and 1980s confirmed the dualist approach.<sup>99</sup>

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<sup>88</sup> Penal Code chapter 2 section 1.

<sup>89</sup> Tiber *et al.*, 1994, *supra* note 79, p. 483.

<sup>90</sup> Penal Code chapter. 26, section 6.

<sup>91</sup> Tiber *et al.*, 1994, *supra* note 79, p. 483.

<sup>92</sup> Penal Code chapters. 27, 28, 31.

<sup>93</sup> H. Danelius, *Mänskliga rättigheter* (Norstedts, Lund 1989), p. 67.

<sup>94</sup> Shaw, 2003, *supra* note 10, pp. 29, 50, 122.

<sup>95</sup> *Ibid.*, p. 122.

<sup>96</sup> *Ibid.*

<sup>97</sup> O. Bring and S. Mahmoudi, *Sverige och folkrätten* (Norstedts Juridik, Stockholm, 2001), p. 40.

<sup>98</sup> *Ibid.*, p. 46.

<sup>99</sup> AD 1972 r 5, NJA1981 s 1205, NJA1981 s 1205, NJA 1984 s 903, *see also* the report SOU 1974:100 *Internationella överenskommelser och svensk rätt*.

Sweden has used three different methods of incorporating its international obligations into national law. Firstly, Sweden can presume that national legislation is already adequate in covering the relevant international obligations. This is a dubious method, as it is difficult to anticipate all possible consequences of an international treaty.<sup>100</sup> Secondly, it can adopt a new Swedish law, translating and adapting the obligations of the international treaty into the Swedish law. Relevant examples of this method include the Genocide convention, which has been translated into a Swedish law,<sup>101</sup> and the parts of the ICC Statute which obliges states to cooperate with the ICC, which has been separated and form a Swedish law.<sup>102</sup> Thirdly, Sweden can adopt a Swedish law which makes reference to the international treaty, or attach the treaty in its original form as an annex.<sup>103</sup>

In light of the above, it is interesting to examine the prohibition of war crimes in the Swedish Penal Code.<sup>104</sup> The provision presents a non-exhaustive list of conduct to be considered war crimes and refers to violations of established principles of humanitarian law. A commentary reveals that both international humanitarian treaties and customary international law could be applied in this provision.<sup>105</sup> This could be seen as a combination of the second and third methods, or even an example of monism. As the third approach described is increasingly popular, it may be argued that monism is making a comeback in disguise in Swedish legislation. It has also been argued that the division between monism and dualism is outdated and irrelevant.<sup>106</sup>

Swedish courts are only allowed to judge according to Swedish law, unless otherwise prescribed.<sup>107</sup> This does not render international treaties meaningless.<sup>108</sup> The courts should resort to the international obligations to interpret national law.<sup>109</sup> When it comes to determining whether Swedish courts have jurisdiction, the Penal Code requires the court to consider possible limitations through international jurisdictional principles.<sup>110</sup>

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<sup>100</sup> Danelius, 1989, *supra* note 92, p. 67.

<sup>101</sup> Lag(1973:1198) om straff för folkmord.

<sup>102</sup> Lag(2002:329) om samarbete med Internationella brottmålsdomstolen.

<sup>103</sup> Bring and Mahmoudi, 2001, *supra* note 96, p. 44.

<sup>104</sup> Penal Code chapter 22, section 6.

<sup>105</sup> 22 kap. Om landsförräderi m. m., Supplement 2, juli 1999, in in L. Holmqvist *et al.* (Eds.) *Brottsbalken, En kommentar* (Norstedts Blå Bibliotek, Stockholm, 1998) (incl. Supplement 14, July 2005), section 22:20, *see also* the Supreme Court case NJA 1946 s. 65 were customary international law was applied by the Swedish Supreme Court.

<sup>106</sup> Bring and Mahmoudi, *supra* note 96, p. 44.

<sup>107</sup> 2 Kap. Om tillämpligheten av svensk lag, supplement 4, juli 2000 in L. Holmqvist *et al.* (Eds.) *Brottsbalken, En kommentar* (Norstedts Blå Bibliotek, Stockholm, 1998) (incl. Supplement 14, July 2005), section 2:2

<sup>108</sup> H. Danelius, *Mänskliga rättigheter* (Norstedts, Lund 1989), p. 70

<sup>109</sup> Bring and Mahmoudi, 2001, *supra* note 96, p. 42 *ff.*

<sup>110</sup> Penal Code, chapter 2, section 7.

### **2.4.3.2 Ratification of relevant treaties**

Sweden ratified the four Geneva Conventions in 1953 and the two optional protocols to the Geneva Conventions in 1979. Sweden has also ratified almost all of the most important treaties of humanitarian law listed by the ICRC.<sup>111</sup>

Sweden ratified the Genocide Convention in 1952 and the ICC Statute in 2001.

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<sup>111</sup> The only treaty not ratified is the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999, see ICRC website, <http://www.icrc.org/web/eng/siteeng0.nsf/iwpList492/6C6481C326D8DC31C1256E35004D53AB>



# 3 Incorporation of international criminal law in Swedish legislation

## 3.1 Genocide

### 3.1.1 Swedish law

After ratifying the UN Genocide Convention in 1952, the Swedish government realised it needed to incorporate a provision on genocide in Swedish legislation. The result was a separate law, which came into force in 1964,<sup>112</sup> after a larger revision of Swedish criminal law in general and the Penal Code in specific.<sup>113</sup> This law will be referred to as the Genocide Act.

The act contains only two provisions. Section one provide the definition of genocide in Swedish law. Genocide is defined as any conduct which is punishable by law by four years of imprisonment or more, which is committed against a national, ethnic, racial or religious group with the intent to destroy the group in whole or in part.<sup>114</sup> Committing genocide is punishable by prison for either a fixed time ranging from four to ten years, or imprisonment for life.<sup>115</sup>

Section two provides the modes of liability for genocide. Apart from commission, the Genocide Act provide that genocide can be committed though attempt, preparation, conspiracy and omission of exposing or reporting the crime. Punishment for the modes of liability, apart from commission, is refereed to the general provision of chapter 23 of the Penal Code.

Attempt to commit genocide is punishable by a maximum of the same scale as commission of genocide, that is 10 years or life imprisonment.<sup>116</sup> The minimum is not specified, but in the case of genocide, it must amount to prison.<sup>117</sup> The minimum prison sentence in Swedish law is 14 days.<sup>118</sup>

The Penal Code is less informative on punishment for preparation and conspiracy to commit a crime. It states that the maximum punishment should be less than for commission of the crime, and the minimum punishment may be less than proscribed for commission of the crime.

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<sup>112</sup> Lagen (1964:169) om straff för folkmord.

<sup>113</sup> Prop. 1962:10.

<sup>114</sup> Lagen (1964:169) om straff för folkmord, section 1.

<sup>115</sup> *Ibid.*

<sup>116</sup> Penal Code chapter 23, section 1.

<sup>117</sup> *Ibid.*

<sup>118</sup> Penal Code chapter 26, section 1.

In the case of preparation and conspiracy generally, imprisonment for longer than two years is only permitted if the commission of the crime may result in imprisonment for longer than eight years. This is the case with genocide. Punishment may not be issued if the risk of completion was very small.<sup>119</sup>

Omission of exposing or reporting the crime is punishable by a maximum of two years imprisonment.<sup>120</sup>

Swedish courts may naturally address all violation of the Genocide act committed in Sweden in accordance with the principle of territoriality. When genocide is committed abroad, Swedish courts have jurisdiction regardless of the nationality of the perpetrator, due to the fact that genocide fall under the category of crimes in Chapter 2, section 3, point 7, that is, crimes which are punishable by four years imprisonment or more. Double criminality is not a requirement in this case.

As a main rule, the Office of the Prosecutor-General must authorise any indictment for crimes committed abroad.<sup>121</sup> As seen above, the conduct of armed forces abroad are usually under exception to that rule and may be prosecuted without such authorisation.<sup>122</sup>

It should be noted that the Penal Code includes a provision on ‘crimes against international law’, which criminalise grave breaches of treaties or customs of humanitarian law. As an example of such a treaty, the UN Genocide Convention is listed. However, this provision is primarily aimed to include war crimes, and will therefore be analysed further in the chapter below.

## **3.1.2 Comparison to the ICC Statute**

### **3.1.2.1 Conduct**

Both the Swedish Genocide Act and the ICC Statute require that the conduct is committed with the same type of qualified intent, that is, with the aim of destroying, in whole or in part a national, ethnic, racial or religious group.

However, there is an apparent discrepancy in the criminalised conduct in the two texts. The ICC Statute largely follow the UN Genocide Convention, the ICTY and ICTR Statutes in enumerating an exhaustive list of five types of conduct to be considered genocide if perpetrated with the qualified intent of. The five types of conduct are:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;

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<sup>119</sup> Penal Code, chapter 26, section 2, para. 3.

<sup>120</sup> Penal Code chapter 26, section 6, additional criterion, which are less relevant to our case can be found in chapter 26, sections 6, 7.

<sup>121</sup> Penal Code chapter 2, section 5.

<sup>122</sup> See chapter 2.3.

- (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.

The Swedish Genocide Act includes all conduct criminalised elsewhere in Swedish legislation, if that conduct would lead to at least four years imprisonment, when perpetrated with the required qualified intent. At the outset, it is difficult to get an overview of this, as it includes a wide range of conduct provided in various acts. However, Swedish law is quite moderate in the proscribed prison sentences, only a few crimes provide a minimum punishment of four years imprisonment. Such crimes includes murder,<sup>123</sup> manslaughter,<sup>124</sup> kidnapping,<sup>125</sup> gross rape (but not rape),<sup>126</sup> gross robbery (but not robbery)<sup>127</sup>.

In the analysis, we should be mindful that the ICC does not provide any obligation for states to enact identical legislation, as long as the states are capable of prosecuting the same conduct.<sup>128</sup> To receive full understanding on whether Swedish law criminalise genocide in the meaning of the ICC Statute we need to examine the full scope of Swedish criminal law. The following analysis aim to investigate whether each of the five types of conducts in the ICC Statute are criminalised as genocide in Swedish legislation, that is, are provided with a minimum punishment of four years imprisonment, and therefore reach the threshold to be considered genocide under the Swedish genocide Act.

In the analysis, only criminal provisions requiring intent will be considered to meet the threshold. The Genocide Act then adds the dimension of qualified intent. If the original criminal provision only require recklessness, it is obvious it cannot be elevated to qualified intent.

