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Sweden and the Ratification of  
the Rome Statute  
Certain Legal Aspects

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# Summary

The strive for international justice have existed for a very long time. We have seen attempts been made to achieve this goal by for example the creations of the Tribunals for former Yugoslavia and Rwanda. The idea has been to prosecute and hold war criminals responsible for their actions. The most recent attempt to establish an international legal system was first made in 1989, when the process of establishing a permanent international criminal court was initiated. These efforts lead to the final adoption of the Rome Statute in 1998, and on July 17, 1998 this document was open for signatures.

In order for the Court and the Rome Statute to come into force, it is necessary that sixty states ratify the Statute. On June 28, 2001 Sweden became the thirty-sixth state to ratify the Rome Statute. The Rome Statute is based on the principle of complementarity, which means that the national courts always have jurisdiction over the crimes in the Statute, with the exception that the ICC will act alone when states are either unwilling or unable to act themselves. But even if the State Parties do not have a legal duty to alter their legislation, there still exists a moral duty to do so. This means that the ratification by Sweden raises a lot of questions concerning the national legal system.

It is not clear what changes that have to be done in the Swedish national legal system. My purpose with this essay have been to examine some of the alterations that Sweden might find it necessary to make in order to comply with the Statute. I have chosen to focus on some specific criminal law aspects that I think can become problematic when co-operating with the Court in the future. These matters include the possible needs to change some of the Swedish criminal provisions concerning specific crimes in the national Penal Code. This might be necessary in order to have similar crime definitions as the ones in the crime catalogue of the Rome Statute. I also examine the question of immunities and privileges. This matter of concern has gone through a lot of changes during the last years, and this is important both for the future work of the Court and for the regulations in the national legal system. One aspect of this is how the immunity for a Head of State ought to be regulated. The last issue that is studied here concerns the subject of period of limitations. The regulations concerning this area in the Statute are quite different from the provisions that exist in Swedish law today, and possible changes are discussed.

# Abbreviations

BrB	Brottsbalken - The Swedish Penal Code
Dir	Direktiv - Instructions for the work of a specific committee
Doc	Document
Ds	Departementsserie - The published report of an investigation performed by a specific Ministry
GA	General Assembly
ICC	International Criminal Court
ILC	International Law Commission
NGO	Non-Governmental Organization
NJA	Nytt juridiskt arkiv I - Published cases from the Swedish Supreme Court
Prop.	Proposition - Proposals from the Swedish Government
RCT	The Danish Rehabilitation Centre for Torture Victims
Res	Resolution
RF	Regeringsformen - The Swedish Constitution
rskr	Riksdagens skrivelse - A communication from the Government to the Parliament concerning a specific decision
SOU	Statens offentliga utredningar - A public investigation initiated by the Government
SÖ	Sveriges överenskommelser med främmande makter - The Swedish International Agreements
UN	United Nations
U.N.T.S	United Nations Treaty Series

# 1 Introduction

## 1.1 Background

The Holocaust of the Second World War, the horrific actions in Rwanda and former Yugoslavia, and the recent terror attacks against the United States have all lead to a call for international justice. Attempts have been made in history in order to prosecute and hold war criminals responsible for their actions. The Nuremberg and Tokyo Tribunals tried to judge and sentence the persons responsible for the crimes committed during the Second World War. Later, the two ad hoc War Tribunals for former Yugoslavia and Rwanda were established. The need to have a forum for international crimes has existed for a very long time. The idea would be to have an institution that would bring justice to the world, as well as try to maintain peace. In 1989, the first step was taken towards an international criminal court which would be permanent, and which could create an international legal order where international law could be respected. The continued work lead to the final adoption of the Rome Statute in 1998. On July 17, 1998 this text was open for signatures.<sup>1</sup>

In order for the international criminal court (ICC) and the Rome Statute to come into force, it is necessary that sixty states ratify the Statute. So far the Statute has 139 signatories and 48 ratifications.<sup>2</sup> On June 28, 2001 Sweden became the thirty-sixth state to ratify the Rome Statute.<sup>3</sup>

"Sweden's ratification today combined with Milosevic's transfer to the ICTY reflect the historic and unstoppable advance of international law and justice."<sup>4</sup>

## 1.2 Purpose

Sweden has ratified the Statute, but it is not clear what changes have to be done in the national legal system. The idea is to examine some of the alterations that Sweden might find it necessary to make in order to comply with the Statute. Here it is important to point out the fact that there are no legal obligations for State Parties to change their national legislation in order to comply with the Statute. This is based on one of the most vital principles

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<sup>1</sup> Lee, Roy S., *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results*, 1999, page 14 ff.

<sup>2</sup> The last state to ratify the Statute was Slovenia, which ratified the document on December 31, 2001. Ratification status available at: <<http://www.iccnw.org>>, January 4, 2002.