### **3.1.2.1.1 Killing members of the group**

Swedish law criminalises intentional killing of persons through the provisions of murder, manslaughter and ‘causing another’s death’.<sup>129</sup> The main difference between the provisions is the level of *mens rea*. ‘Causing another’s death’ only require recklessness, and therefore cannot be elevated to genocide. Both murder and manslaughter provide minimum punishment well above the threshold of four years imprisonment, and therefore meet the criterion of conduct which may constitute genocide under Swedish law.

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<sup>123</sup> Penal Code, chapter 3, section 1.

<sup>124</sup> Penal Code, chapter 3, section 2.

<sup>125</sup> Penal Code, chapter 4, section 1.

<sup>126</sup> Penal Code chapter 6, section 1

<sup>127</sup> Penal Code, chapter 8, section 6,

<sup>128</sup> See further discussion in Chapter 2.2.3.

<sup>129</sup> Penal Code, chapter 3, sections 1, 2, 7.

Through murder and manslaughter, read in conjunction with the Swedish Genocide act, Swedish Law does criminalise the conduct covered by genocide by killing in the ICC Statute.

### **3.1.2.1.2 Causing serious bodily or mental harm to members of the group**

Swedish law prohibit causing serious bodily or mental harm through intentional conduct through the provisions of assault and gross assault.<sup>130</sup> However, assault is punishable by maximum two years imprisonment, and gross assault is punishable by one to ten years imprisonment. Neither of the crimes have a punishment tough enough to qualify as a genocidal conduct according to the Genocide Act.

Bodily and mental harm can be inflicted a various ways. The ICTR has established that rape and sexual violence can constitute the type of bodily or mental harm required for genocide.<sup>131</sup>

Rape is defined in the Penal Code, as a forced intercourse or other sexual act perpetrated through assault, other violence or threat of a criminal act. If the victim is incapacitated by being unconscious, at sleep, intoxicated etc, no force or threat of force is necessary. Rape is divided in three levels of gravity. Rape which is considered less grave is punishable by a maximum of four years imprisonment. Rape to the medium degree is punishable from two to six years imprisonment. Gross rape is punishable by four to ten years imprisonment.

Only gross rape therefore qualifies as a conduct whereby genocide may be committed, under Swedish law. So, what is gross rape? To assess whether the rape should be considered gross rape, special attention should be given to whether the violence or threat of violence was particularly serious, if there were multiple perpetrators or if the act had been perpetrated by particular ruthlessness or brutality.<sup>132</sup> Nothing is said regarding the aim of the rape.

The prohibition of rape underwent a change in 2005, whereby it was expanded to the present wording.<sup>133</sup> Among many changes, the requirements for gross rape were lowered. The government report expressly stated that courts had been too restrictive in convictions of gross rape and that the change aimed to enable a wider range of conduct to be considered gross rape.<sup>134</sup> Although rape in the context of genocide may often include elements by which it will be considered gross rape, it is possible that many cases of rape as a method of causing serious bodily or mental harm to member of a group may include situations which would be defined as rape,

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<sup>130</sup> Penal Code, chapter 3, sections 5, 6.

<sup>131</sup> *The Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-T, 2 September 1998, (Trial Chamber), paras. 706-707, 731-734, 688

<sup>132</sup> Penal Code, chapter 6, section 1, para. 4.

<sup>133</sup> Lag 2005:90 om ändring i brottbalken

<sup>134</sup> *En ny sexualbrottslagstiftning* Prop. 2004/05:45, chapter 7.1.3

and not gross rape, in Swedish legislation. As only gross rape can be considered as genocide under Swedish law, Swedish law does not properly criminalise this situation to the standards set by the ICC.

Swedish law does therefore not criminalise genocide by causing serious bodily or mental harm, as defined in the ICC Statute.

### **3.1.2.1.3 Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part**

Swedish law does not have a specific crime to match the conduct of genocide by deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

This type of conduct can take a variety of forms, affecting all aspects of “conditions of life”. It may cover deportations, placing the group on a subsidiary diet, reducing medical services, withholding proper accommodation etc..<sup>135</sup> It is impossible to provide an accurate list of all possible conduct under this provision, as the methods of genocide may continuously change and take new forms. Therefore, it is also impossible for Swedish law to genuinely cover all such conduct, unless it adopts a text similar to the one of the ICC Statute.

The Swedish legislation on discrimination may constitute an efficient protection against destructive practices aimed at an ethnic, racial or religious group. There are a number of acts prohibiting ethnic discrimination in general,<sup>136</sup> in the workplace,<sup>137</sup> in schools,<sup>138</sup> college and university<sup>139</sup>. Ethnic discrimination includes discrimination due to race, skin colour, national or ethnic origin or religious faith<sup>140</sup>, which corresponds to the groups included in the definition of genocide. However, none of the acts proscribe prison as punishment, and therefore discrimination in itself cannot be a conduct by which genocide may be perpetrated, according to Swedish law.

This category of conduct can take so many forms, it is impossible to criminalise without using the same terminology. Sweden has not incorporated a similar definition into its criminal law and is therefore incapable of addressing all aspects of this form of genocide. In fact, it is difficult to find any conduct under this category which meets the requirements of the Genocide Act.

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<sup>135</sup> See for example W. Shabas 'Genocide' in Triffterer (Ed.), 2006, *supra* note 32, p. 113.

<sup>136</sup> Lag (2003:307) om förbud mot diskriminering.

<sup>137</sup> The law (1999:130) on measures against ethnic discrimination in working life.

<sup>138</sup> Lag (2006:67) om förbud mot diskriminering och annan kränkande behandling av barn och elever.

<sup>139</sup> Lag (2001:1286) om likabehandling av studenter i högskolan.

<sup>140</sup> The law (1999:131) on the Ombudsman against ethnic discrimination, section 1.

#### 3.1.2.1.4 Imposing measures intended to prevent births within the group

Genocide by imposing measures intended to prevent births within the group also include a variety of conduct, for example sterilisation, compulsory abortion, segregation of the sexes, obstacle to marriage or rape (in cultures which determine the child's ethnicity by its fathers ethnicity, or in the case of inflicting mental damage so that women refrain from having sex).<sup>141</sup> Swedish law does not provide a general prohibition of preventing births, and is therefore ill equipped to punish this type of genocide. However, we will examine sterilisation, abortion and rape under Swedish law, as these seem to be the most frequent examples of preventing birth.

Sterilisation may only be conducted voluntarily, by a medical doctor, after the patient has been properly informed about the consequences of the procedure etc..<sup>142</sup> The punishment for a breach of procedure is fines, or a maximum of six months imprisonment, unless the conduct falls under the Penal Code. Intentional, forced sterilisation could be regarded as assault or gross assault under the Penal Code.<sup>143</sup> Gross assault is punishable by one to ten years imprisonment, which does not meet the threshold to be a conduct by which genocide can be perpetrated, under Swedish law.

Abortion is legal in Sweden, within certain circumstances.<sup>144</sup> The pregnant woman must request an abortion herself, and must be provided with counselling.<sup>145</sup> The abortion must be performed by a medical doctor, in a hospital.<sup>146</sup> Gross illegal abortion is punishable by a maximum of four years imprisonment.<sup>147</sup> This does not meet the threshold of the Genocide Act. Even if the forced abortion is conducted in a manner where it can be considered assault, or gross assault, this does not reach the standards to be considered genocide.

Rape can also be a way of inflicting serious bodily or mental harm, and has therefore been analysed under the previous subheading. Suffice is to say that rape in the average degree does not reach the standards of the Genocide Act, but gross rape does. Still, there are many situations of rape as a method of preventing births within a group which may be categorised as rape to the average degree. Swedish law does not criminalise rape as a conduct in genocide, which is a substantial shortcoming in comparison to international standards.

This analysis is of course inadequate, as only three of the multitude ways of committing genocide by imposing measures intended to prevent births within a group. Still, we can safely say that there are substantial shortcomings in the Swedish legislation, as the three perhaps most obvious

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<sup>141</sup> See for example W. Shabas 'Genocide' in Triffterer (Ed.), 2006, *supra* note 32, p. 113f.

<sup>142</sup> Steriliseringslag (1975:580), sections 2, 5, 6.

<sup>143</sup> Penal Code, chapter 3, section 5, 6.

<sup>144</sup> Abortlag (1974:595), section 1.

<sup>145</sup> *Ibid.*, sections 1, 2, 8.

<sup>146</sup> *Ibid.*, section 6.

<sup>147</sup> *Ibid.*, section 9.

ways of perpetration are not adequately criminalised. Forced sterilisation and forced abortion are not crimes which can constitute genocide under Swedish law, although they most likely will be recognised as such in the ICC. Rape may only be considered a method of perpetrating genocide if the conduct is ruthless enough to be qualified gross rape.

Bearing this in mind, the analysis shows that Swedish law does not criminalise this form of genocide to the standard set by the ICC.

### **3.1.2.1.5 Forcibly transferring children of the group to another group**

Swedish law does not provide a specific prohibition of transferring children from one group to another.

The most relevant provision in the Penal Code would be kidnapping. Kidnapping is defined as taking control of, transporting or locking up a child, or any other person, with the intent to harm or kill the person or to force the person to perform services or to blackmail the person.

Kidnapping is punishable by four to ten years imprisonment, and therefore reaches the threshold set by the genocide Act. However, it is doubtful that the requirements of specific intent in kidnapping are met in all cases of forcible transferring children. A perpetrator may transfer a child from one ethnic group to another with the intention to introduce cultural or religious values to the child, which the perpetrator considers superior.<sup>148</sup> In such a situation, it is doubtful whether the specific intent of kidnapping in Swedish law is met, that is, the intent to harm or kill the person, force the person to perform services or blackmail the person.

The Penal Code also provides kidnapping in a less grave degree, punishable by maximum six years imprisonment.<sup>149</sup>

Forcible transfer of children may typically be institutionalised by government or other authority. The Care of Young Persons Act (1990:52) allow the social service to provide treatment for youth in trouble, including to take the youth into custody, even in an location unknown to the parent. However, this not criminal law, and also law specifically adapted to the Swedish social service which cannot be applied to conduct in a foreign country.

It seems that the implementation in Swedish law of genocide by forcibly transferring children of the group to another group is largely insufficient.

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<sup>148</sup> Allegations of such conduct have been discussed in relation to Greenlandic children transported to Denmark, and Jewish children brought up in catholic traditions after World War II.

<sup>149</sup> Penal Code, chapter 4, section 1, para. 2.

### 3.1.3 Modes of liability

The modes of liability for the crimes of the ICC Statute are; commission (individually or jointly), ordering, soliciting or inducing the commission of crimes, aiding, abetting or assisting in a crime, contributing to a crime by a group of persons acting with a common purpose, attempt and command responsibility.<sup>150</sup> Incitement is also added to the list, but only in the case of genocide.

The provision in the ICC Statute is interesting as it is the first time a tribunal has departed from the UN genocide convention. The convention had a specific list of modes of liability. The ICTY and ICTR Statute copied the definition of the Genocide convention, which by that time had become customary international law<sup>151</sup> which resulted in one general list of modes of liability and another, specific list for genocide. The ICC chose a different route, incorporating the two lists into one.

As described above, the Genocide Act criminalises attempt, preparation, conspiracy and omission of exposing or reporting the crime in the case of genocide.

Under Swedish law, attempt is when a conduct has been initiated to commit the crime, without the crime being completed, if there was a risk for that conduct to have led to the completion of the crime, or if the crime was not completed due to accidental circumstances.<sup>152</sup>

Preparation to commit a crime requires less than attempt. The accused must have taken some preparatory steps aimed at completing or aiding a crime, such as issuing payments, manufacturing, transporting or storing something, which is intended to aid the crime.<sup>153</sup>

Conspiracy to commit a crime is understood as a person deciding with another to commit a crime, trying to provoke another to commit a crime, or accepting or volunteering to commit a crime.<sup>154</sup>

Omission to expose or report the crime is only punishable when this could have been done without risk of harm to the person or others. This mode of liability only concerns those who have participated in the commission of a crime in a limited degree.

To compare the modes of liability of Swedish law to those of the ICC is a difficult task, as the terms may have different meanings in the legal systems. The Swedish Genocide Act does not include explicit prohibition of incitement to genocide or aiding, abetting or assisting and contributing to a

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<sup>150</sup> ICC Statute arts. 25(3), 28.

<sup>151</sup> A. Cassese, *International Criminal Law* (Oxford University Press, Oxford, 2003), p. 98.

<sup>152</sup> Penal Code chapter 23, section 1.

<sup>153</sup> Penal Code chapter 26, section 2, para. 1

<sup>154</sup> Penal Code, chapter 26, section 2, para. 2.



crime by a group of persons acting with a common purpose, all of which are a part of the ICC definition. On the other hand, the Genocide Act has criminalised preparation and omission to report the crime, which are not included in the ICC Statute. However, other provisions in Swedish criminal law make up for these shortcomings.

Incitement has always been an acceptable mode of liability for genocide in international law, from the UN Genocide Convention to the ICC Statute, and it would be very strange if Swedish law did not criminalise the same.

In Swedish law, conspiracy, which is a mode of liability in the Genocide Act, includes the conduct where a person seeks to incite another to commit a crime.<sup>155</sup> Where this is not applicable, there is also a general prohibition of incitement, including the prohibition of publicly inciting people to commit crimes.<sup>156</sup> The penalty for this is a fine or imprisonment to maximum six months. If the crime is gross, the punishment is increased to a maximum of four years imprisonment. There are also important provisions in Sweden's constitution supporting the prohibition of public incitement and hate speech.<sup>157</sup>

Hate speech is also prohibited in the Penal Code.<sup>158</sup> Although it does not refer to genocide, it prohibits public messages which threaten or degrade a group of persons based on race, skin colour, national or ethnic background, faith or sexual orientation. This provision may cover important areas of incitements to commit genocide. Hate speech is punishable by fines or a maximum of two years imprisonment, or six months to four years if the crime is gross.

When it comes to the accomplice liabilities, a general provision in the Penal Code provide that responsibility for all crimes in the Penal Code, and in special criminal law (including the Genocide Act) shall not only be incurred on the principal perpetrator but also on anyone who has furthered the crime by advice or deed.<sup>159</sup> The modes of liability have been translated to instigation and aiding in the official English translation of the Penal Code.<sup>160</sup>

The Genocide Act does not criminalise command responsibility for genocide, which is an important mode of liability in the ICC.

It should be noted that the Swedish genocide act was aimed to implement the UN Genocide Convention, which contained a different set of modes of liability than the ICC Statute. The UN Genocide Convention did for

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<sup>155</sup> Penal Code chapter 23, section 2 para. 2.

<sup>156</sup> Penal Code, chapter 16, section 5.

<sup>157</sup> Yttrandefrihetsgrundlagen (1991:14:69) chapter 5, section 1, Tryckfrihetsförordningen (1945:105) chapter 7, section 4, point 10, 11.

<sup>158</sup> Penal code, chapter 16, section 8.

<sup>159</sup> Penal Code chapter 23, section 4

<sup>160</sup> The Swedish Penal Code, Ds 1999:39.

example not include aiding and abetting, but did include complicity, which also is an accomplice liability.

*In sum*, the Swedish Genocide Act has a very different set of modes of liability than the ICC Statute. However, general criminal provisions, outside of the Genocide Act provide most of the missing part, and complement the Genocide Act so that it does seem to live up to ICC standards. One serious shortcoming remains and that is the lack of command responsibility for genocide.

### 3.1.4 Punishment

The ICC Statute includes a general provision on punishment, applicable to all crimes in its Statute. Punishment may either be a fixed prison sentence of maximum 30 years, or life imprisonment.<sup>161</sup> No minimum prison sentence is proscribed, although as the provision speaks of years, it is likely the punishment would not be less than one year.<sup>162</sup> This may be combined with fines and forfeiture of proceeds, property and assets.<sup>163</sup> The court shall assess the gravity of the crime and the individual circumstances of the convicted person.<sup>164</sup> No further clarification is made to whether any of the crimes should be considered more grave than the other. The drafters of the ICC Statute noted the need for flexibility in sentencing, so that the judges could determine the sentences adapted to the future needs.<sup>165</sup>

The ICTY and ICTR Statutes did not provide specific penalties to each crime either. Here, the Tribunals had to consider (but not necessarily follow)<sup>166</sup> the national practice of sentencing in Rwanda and Yugoslavia.<sup>167</sup> Nevertheless, the ICTR did rank the crimes and found that genocide was the most serious, followed by crimes against humanity and then war crimes.<sup>168</sup>

As neither the ICC nor Swedish courts have yet decided any cases concerning genocide, it is impossible to compare its practice in sentencing. However, some remarks can be made on penalty in the Swedish Genocide Act.

Firstly, the possible fixed prison penalty in Swedish law is considerably lower than in the ICC, 10 years compared to 30 years.

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<sup>161</sup> ICC Statute art. 77.

<sup>162</sup> R. E. Fife, 'Article 77' in Triffterer, 2006, *supra* note 32, p. 1995.

<sup>163</sup> *Ibid.*

<sup>164</sup> ICC Statute art. 78.

<sup>165</sup> Fife, 2006, *supra* note 160, p. 986.

<sup>166</sup> *The Prosecutor v. Omar Serushago*, Case No. ICTR-98-39-A, 6 April 2000 (Appeals Chamber), para. 30

<sup>167</sup> ICTY Statute art. 24(1), ICTR Statute art. 23(1).

<sup>168</sup> *The Prosecutor v. Jean Kambanda*, Case no. ICTR- 97-23-S, 4 September 1998, (Trial Chamber), para. 12-14, 16, *The Prosecutor v. Clement Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T. 21 May 1999, (Trial Chamber), Sentence para. 8-9:

Secondly, punishment through the Swedish Genocide act often amount to the same severity as punishment for the conduct committed without the genocidal intent. For example, the punishment for murder is 10 years or life imprisonment, while the punishment for genocide by murder may give maximum penalty of 10 years or life imprisonment. As the prohibited conduct may be punished to the same degree whether it was perpetrated with the qualified intent in genocide, as without, it does not sufficiently consider the serious nature of the crime of genocide. This deficiency was noted in the preparatory works of the act, but without a change in the text.<sup>169</sup>

It should also be noted that Swedish criminal law does list an attack aimed at a specific group of people by reason of race, colour, national or ethnic origin, religious belief or other similar circumstance as an aggravating circumstance, which may result in a heavier penalty within the proscribed scale.<sup>170</sup> This provision should be used in the case of genocide, although the lack of adjudicated cases makes an assessment of the use difficult. In addition, in the comparison between murder and genocide by killing, the aggravating circumstance would have no effect, as the maximum penalty is the same for both crimes.

## 3.2 Crimes against humanity

### 3.2.1 Swedish law

Swedish law does not contain any provisions on crimes against humanity. Although the specific term of crimes against humanity is non-existent, some conduct included in crimes against humanity may be covered by Swedish law, albeit not recognising the specific character of the crime.

For example, murder and rape is criminalised through general criminal law. If such crimes are committed as an attack aimed at a specific group of people by reason of race, colour, national or ethnic origin, religious belief or other similar circumstance, it will be considered an aggravating circumstance, and may result in a heavier penalty.<sup>171</sup> As described above, a Swedish soldier can be liable for all violations of Swedish criminal law, if committed abroad.<sup>172</sup>

Another possibility is to use the prohibition of ‘crimes against international law’ in the Penal Code, chapter 22, section 6. This provision applies to grave breaches of international treaties or recognised principles of humanitarian law, during armed conflict. A non-exhaustive list of such grave breaches is provided. The provision does not mention any requirement of the acts to be committed as a part of a widespread or systematic attack

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<sup>169</sup> Prop. 1964:10, p. 203

<sup>170</sup> Penal Code, chapter 29, section 2.

<sup>171</sup> Penal Code, chapter 29, section 2, *see also* chapter 3.1.4 above.

<sup>172</sup> Penal Code, chapter 2, section 3.

against the civilian population, which is the requirement for crimes against humanity by the ICC Statute. It therefore does not adequately target the conduct included in crimes against humanity, and will be further examined in the discussion of war crimes, where it belongs.

### 3.2.2 Comparison to the ICC Statute

Crimes against humanity is slightly more difficult to define under international law than genocide and war crimes, as the definition of crimes against humanity has varied during time and in different institutions.

In the Nuremberg and Tokyo tribunals, genocide was considered a form of crimes against humanity<sup>173</sup> although the Genocide convention adopted after World War II established genocide as a separate crime.

The ICTY and ICTR adopted similar definitions, although they differed in important aspects.

The definition adopted by the ICC builds on this development, but takes it further. In this context it is important to note that the ICC Statute is generally only binding on state-parties, and that it does not follow customary international law in all aspects.<sup>174</sup>

The total absence of crimes against humanity in Swedish law is remarkable. As the definition of crimes against humanity has varied considerably in the last century, it may perhaps be understandable that national law have had problems implementing these norms. Also, there is no convention or treaty on crimes against humanity, as there is on genocide and war crimes. This leaves national jurisdictions to consider customary international law, where even the UN ad hoc tribunals came to diverging conclusions regarding the content of crimes against humanity in customary international law. However, the ICC Statute provides an explicit definition of crimes against humanity, and expects state parties to be capable of prosecuting such crimes. Swedish law does not provide the capacity to do so.

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<sup>173</sup> Cassese, 2003, *supra* note 149, p. 96.

<sup>174</sup> According to the principle of *pacta sunt servanda*, see Vienna Convention on the law of treaties, adopted 23 May 1969, in force 27 January 1980, Article 26, Bassiouni, 2003, *supra* note 12, p. 262.

## 3.3 War crimes

### 3.3.1 Swedish law

#### 3.3.1.1 The Penal Code

The main provision in Swedish law regarding war crimes is in chapter 22, section 6 of the Penal Code.

The section provides that grave breaches of a treaty with a foreign power or of a generally recognised principle of law relating to humanitarian law in armed conflict shall be considered a crime named ‘crimes against international law’.

The term is unfortunate, as ‘international law’ has a much wider scope than ‘humanitarian law’, which the provision actually refers to.<sup>175</sup>

The drafters of the act primarily seem to have the Geneva Conventions in mind when referring to treaties, but many other treaties may come in question. In a long list of possible treaties to be used in the provision, the UN Genocide Convention also appear.<sup>176</sup> This is remarkable, as there is a separate Genocide Act in Swedish legislation, enacted after the provision of ‘crimes against international law’. ‘Crimes against international law’ also seems ill-equipped to address genocide through its general nature and modest punishment. The provision also provides different possibilities than in the Genocide Act, for example command responsibility. For this older legislation to provide a mode of liability which is non-existent in the later, more specific legislation seems contrary to both the principle of *lex posterior derogate priori* (a more recent law prevail) and *lex specialis derogate legi generalis* (a more specific law prevail). With all this considered, we will examine ‘crimes against international law’ under the heading of war crimes with the caveat that it, however unlikely, may be used for genocide and crimes against humanity.

The provision includes a non-exhaustive list of such grave breaches. The list includes

- the use of weapons prohibited by international law
- misuse of the insignia of the United Nations etc.
- attacks on civilians or on persons who are injured or disabled
- initiating an indiscriminate attack knowing that such attack will cause exceptionally heavy losses or damage to civilians or to civilian property
- initiating an attack against establishments or installations which enjoy special protection under international law
- 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

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<sup>175</sup> See definition of humanitarian law in chapter 3.3.2.1.

<sup>176</sup> Brottsbalkskommentar, 2005, supra note 105, section 22:20.

These examples are inspired by certain provisions in the Geneva Conventions and their optional protocols.

This provision was originally included in the Penal Code after a reform in 1948. It was revised in 1986 and updated in 1994 to adapt to international humanitarian law.<sup>177</sup> One example of this is that members of armed forces previously were punished more leniently under this provision than civilians. This exception was taken out and today the provision include a strict version of command responsibility, stating that if a soldier is convicted, his or her superior should also be convicted, if the superior has a possibility of foreseeing the crime, but did not take action within his or her mandate to prevent the conduct. These changes are good examples of how Swedish law has adapted to the developments in international criminal law.

Crimes against international law is punishable by maximum four years imprisonment. If the crime is gross, it may be punished by a maximum of ten years imprisonment or life imprisonment. To be considered gross the crime may include multiple acts or multiple victims or extensive loss of property.

The provision of crimes against international law is very interesting as it makes customary international humanitarian law directly applicable to Swedish law in Swedish courts.<sup>178</sup> Sweden is generally regarded as a dualist country, whereby all international law must be implemented in Swedish legislation to be applicable.<sup>179</sup> Although this provision can be seen to implement the principles of international humanitarian law sufficiently, it is important to note that customary international law is ever changing. By this "blanket-implementation", it seems the Swedish government is willing to see all future developments of humanitarian law as applicable Swedish law. The Supreme Court has also established that customary international law was applicable in a case regarding a German citizen, stationed in Norway during World War II, who worked as a spy in Sweden.<sup>180</sup>

Chapter 22 continue with three other, more specific provisions on war crimes. Chapter 22, section 6a target conduct relating to chemical weapons. This is punishable by a maximum of four years imprisonment. If the crime is gross, it may be punished by a maximum of ten years imprisonment or life imprisonment. The provision was included in the Penal Code, after Sweden ratified the UN Chemical Weapons Convention<sup>181 182</sup>.

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<sup>177</sup> Brottsbalkkommentar, 2005, *supra* note 105, section 22:19.

<sup>178</sup> *Ibid.*, 22:20.

<sup>179</sup> See chapter 2.4.3.1 above.

<sup>180</sup> NJA 1946 s. 65

<sup>181</sup> Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 30 November 1992 (A/RES/47/39).

<sup>182</sup> Brottsbalkskommentar, 2005, *supra* note 105, section 22:28.

Chapter 22, section 6b target conduct relating to anti-personnel mines. Punishment is identical to the provision on chemical weapons above. The provision explicitly refers to the 1997 UN Convention on Anti-Personnel Mines.<sup>183</sup>

Chapter 22, section 6c follow the exact same pattern as sec 6a and b, but refer to nuclear explosion. Although it was created in 1998, it is not yet in force, but will enter into force when the when the government decides so.

Towards the end of Chapter 22, the Penal Code introduces a somewhat surprising provision. Section 8 provides that if a person commits a crime during war, without reason to believe that the conduct was not allowed by the customs of war, he or she may receive a less severe punishment for the conduct. If the circumstances were especially extenuating, no punishment at all should be issued. The provision is general in nature, as the text does not specify what type of crime it refers to, other than a crime committed during war. However, the preparatory work reveals that it was designed to effect the provision of 'crimes against international law'.<sup>184</sup> It will therefore be examined under the heading of war crimes, although it may also affect Swedish implementation of genocide and crimes against humanity.

### 3.3.1.2 Other provisions

Members of the Swedish armed forces are trained in humanitarian law. If they do not conduct themselves according to the training given, there are a number of possible measures to resort to.

Members of armed forces, who intentionally, or by recklessness disregard from instruction, superior order or other principles which he or she should abide by, can be charged with disciplinary misdemeanour.<sup>185</sup> Punishment for such conduct is warning, extra duty or deduction from wages. In time of peace, the act is applicable to a limited number of groups within the armed forces, including Swedish soldiers sent on mission abroad.<sup>186</sup> In time of war, the act applies to all groups in Sweden which are obliged to participate in the defence of the country.<sup>187</sup> The employees in the armed forces who are not included in the above mentioned act in time of peace are still covered by the general obligations as civil servants and the corresponding regulations of disciplinary actions.<sup>188</sup>

If Sweden enters a state of war, Chapter 21 of the Penal Code becomes applicable. There is no definition of a state of war in the text, but it may be assumed that the chapter do not cover the situation of Swedish soldiers

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<sup>183</sup> Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997

<sup>184</sup> Brottsbalkskommentar, 2005, *supra* note 105, section 22:35.

<sup>185</sup> Lagen (1994:1811) om disciplinansvar inom totalförsvaret.

<sup>186</sup> *Ibid.*, section 1.

<sup>187</sup> *Ibid.*, section 2.

<sup>188</sup> Lagen (1994:260) om offentlig anställning

being sent on international missions, where Sweden is not a party to the conflict (which should always be the case due to the neutrality principle<sup>189</sup>). Chapter 21 provides a number of rules on the conduct of members of the armed forces. Chapter 21, section 14 provide that a member of the armed forces who intentionally or through gross carelessness disregards the duties incumbent upon him and the fault is considered to be serious, shall be sentenced for "breach of duty" to imprisonment for at most two years. Less serious breaches of duty is punished, as mentioned above, as disciplinary misdemeanours

As Sweden has not been at war for over 200 years, and as Swedish soldiers stationed abroad on peacekeeping missions etc are not covered by it, Chapter 21 is of very little practical relevance.

Humanitarian law has also been implemented in a number of separate Swedish acts, providing regulations for identity cards, protected objects, the status under international law of various actors Swedish defence, rules concerning prisoners of war and legal advisors within the armed forces.<sup>190</sup> As such, provisions do not regulate the grave breaches of humanitarian law classified as war crimes, we will not expand the analysis to these acts.

### **3.3.1.3 Jurisdiction**

Swedish law provides universal jurisdiction for all actors for violations of Penal Code chapter 22, section 6 (crimes against international law), section 6a and 6b, through the Penal Code chapter 2, section 3, point 6.

Also considering the wide jurisdiction for acts committed by members of armed forces,<sup>191</sup> it can safely be said that members of armed forces that commit the above mentioned crimes could not escape though Swedish jurisdictional principles.

## **3.3.2 Comparison to the ICC Statute**

### **3.3.2.1 Legal background to international humanitarian law and the concept of war crimes**

War crimes has the richest and longest history of the three crimes currently in the ICC Statute. Evidence of law of war dates back to 500 BC, although philosophers, religious and political leaders laid out the main thoughts around the 1100 century.<sup>192</sup> In the middle of 1800<sup>th</sup> century, codification of

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<sup>189</sup> See chapter 2.2. above.

<sup>190</sup> Folkrättsförordning (1990:12) om totalförvarets folkrättsliga ställning, identitetskort, skyddsobjekt, folkrättsliga rådgivare etc., Förordning (1996:1475) om skyldigheten att lämna upplysningar m. m. rörande krigsfångar och andra skyddade personer, Försvarsmaktens föreskrifter om folkrättsliga rådgivare inom Försvarsmakten (FFD 2002:3)

<sup>191</sup> See chapter 2.3.1.2. above.

<sup>192</sup> I. Detter, *The Law of War* (Cambridge University Press, Cambridge, 2000), p. 151ff.



the law of war began, both in international conventions, and national guidelines for armed forces.<sup>193</sup>

The law of war was divided into the right to wage war and the rights and duties once the war has begun. In the latter category, humanitarian law was developed.<sup>194</sup> Humanitarian law concern the protection of individuals in war.<sup>195</sup> Rules regarding protection of individuals are often referred to as "Hague law", as opposed to the "Geneva law", which mainly concern the action of states, such as use of specific types of weapons. The most relevant instruments of humanitarian law, are the four Geneva Conventions from 1948, and the two optional protocols of 1977. Through time, the rules of the law of armed conflict become more and more complex through an interwoven network of conventions, and special advisor positions are often set up with armed forces to ensure the necessary expertise.<sup>196</sup>

As the Geneva Conventions include over 400 provisions, state parties are only obliged to punish grave breaches.<sup>197</sup> Serious violations of customary or treaty rules of international humanitarian law in international or internal armed conflict are often referred to as war crimes.<sup>198</sup> Traditional war crimes include the rights of prisoners of war, the prohibition of killing soldiers which have surrendered, the prohibition of murder and devastation not justified by military necessity, and crimes against civilians.<sup>199</sup>

Individual responsibility for war crimes was developed after the first and second world war and naturally has its place in the two *ad hoc* tribunals.

The ICTY Statute included two articles on war crimes. Article 2 criminalises a number of grave breaches of the Geneva Conventions of 1949. Article 3 criminalises violations of the "laws and customs of war", which includes provisions on both methods of warfare and weapons used.

The ICTR Statute includes a different version of war crimes, as the conflict in Rwanda was of a solely internal nature. The regime of the Geneva conventions provide that all rules are applicable in international armed conflict, but only common article 2 and additional protocol II is applicable in internal armed conflict. Article 4 of the ICTR Statute therefore a non-exhaustive list of violations of these instruments.

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<sup>193</sup> *Ibid.*, p. 153

<sup>194</sup> *Ibid.*, p. 157f.

<sup>195</sup> Detter, *supra* note 190, p. 160.

<sup>196</sup> *Ibid.*, p. 156.

<sup>197</sup> Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949, art. 49, Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949., art. 50, Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949. art. 129, Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. art. 146 and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, art. 85.

<sup>198</sup> Cassese, 2003, *supra* note 149, p. 47.

<sup>199</sup> Detter, 2000, *supra* note 190, p. 421.

### **3.3.2.2 War crimes in the ICC Statute**

The ICC Statute includes an elaborate definition of war crimes in Article 8, covering fifty types of situations. The article contains four exhaustive lists on conduct to be considered war crimes.

The lists concern four different situations; grave breaches of the Geneva Conventions of 1949, other serious violations of law and customs applicable to international armed conflict, serious violations of common article 3 in case of a conflict not of an international character and other serious violations of laws and customs applicable in conflict non of an international character.

The list then contains a number of conducts to be considered war crimes in the given situation. The same conduct is often repeated in the various lists.

### **3.3.2.3 The Swedish provisions in the light of the ICC Statute**

#### **3.3.2.4 *Actus reus* and *mens rea***

Although a number of acts and ordiances provide a network of legislation to prohibit ill-treatment by soldiers in Swedish law, chapter 22, section 6 is the most relevant as it actively targets war crimes. The comparison will therefore focus on this provision in the light of the ICC Statute article 8 which cover war crimes.

The Swedish legislation provides a very wide definition of war crimes. This is surprising compared to the Swedish regulations on genocide and crimes against humanity, and there is a great difference in the method of implementation of the various crimes.

The Penal Code chapter 22, section 6, provides a blanket criminalisation of serious violations of international treaties and customs relating to humanitarian law. It has also been updated to adapt to the development of international law.

When comparing the definitions of war crimes the most obvious reflection is that the ICC Statute includes 50 types of war crimes in an exhaustive list, while the Swedish provision provides a non-exhaustive list. In this sense, the Swedish provision actually goes beyond the requirements of the ICC and provides a wider definition of war crimes.

It is interesting to note that the wide definition of war crimes is due to the mode of implementation, that is, referring directly to international law. This enables Swedish courts to directly apply to recent developments in international humanitarian law, and to be continuously updated to recent developments (providing the Swedish courts recognise and acknowledge

such developments). The legal technique of implementation is perhaps the only way of implementing the full scope of international humanitarian law, as this body of law is complex and includes a large number of conventions and a substantial amount of rules developed by case law and customary international law.

However, the provision can also be criticised in light of the principle of legality. The principles of legality comprise of two well-recognised legal principles, *nullum crimen sine lege* (no crime without law) and *nullum poene sine lege* (no punishment without law).<sup>200</sup> The principles of *nullum crimen sine lege* and *nullum poene sine lege* are present in all of the most important international treaties<sup>201</sup> and form a part of the non-derogable rights.<sup>202</sup> As the principles require crime and punishment to be provided by law, they are vital safeguards in all legal jurisdictions as they protect against potential abuse and arbitrary application of law<sup>203</sup>. Last but not the least, clear legislation is vital for the defence so that it can prepare for trial.<sup>204</sup> It can be argued that the provision of ‘crimes against international law’ is so wide and may include so many types possible criminal conduct, that it is difficult to understand the full scope of the provision. The provision also includes customary international law, which may continuously change and provide and additional problems in foreseeability.

The provision of the ICC has a different background than the Swedish legislation. The ICC is potentially a very powerful tool for prosecution of international crimes. The state parties to the ICC Statute wanted to ensure that the ICC Statute would not be interpreted too widely, as the jurisdiction delegated to the ICC challenged the traditional perception of state sovereignty.<sup>205</sup> The ICC therefore comprises of exhaustive provisions and general rules to ensure strict interpretation of the rules.<sup>206</sup> The states wanted to know what they signed on to, and this is the reason for the exhaustive list of war crimes. A general provision like in the Swedish legislation would not have been acceptable to a large number of countries and jeopardised the ICC Statute at large.

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<sup>200</sup> Bassiouni, 2003, *supra* note 12, p. 218.

<sup>201</sup> See Universal Declaration of Human Rights (UDHR), art. 11(2), International Covenant on Civil and Political Rights (ICCPR) art. 15(1), Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) art. 7(1) and African Charter of Human and Peoples Rights (ACHPR) Article 7(2) almost unanimous provisions, UDHR: “No one shall be held guilty of any penal offence on account of any act or omission which did not constitute an offence, under national or international law, at the time when it was committed”.

<sup>202</sup> Bassiouni, 2003, *supra* note 12, p. 63.

<sup>203</sup> Bassiouni, 2003, *supra* note 12, p. 218.

<sup>204</sup> S. Powles, ‘Joint criminal enterprise. Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?’ 2 *Journal of International Criminal Justice* (2004) p. 616.

<sup>205</sup> M. Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Hart Publishing, Oxford, 2002), p. 617.

<sup>206</sup> *Ibid.*, and W. Shabas, *An Introduction to International Criminal Law*, (Cambridge University Press, Cambridge, 2004), p. 94.

In the sense of *actus reus* of the crime, there is no doubt that Sweden fulfils not only the obligations of the ICC Statute, but also its international obligations of implementing war crimes. The problems lie in other areas.

Neither the text of the provision ‘crimes against international law’, nor the provision of war crimes in the ICC Statute mention *mens rea*. In both cases, this leads to the conclusion that the main rule is applicable, that is, intent is required in Swedish law, and intent and knowledge is required in the ICC.<sup>207</sup> On the face of it, the ICC seems to have a stricter requirement, as it also adds knowledge. However, the ICC allows intent to be inferred from relevant facts and circumstances.<sup>208</sup> When one can infer intent, one can often infer knowledge, so in a practical context, similar situations may be dealt with. A Swedish commission of inquiry have also stated that while the *mens rea* requirements of Swedish law and the ICC are not identical, practical difference would only appear in exceptional cases.<sup>209</sup>

### 3.3.2.5 Modes of liability

The provision of crimes against international law only state commission and command responsibility as modes of liability.<sup>210</sup> The Penal Code also adds the general modes of liability of instigation, aiding the crime<sup>211</sup> and incitement of the crime,<sup>212</sup> which are applicable to all crimes.

The ICC provides a general list of modes of liabilities for all crimes. This includes commission (individually or jointly), ordering, soliciting or inducing the commission of crimes, aiding, abetting or assisting in a crime, contributing to a crime by a group of persons acting with a common purpose, attempt and command responsibility.<sup>213</sup>

The modes of liability for ‘crimes against international law’ are more limited than for genocide under Swedish law.<sup>214</sup> However, it seems that ‘crimes of international law’ more or less corresponds to the modes of liability of the ICC Statute, with one exception. The exception regards attempt. Attempt to commit ‘crimes against international law’ is not criminalised in Swedish legislation. Attempt to commit war crimes are criminalised by the ICC Statute. This is one apparent discrepancy. However, ‘crimes against international law’ explicitly refers to command responsibility, which is lacking in the Genocide Act.

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<sup>207</sup> Penal Code, chapter 2, sections 1, 2, ICC Statute art 30(1).

<sup>208</sup> Elements of Crime, ICC-ASP/1/3 part II –B, adopted 09/09/2002, in force 09/09/2002, The Official Journal of the International Criminal Court, 1<sup>st</sup> Year (Elements of crime), p. 112, para. 3.

<sup>209</sup> SOU 2002:98, pp. 277, 334 the discussion refers to the commissions proposed new act on international crime, but as the *mens rea* requirements are the same it is also relevant to this discussion.

<sup>210</sup> Penal Code chapter 22, section 6, para. 3.

<sup>211</sup> Penal Code, chapter 23, section 4.

<sup>212</sup> See chapter 3.1.3 above.

<sup>213</sup> ICC Statute arts. 25(3), 28.

<sup>214</sup> See discussion in chapter 3.1. on the definitions of modes of liability under Swedish law.

### 3.3.2.6 Punishment

Violations of crimes against international law are punishable by a maximum of four years imprisonment. If the crime is gross, a maximum of ten years imprisonment or life imprisonment may be issued. The crime may be considered gross if it has been perpetrated through a large number of acts or if many persons were killed or injured.

As discussed above,<sup>215</sup> the ICC has a general provision on punishment applicable for war crimes, but also crimes against humanity and genocide.<sup>216</sup> Article 77 provides that these crimes may be punished by imprisonment for a maximum of 30 years, or life imprisonment. As no cases have yet been decided, it is difficult to say where the punishment for war crimes will usually range. The drafters of the ICC Statute noted the need for flexibility in sentencing, so that the judges could determine the sentences adapted to the future needs.<sup>217</sup>

There are some problematic aspects of Swedish legislation in comparison to the ICC Statute.

Firstly, the maximum of four years imprisonment set to the average degree of violations of crimes against international law is very low. This is backed up by the heavier penalty for gross violations which may give maximum 10 years or life imprisonment, which in context of the ICC is also very low. It should be noted that even for the average degree of violation, the conduct must still meet the threshold of “grave breaches” of humanitarian law, which does set a high standard in itself. To have a gross version of grave breaches does seem to be an awkward legislative strategy.

Now, these provisions shall of course be seen in context of the Swedish system of penalty, which do generally provide for shorter prison sentences than many other states do. To place the Swedish punishment into context, we can compare it to the penalty of murder, rape and assault, as these crimes include conduct which may come into question in grave breaches of humanitarian law. Murder may give maximum of 10 years or life imprisonment.<sup>218</sup> Rape may give between ten and six years imprisonment, and four to ten years imprisonment for gross rape.<sup>219</sup> Assault may give a maximum of two years imprisonment, or one to ten years for gross assault.<sup>220</sup>

Proscribing a penalty for war crimes is problematic in the way that it includes a wide variety of conduct, ranging from destruction of property to

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<sup>215</sup> Chapter 3.1.4.

<sup>216</sup> ICC Statute art. 77.

<sup>217</sup> Fife, 2006, *supra* note 160, p. 986.

<sup>218</sup> Penal Code, chapter 3, section 1.

<sup>219</sup> Penal Code, chapter 6, section 1.

<sup>220</sup> Penal Code, chapter 3, sections 5, 6.

killing of persons. Although the Swedish law generally is moderate in issuing punishment, it is important that the provision on war crime is tough enough to combat the worst expressions of war crimes, for example killing of civilians or prisoners of war.

In fact, a single killing of a civilian or prisoner of war may be regarded as a violation of crimes against international law by the average degree, as the gross violation is aimed at situations where more than one person was killed. The single killing of a civilian would then incur a maximum penalty of four years imprisonment, radically lower than murder or gross assault. In this comparative analysis, it is clear that Swedish legislation provide lower punishment for certain conduct perpetrated in war than in peace.

It should also be noted that conduct may be regarded as either an ordinary criminal conduct, such as murder, or as a war crime. A person may be prosecuted for murder, and receive the penalty for murder, even if the conduct occurred in an armed conflict and fulfil the requirements of crimes against international law.<sup>221</sup> However, it does seem more appropriate that the provision on war crimes would have the possibility of combating even the most brutal war crimes to an adequate extent, so that recourse to other provisions would not be needed. Ordinary criminal provisions are not adapted to be applied in the context of armed conflict, which is exactly the reason why there are separate provisions on war crimes.<sup>222</sup>

The provisions of punishment for war crimes must be reformed to meet the standards of the ICC. Although Swedish law does not need to conform to the exact level of punishment of the ICC, the punishment issues should be in conformity with other provisions in the Swedish criminal law. The penalty for war crimes should not be lower than penalties for equivalent conduct in time of peace. The prosecutor should not need to resort to other criminal provisions to ensure an adequate punishment.

### **3.3.2.7 Ignorance of the law as a defence**

In the analysis of Swedish legislation on war crimes, we noted the remarkable provision of chapter 22, section 8 of the Penal Code.<sup>223</sup> The provision provides that a person may receive a lesser penalty for war crimes if he or she had no reason to believe that the conduct was illegal. If the circumstances are especially extenuating, the person shall incur no criminal responsibility for the conduct.

The provision is interesting, as it constitutes an exception to the main rule followed by Swedish law, i.e., that ignorance of the law is no defence.<sup>224</sup> It applies to all actors, and not just members of armed forces.<sup>225</sup>

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<sup>221</sup>Brottsbalkskommentar, 2005, *supra* note 105, section 22:27.

<sup>222</sup>*Ibid.*, section 22:22.

<sup>223</sup> See chapter 3.3.2.7.

<sup>224</sup>Brottsbalkskommentar, 2005, *supra* note 105, section 22:35,

<sup>225</sup> *Ibid.*

The drafters of the law argued that customary international law may not be clear and will not always be available in definitive, written format. This would allow a certain degree of insecurity on what constitute the applicable rules in armed conflict, and it would be unreasonable to hold an individual responsible for such conduct.<sup>226</sup> A requisite of this exception is that the accused must genuinely believe that the conduct was permitted.<sup>227</sup> The provision has never been used, and therefore it is difficult to assess how strict is applied.

The reasoning behind the provision does seem to have some inherent logical flaws. The requisites for liability under crimes against international law are that grave breaches of humanitarian law have been committed internationally. It seems unlikely that there would be any doubt what constitutes grave breaches, as they would appear in customary international law for some time prior to being considered established grave breaches. The Swedish soldiers are, as most soldiers from developed countries, trained in humanitarian law. They should be aware of most prohibited conduct, and should be fully aware of what constitute grave breaches.

Apart from the inherent lack of logic in the provision, does this provision have any corresponding principle in the ICC Statute?

The ICC Statute does include a number of ways of excluding criminal responsibility. Most of course relate to intoxication, duress, self-defence etc. Such provisions are also in Swedish law, but due to space considerations, this will not be analysed here.

The ICC Statute does address mistake of law, which is the subject of the Swedish provision. Article 32(2) provides:

"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."

According to Article 33, superior order is no excuse for criminal liability, unless three conditions are met;

1. The person were under legal obligation to obey orders from the Government or the superior
2. The person did not know the order was unlawful and
3. The order was not manifestly unlawful.

It seems the main rule in the ICC is that ignorance of the law is not a defence, and there seem to be two strict exceptions; that the ignorance results in the person not having the required *mens rea*, or that the ignorance

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<sup>226</sup> *Ibid.*

<sup>227</sup> *Ibid.*, section 22:36.

was a result of a superior order in the specific circumstances described above.

The ICC has therefore taken a much stricter approach to the issue of ignorance of law, than Swedish legislation. The Swedish provision is general in nature, allowing anyone exclusion of liability for crimes committed in war if they genuinely believed the conduct was not criminal. Especially with the increased awareness of international criminal law, and the training in humanitarian law soldiers go through, the general exclusion does not seem justified. Apart from being an anomaly in Swedish law, it does not live up to the standards of the ICC. The provision undermines the prohibition of war crimes, and possibly also genocide under Swedish law.

## 3.4 Other issues

### 3.4.1 Examples of prosecution

There are no cases of genocide, crimes against humanity or war crimes, which have been adjudicated by a Swedish court.

Most of the five international chambers of the regional public prosecutors office have kindly responded to my request for information on previous and pending cases. Interesting enough, there seem to have been a number of investigations regarding war crimes, and some that are currently pending.

In one case concerning leaders of a rebel group in Banda Aceh province of Indonesia who were presently in Sweden, the staff of the Swedish prosecutor's office even conducted a mission to Indonesia to investigate the accusations. In the end the case was dismissed as sufficient evidence were not found to tie the leaders of the rebel group to the specific action in Banda Aceh.<sup>228</sup>

In 14 July 2006, Jackie Arklöv, an infamous bank robber and police killer in Sweden, was indicted for gross violations of 'crimes against international law' (war crimes).<sup>229</sup> Arklöv worked as a mercenary in the Balkans during the war<sup>230</sup> and was convicted of war crimes by a Bosnian court to serve 13 years in prison. He only served one year, and was transferred to Sweden through a Red Cross operation. Only in 2004 did Swedish Police take up the case, as new witnesses came forward, after Arklöv had starting serving life

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<sup>228</sup> Beslut, Internationella åklagarkammaren i Stockholm, 2005-04-22, Diarienummer C9-1-691-03

<sup>229</sup> J. Fredén, 'Aklöv åtalad för tortyr', *Dagens Nyheter*, 14 July 2006, available at <http://www.dn.se/DNet/jsp/polopoly.jsp?a=559368>, laste visisted 28 August 2006.

<sup>230</sup> Ansökan om stämning, Internationella åklagaskammaren i Stockholm, 2006-07-14, Diarienummer C09-9-388-04



imprisonment for murdering police.<sup>231</sup> Experts believe this case may be the first case on war crimes to be adjudicated by a Swedish court.<sup>232</sup>

### 3.4.2 Relevant Swedish fora

There are no special military courts in Sweden. Prosecution of genocide and war crimes will go through the ordinary criminal law procedure, starting at a District Court with possibility to be appealed to a Court of Appeal and possibly the Supreme Court.

### 3.4.3 Developments in Swedish law

#### 3.4.3.1 Introduction to SOU 2002:98

Sweden signed the ICC Statute in October 1998. In November 2000, a commission was appointed by the Swedish government to analyse Swedish criminal law as it relates to international criminal law and individual responsibility.<sup>233</sup> The Commission presented their final report in November 2002, including analysis and proposed updates on Swedish criminal law and jurisdiction.

The report includes a proposed new act on international crimes including genocide, crimes against humanity and war crimes, modelled after the ICC Statute. The report also proposes changes to 20 existing laws. This section will include a summary of the proposed changes as it relates to the subject matter of the thesis and the issues discussed above.

The proposed Act on International Crimes target the prohibition of genocide, crimes against humanity and war crimes and is heavily influenced by the ICC Statute. It includes a general provision stating that principles and practice of the ICC shall be recognised, within the framework of Swedish law.<sup>234</sup>

#### 3.4.3.2 Genocide

The definition of genocide in the proposed act is divided in two sections, one describing the *mens rea*<sup>235</sup> and the other the *actus reus*<sup>236</sup>. Altogether, the definition is identical to the definition of the ICC and the Genocide convention.

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<sup>231</sup> J. El Mahdi, 'Arklöv kan åtalas för krigsbrott', *Svenska Dagbladet*, 14 May 2006. available at [http://www.svd.se/dynamiskt/inrikes/did\\_12654186.asp](http://www.svd.se/dynamiskt/inrikes/did_12654186.asp), last visited 28 August 2006.

<sup>232</sup> E-mail correspondence with Prof. Ove Bring.

<sup>233</sup> SOU 2002:98, p. 3, 17.

<sup>234</sup> SOU 2002:98, Proposed act on international crimes, chapter 1, section 2

<sup>235</sup> *Ibid.*, chapter 2, section 1

<sup>236</sup> *Ibid.*, chapter 2, sec 2

This amounts to a significant change to the definition on the current Genocide act, which its special definition of genocide and a conformity to the ICC Statute.

The proposed penalty would be imprisonment from four to ten years or lifetime imprisonment.<sup>237</sup> This is the exact same punishment as the current provision on genocide. The current Swedish Genocide Act is proposed to be abolished.<sup>238</sup>

### 3.4.3.3 Crimes against humanity

Chapter 3 of the proposed act introduces crimes against humanity in Swedish law. Crimes against humanity is currently non-existing in Swedish legislation, and the inclusion of such a provision is therefore a giant leap forward in Swedish legislation.

The definition in the proposed act follows the structure of the ICC Statute with just a few changes to the text. Some of the *actus reus* requirements are more highly defined in the Swedish proposal, for example apartheid is defined in the Swedish text, whereas the ICC Statute only refers to the term apartheid. Likewise, the term enforced disappearance, which stands without further explanation in the ICC Statute, as defined in detail in the Swedish proposal including a requirement of government involvement, or omission, in the disappearance. Another interesting difference is the crimes against humanity through persecution, which has been translated in the Swedish proposal as discrimination, which does not seem to target the same severity of conduct.

The Elements of Crime<sup>239</sup> give some further information to clarify the discrepancies. As regards crimes against humanity by persecution, the elements of crime define one element to be severe deprivation of fundamental rights.<sup>240</sup> The Swedish proposal only requires deprivation of fundamental rights. Based on the ordinary meaning of the text, it seems that the Swedish proposal have set a lower level of *actus reus* requirements to include a wider definition of crimes against humanity. As regards apartheid, the detailed definition of apartheid in the Swedish proposal is identical to the requirements of the elements of Crime.<sup>241</sup> Due to the role of the Elements of Crimes, it is fair to say that the Swedish proposal is identical to the law of the ICC when it comes to crimes against humanity by apartheid. Also when it comes to crimes against humanity of enforced disappearance of persons, the detailed Swedish proposal is a replica of the requirements found in the Elements of Crimes.

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<sup>237</sup> *Ibid.*, chapter 2, section 3

<sup>238</sup> SOU 2002:98, Förslag till lag om upphävande av lagen (1964:169) om straff för folkmord

<sup>239</sup> The Elements of Crimes is an official ICC document which assists the interpretation of the ICC Statute, see Article 9 if the ICC Staute .

<sup>240</sup> Elements of crime, *supra* note 209, p. 122

<sup>241</sup> Elements of Crimes, *supra* note 209, p. 123.

In sum, the Swedish proposal on crimes against humanity matches the standard set by the ICC and actually goes slightly beyond the ICC obligations. The proposed penalty is four to ten years imprisonment or life imprisonment, which matches the standard set for genocide.<sup>242</sup>

#### **3.4.3.4 War crimes**

Chapter four of the proposed act introduces war crimes, and uses the direct translation of the term war crimes, instead of the current term of “crimes against international law”, which is misleading to some extent.

The text of the Swedish proposal is more detailed than the general provision currently in place. Unlike for genocide and crimes against humanity, the proposed provision on war crimes does not follow the structure of the ICC Statute. War Crimes in the ICC Statute is divided in sections of lists of prohibited conduct applicable on either international or non-international armed conflict. In the Swedish proposal, the majority of prohibited conduct is applicable to both international and non-international armed conflict, only a few provisions refer exclusively to international armed conflict. In the current development of warfare, where conflicts are more difficult to place in either category, the decreased emphasis on separation of conflict feels refreshing.

The proposed provision on war crimes are divided in several sections dealing with crimes against persons, crimes against property and civil rights, crimes against protected efforts and emblems, prohibited methods of combat and prohibited means of combat. The text is well structured and clear.

Punishment for war crimes is proposed to be a maximum of six years imprisonment. If the crime is gross, the punishment may be four to ten years or life imprisonment. This is a significantly increased punishment compared to the current punishment of maximum four years imprisonment, or maximum 10 years for gross violation. It also introduced life imprisonment for gross war crimes, which was lacking previously. The current regulation on war crimes in the Penal Code, chapter 22, section 6 is proposed to be abolished.

#### **3.4.3.5 Modes of liability**

The report suggest that individual responsibility for the three crimes in the proposed act should include attempt, preparation and conspiracy and argue that the Swedish standards for these modes of liability cover the range of

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<sup>242</sup> SOU 2002 :98, proposed act on international crimes, chapter 3, article 3

modes of liability in the ICC Statute.<sup>243</sup> Incitement to commit genocide would be covered by existing provisions.<sup>244</sup>

### 3.4.3.6 Misstake of law

The commission suggests to abolish chapter 22, section 8 of the Penal Code, which provides that a mistake of law may lead to less or no punishment for crimes committed during war.<sup>245</sup> The provision referred to the old provision on of crimes against international law, which is also proposed to be abolished.<sup>246</sup> The commission does not find any need for a continuation of acknowledging mistake of law as a defence in the proposed act.<sup>247</sup>

### 3.4.3.7 Timeframe

No further substantial developments have been made with regards to the proposed law since the report was published in 2002.

A member of the commission state that the reason may be the large number of proposed changes in legislation within the report.<sup>248</sup> Apart from analysing international criminal law, the commission also had a mission to update Chapter 2 of the Penal Code, concerning jurisdiction. Such changes naturally need some time to be processed. In January 2006, a person also received the task of analysing rules of statute of imitations. The result will be considered within the current reform. There are still many stages left until the proposed act can be adopted.

The Minister of Justice, have made a statement where he aims at sending the proposed changes to the Council of Legislation in 2007.<sup>249</sup> This is only apart of the process, and even if it is sent to the council, it may still take many years before the proposed act becomes reality.

It should also be noted that Sweden will hold parliamentary elections in September 2006 and the aim of the current minister of justice will not be relevant of the current government fails to be re-elected.

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<sup>243</sup> SOU 2002:98, p. 326

<sup>244</sup> Brottsbalken 16:5, Tryckfrihetsförordningen (1949:105) chapter 7 section 4, point. 10, Yttrandefrihetsgrundlagen (1991:1469) chapter 5 section 1, SOU 2002:98, p. 326.

<sup>245</sup> SOU 2002:98, B, p 34.

<sup>246</sup> *Ibid.*

<sup>247</sup> SOU 2002:98, B. 339.

<sup>248</sup> Phone conversation with Maria Kelt, Ministry of Justice, 23 August 2006.

<sup>249</sup> *Ibid.*,

# **4 Main issues to be addressed**

## **4.1 The obligation to incorporate**

As stated in Chapter 2.2.3, there is no formal obligation to incorporate the ICC Statute into national legislation, but there is an obligation for the State to investigate and prosecute cases of genocide, crimes against humanity and war crimes. If the state does not have the legislation in place to conduct such action, the ICC may find the state unable to investigate or prosecute and pursue investigation itself. The state party must therefore enact corresponding, although not necessarily identical, legislation as the ICC.

Sweden has a long tradition of supporting human rights and humanitarian law internationally, but does not seem to scrutinize itself to the same degree. This may be due to the long tradition of democracy, political stability and prosperity the country have enjoyed, which may result in a deceitful comfort. However fortunate a country may be, it is not isolated in this world. In an increasingly globalised world, perpetrators of international crimes may have considerable international connections, perhaps as a foreigner visits, or taking up residence, in Sweden, or as a Swedish soldier (or mercenary) taking part in an armed conflict abroad.

Sweden has been an active supporter of the ICC, promoting ratifications and criticising those who aim at avoiding ICC jurisdiction. It would be most unfortunate if Sweden itself was found to not have incorporated the ICC standards in its own legislation. It would be a serious embarrassment if a case of genocide, crimes against humanity or war crimes was brought up in Sweden, and Swedish law was found by the ICC to be unable to address the situation. If Sweden is serious about its international obligations, it should address its own problems first.

This section of the thesis will highlight some of the most problematic aspects of Swedish implementation of international criminal law.

## **4.2 Lack of incorporation**

### **4.2.1 Crimes against humanity**

There are large sections of international criminal law, which have not been incorporated into Swedish legislation.

The most obvious example is the lack of incorporation of crimes against humanity in Swedish law.

It may be argued that crimes against humanity has not been defined in any international treaty and international tribunals have used different definitions. However, the core concept has more or less been the same, and crimes against humanity has been used in international criminal law since the Nuremberg Trials. This should have given Sweden plenty of time to introduce a definition of crimes against humanity in its national legislation.

The only option available in Swedish law to address crimes against humanity is to use the ordinary criminal provisions, such as rape or murder, or to use the provision of crimes against international law. This method does not recognise the serious nature of crimes against humanity, or its special requirements or provide a severe enough penalty.

It may be argued that it does not matter what the conduct is called, as long as the criminal action is punished, it is the authors view that there are advantages of labelling a conduct by a specific term, if this enables the recognition of that specific conduct. Hiding crimes against humanity under other labels does not promote the work against ending impunity for such conduct.

## **4.2.2 Genocide**

The second example of lack of incorporation is less obvious, but perhaps more chocking. Although genocide has been introduced in Swedish law through the Genocide act, it has not been implemented well.

Swedish Genocide Act did not adopt the definition of genocide found in the UN Genocide Convention, which is today part of the ICC Statute, despite the fact that this is the most clear and succinct definition of the three crimes, has been used unanimously in many treaties and forms part of customary international law.

The Swedish Genocide Act created a new definition. The definition chosen have a radically different format and is ill-equipped to address the five categories of criminal conduct of the ICC genocide definition. For the wider categories, such as "Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part", ordinary criminal provisions just cannot cover all possible expressions, and Swedish legislation on genocide stands without a corresponding prohibition. Most of the categories of conduct in the international definition of genocide are wide. The focus is on the genocidal intent, rather on the specific conduct by which it is committed. The Swedish Genocide act limits the possible conduct to a very limited amount of criminal acts, and therefore limits the definition of genocide to a level far below the ICC standard.

The Swedish Genocide Act does not even criminalise the most obvious forms of genocide, such as such as rape as a form of either causing bodily or mental harm, or as a method of preventing births. The rape must be

qualified to gross rape before it is acceptable as genocide, under the Swedish act. The fact that Swedish law does not criminalise such conduct as genocide is bewildering. Sexual violence has played a gruesome and devastating role in genocides through the 2000 century, and Sweden does not prohibit it. This is contrary to all logic, especially since Sweden has a relatively good legislation on general sexual violence and has adapted its legislation to be able to better target gender based violence.

The Swedish definition of genocide does also not recognise forced serialisation, forced abortion, assault or gross assault committed with a genocidal intent as genocide. This is contrary to international practice and a severe limitation of the concept of genocide.

In the analysis above, we have found that Sweden only reach the ICC obligations in one out of five categories of conduct for genocide. This is the result of the inadequate Swedish definition of genocide.

The best way to ensure a proper implementation of genocide, not only by the ICC Standards, but by the standard of international law, would be to incorporate the specific definition of the ICC Statute and Genocide Convention. Although it is no required to implement an identical provision as in the ICC Statute, the national provisions must be able to target the same type of crimes. The Swedish Genocide Act is far away from this goal and leaves large parts of conduct to be considered genocide without criminalisation. Sweden is ultimately unable to investigate and prosecute large sections of the crime of genocide.

## **4.3 Inconsistencies in current legislation**

### **4.3.1 Method of implementation**

Genocide, crimes against humanity and war crimes have been implemented in three very different ways in Swedish legislation.

Genocide was incorporated through a separate act, which created a unique definition of genocide, significantly more limited than its international counterparts.

Crimes against humanity was not incorporated at all. Pre-existing general criminal law remains to combat a conduct, for which they were not designed.

War crimes were incorporated in the Penal Code and named crimes against internal law. The provision criminalises all serious violations of international treaties and custom regarding humanitarian law. This is an extremely wide provision, which incorporate all current and future aspects of war crimes. It also may incorporate both crimes against humanity and

genocide, although proof of this is yet to be seen. In contrast to the two previous crimes, the problem of ‘crimes against international law’ is that it is too wide and may threaten the principle of *nullum crimen sine lege*.

The incorporation of the three crimes has not followed any clear strategy. The considerable differences in the various provisions result in practical consequence in for example modes of liability and scale of punishment. The lack of coherency in the implementations of the three crimes makes the legislation difficult to navigate in, and require considerable research to use. The proposed act on international crimes would remedy the shattered legislation as it would incorporate all three crimes in an act and provide the same rules to their application.

### **4.3.2 Modes of liability**

One example of the consequence of the different provisions on international criminal law is that the list of modes of liability differs. In most cases, Swedish principles of modes of liability more or less cover the same range of actors as those in the ICC. In the analysis above, we have seen two interesting exceptions.

Swedish law explicitly provide command responsibility for ‘crimes against international law’ which corresponds to war crimes. This provision has been specifically updated to follow international developments and include command responsibility.

In contrast, the Swedish Genocide Act lacks any explicit provision of command responsibility. Perhaps this is a result of the fact that the act came into force in 1964 and has not changed since then. Command responsibility has developed substantially through the case law of the ad hoc tribunals, which is of a much later date than the Swedish Genocide Act. Ordinary forms of accomplice liability may cover this gap to some extent, but command responsibility enable a more strict form of liability when it comes to superior – subordinate relationship, which ordinary accomplice liability do not reach.

The ICC provides command responsibility as a mode of liability for all three crimes. The lack of command responsibility for genocide in Swedish law constitutes a substantial discrepancy to the ICC Statute.

In return, the Genocide Act includes attempt to commit genocide as a mode of liability where ‘crimes against international law’ does not. In the ICC, attempt is a prescribed mode of liability for both crimes. There is no apparent reasoning behind this. In Swedish law, it needs to be explicitly states for each crime if attempt, and certain other modes of liability, may be used. For ‘crimes of international law’, this is simply not provided, which results in another discrepancy in relation to the ICC Statute.



### 4.3.3 Punishment

The three divergent methods of implementation have also created a substantial discrepancy in punishment of the three crimes in Swedish law. All of them are far away from the level of punishment of the ICC, which is to be expected. However, the punishment should reflect the severity of the crime.

Genocide is punishable by four to ten years imprisonment, or life imprisonment by the Genocide Act. In comparison to other criminal law provision, certain crimes are found to result in the same maximum punishment, whether regarded as genocide or not, as is the case with murder. In this case, the gravity incumbent in the crime of genocide, which has higher requirements of proof, especially of *mens rea*, is not recognised.

When it comes to crimes against humanity, the fact that it is not recognised in Swedish law, result in that the gravity of this crime is not recognised either. Although committing murder on a wide scale may be considered aggravating circumstances, and result in a higher penalty, it would have been desirable to have the special requisites of crimes against humanity spelled out in Swedish law to ensure that such circumstances lead to a heavier penalty and that the concept of crimes against humanity are recognised.

Last but not least, we have war crimes, or the provision on ‘crimes against international law’. Violations of this provision are punishable by a maximum of four years, or maximum of 10 years or life for gross violations. The punishment for the average degree of this crime is astoundingly low, considering it must amount to grave breaches of humanitarian law. Perhaps this is a consequence of the provision being exceptionally wide, covering all grave breaches, found in treaties of customary international law. The Swedish provision of genocide has a much stricter approach, where 10 years or life would be adequate for all violations of the provision.

In comparison to the other of the three crimes, it is clear that war crimes have a very low level of punishment. The imbalance is especially obvious when compared to general criminal provisions. Where killing a person is a war crime, only a maximum of four years imprisonment may be issued. When killing is considered murder by general criminal provisions, ten years of life imprisonment may be issued. Why should a conduct be punished less when considered war crimes? The use of the provision is considerably reduced, if prosecutors will use other provisions to ensure adequate punishment.

Added to this is the remarkable provision accepting ignorance of the law as a defence in some cases of war crimes. This is inconsistent with general Swedish Criminal law as well as international criminal law. This provision further reinforces the perception of armed conflict as an extenuating factor,

which is contrary to the current international strive to end impunity for crimes in armed conflicts.

The punishment for genocide, crimes against humanity and war crimes are not only substantially lower than in the ICC Statute, there are also great inconsistencies between the punishment for the three crimes, and substantial inconsistencies between the same conduct in general criminal law provisions.

## 5 Conclusion

The analysis above has aimed to find whether Sweden is able to investigate and prosecute soldiers stationed abroad for genocide, crimes against humanity and war crimes. This conclusion will bring out the relevant information from the analysis to answer this question.

Firstly, does Sweden have jurisdiction over Swedish soldiers stationed abroad for these crimes?

Swedish law provide far-reaching principles of jurisdiction. In the case of crimes committed abroad, these are limited by the requirement of double criminality and the need for authorisation by the Office of the Prosecutor-General. However, Swedish law have included a number of exceptions to these rules. Swedish soldiers stationed abroad may be investigated and prosecuted for criminal conduct without the requirement of double-criminality and without special authorisation.

Also, the provision of 'crimes against international law' (which includes war crimes, but perhaps also crimes against humanity and genocide) is provided with universal jurisdiction, and therefore is not subject to the requirement of double criminality. The Swedish Genocide Act is also excused from the requirement of double criminality, although through a different line of reasoning.

All in all, this enables Swedish courts to have full jurisdiction over all crimes committed by Swedish soldiers abroad, especially genocide, crimes against humanity and war crimes.

The next question concern whether Sweden has criminalised genocide, crimes against humanity and war crimes in a manner that corresponds to the ICC.

In the case of genocide, Sweden has adopted a specific Genocide Act. The act defines genocide as all crimes in Swedish legislation which are punishable by at least four years and committed with a genocidal intent. With Sweden's moderate scales of punishment, such crimes are few. In contrast the ICC provide five types of conduct which may be considered genocide if perpetrated with the required intent. In comparison between Swedish law and the law of the ICC, it is clear that Swedish legislation only cover one of the five types of crimes adequately.

In fact, there are serious shortcomings in the Swedish legislation on genocide. For example, rape, assault, gross assault, forced sterilisation and forced abortion are among the conduct with cannot be regarded as genocide in Swedish law. These conducts may all be presumed to fall within the definition of genocide in the ICC, as they have been recognised by the

ICTR, ICTR and/or preparatory works to the ICC. This constitutes a flagrant shortcoming of Swedish legislation.

Crimes against humanity is not recognised at all in Swedish legislation. Although the same conduct may fall under the general criminal provisions or possibly the provision of 'crimes against international law', this does not recognise the specific elements of crimes against humanity.

War crimes are criminalised through the provision of 'crimes against international law', an unfortunate title as the provision actually refers to violations of humanitarian law, and not the full scope of international law. In contrast to the implementation of genocide and crimes against humanity, this provision is very wide. It encompasses all violations of international treaties and custom relating to humanitarian law. This may actually include genocide and crimes against humanity, although the Genocide Act should prevail as it is more recent and more specific than 'crimes against international law'. The main problem of this provision is that it is too wide. It is impossible to foresee all possible applications of this provision, especially as it includes customary international law as directly applicable in Swedish courts. This is contrary to the general dualist approach of Swedish law, as well as problematic in terms of the principle of legality.

Perhaps the wide scope of 'crimes against international law' is the reason for the provision of chapter 22, section 8 of the penal code, providing ignorance of the law as a defence in cases of crimes in armed conflict. This provision is contrary to the general principle in Swedish law that ignorance of the law is not defence, as well as contrary to the ICC standards. Although the provision may aim to compensate 'crimes against international law', two wrongs do not make one right.

Genocide, crimes against humanity and war crimes have been implemented in three very different ways in Swedish legislation. Although Swedish law accept all these forms of implementation, it results in an inconsistency in the application of the three crimes which share a common history and application in international law. In this analysis, the inconsistencies have primarily been evidenced in modes of liability and punishment

Although all three crimes generally share the same modes of liability in Swedish law as in the ICC, two apparent differences appear. Firstly, command responsibility is only applicable for the provision of 'crimes against international law' and not on the Genocide Act. Secondly, attempt is only applicable on the Genocide Act and not on 'crimes against international law'.

The scale of punishment for genocide and war crimes are substantially lower in Swedish law than in the ICC, which would be acceptable, if the crimes at least are aligned with general punishment in Swedish legislation. The punishment assigned to the Genocide Act and to 'crimes against international law' is not only very different to each other, it also does not fit

well within the general scale of punishment used in Swedish criminal law, as punishment for genocide or gross violations of 'crimes against international law' are the same or lower than punishment for a murder. This does not recognise the aggravated and specific nature of the crimes in question.

The commission's proposed new act on international crimes would cure most of these inconsistencies and flaws, as it would create a separate act for the three crimes, modelled after the ICC Statute. As the above analysis shows, there is a desperate need for such action. However, since the report was publicised in 2002, no progress has been made.

As a conclusion, the analysis of this thesis has shown that Swedish soldiers stationed abroad may be prosecuted for all crimes in Swedish law without any hindrance in jurisdiction. However, in the case of genocide, crimes against humanity and war crimes, Swedish law has substantial flaws and cannot be said to live up to ICC standards. It is therefore, with great regret, the conclusion of this thesis is that Sweden is unable to prosecute Swedish soldiers stationed abroad (or other subjects) for all aspects of genocide, crimes against humanity and war crimes as defined in international criminal law.

This is deeply disturbing, especially due to Sweden's increased involvement in armed conflict abroad, as well as Sweden's persistent support of the ICC and international criminal law in general. Sweden is under an obligation to implement legislation corresponding to that of the ICC, and has failed to do so yet.

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