<sup>3</sup> ICC Press Release, *Sweden Becomes 36<sup>th</sup> State Party to the ICC treaty, Momentum Builds in Efforts to Establish Permanent International Criminal Court*, June 28, 2001.

<sup>4</sup> ICC Press Release, Statement by William R. Pace, Convenor of the 1000-member NGO Coalition for an International Criminal Court, on June 28, 2001.

of the ICC, the principle of complementarity. This principle states that the national courts always have jurisdiction over the crimes in the Statute, but with the exception that the ICC will act alone when the states are either unwilling or unable to act themselves.<sup>5</sup> This could happen if a state does not have an adequate national regulation concerning a specific crime in the Statute. This would lead to the result that the ICC would take over the responsibility of prosecuting the crime. Even if there are no legal obligations for the ratifying states to alter their legislation in order to be consistent with the Statute, there is a moral duty to do so. The State Parties should have an interest in prosecuting crimes to the same extent as the ICC.<sup>6</sup> Because of this it is important to examine the national regulations that would become relevant during the work with the Court, and to see if any changes need to be done.

One of my intentions with this essay is to see which inspirations effected the work of the Statute, and also too compare the new solutions with earlier attempts. My main intention is to examine the Swedish national legislation in the light of the Rome Statute. This will be done from both a criminal law perspective, as well as a human rights perspective. I will try to identify some problems that Sweden might face in the future work with the ICC, based on the national legislation that exist today. I will also try to find solutions to the alleged problems, either in the way of altering the laws or by different interpretations of the existing regulations.

### 1.3 Delimitations

Because of the vast area that can be included in this topic, I have chosen to limit myself to certain areas of concern. My basic starting point was to begin to examine how the Swedish criminal legislation complied with the Statute, and if any alterations would be needed here. After a period of time, I realised that also this limited matter was too broad to be correctly studied in this thesis. I then started to ponder on which issues that would be most interesting to cover, and how to find a consistent and logical connection between the chosen topics.

The issues that I chose to cover include the new crime catalogue in the Rome Statute, the question of the period of limitation and also immunities and privileges. These matters have a close linkage because of their relevant position in the world today, and also because they rise important questions when comparing it to the national Swedish legislation. I could have chosen to examine a number of other topics, for example the position of victims and punishments within the Court. I chose not to, because I think that it is

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<sup>5</sup> The International Criminal Court, Fact Sheet, Public Information, *Setting the Record Straight, The International Criminal Court*, page 2, available at: <http://www.un.org/News/facts/iccfact.htm> >.

<sup>6</sup> Ds 2001:3, *Romstadgan för Internationella brottmålsdomstolen*, page 8. This document will be explained further on, see chapter 4.1.



necessary to have a limited question at issue, and not try to examine all questions that can be included in the topic. I limited my essay to three big fields, which all are interesting from different perspectives.

The crime catalogue might be the most important aspect of the Statute, and it is interesting to compare it with the Swedish criminal provisions. I decided to only briefly cover the regulation of the crimes in the Statute, and instead concentrate and focus on the Swedish aspect of this issue. The period of limitation has a strong history in the Swedish legal system, and the regulation in the Rome Statute differs from the Swedish view. Once again, I decided to focus on the Swedish perspective rather than the regulation in the Statute, and therefore the section concerning the period of limitation in the Rome Statute is quite brief. The immunity question is of course vital when you look at the crimes within the jurisdiction of the Court, but the main idea here is to see how recent developments has changed its scope. This essay has generally focused on the Swedish legislation, and not the precise formulation in the Rome Statute. I wanted to see if any changes were needed, and if so, how they best could be done.

## 1.4 Method and Material

I have basically used two methods during my work on this essay, the descriptive method and the analytical method. In the descriptive part I have gone over a number of different materials, with the intent to form a background of the existing regulation in this area. I have looked through some of the preparatory work of the Rome Statute in order to find the reasoning behind the different articles. I have also, in the sections concerning the new crime catalogue, tried to compare it with earlier attempts and efforts to formulate distinct crime definitions. The intention was to describe how the specific articles in the Rome Statute were created, together with a description of their origins and influences. This would then become the basis for a comparison with the Swedish national legislation. This relationship would as a result later lead to the conclusion if any specific alterations are needed or not.

The materials used in this work have been a variety of literatures. The different kinds of material have mainly depended on the purpose of the chapters. In chapter two concerning early attempts to establish criminal procedures, I have primarily used Yves Beigbeders book *Judging War Criminals*<sup>7</sup>, which gives a good view over how war criminals have been brought to justice over time. In chapter three I have basically used books that give a broad picture of the work on creating the Court and the Rome Statute. Chapter four, which have to do with Sweden and the Rome Statute in quite general terms, are to a large extent based on different types of Swedish official materials. I have here tried to examine the material from a critical

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<sup>7</sup> Beigbeder, Yves, *Judging War Criminals*, The Politics of International Justice, 1999.

approach with the intent to see if the suggestions in the documents are valid or not according to my point of view.

Chapters five through six relate to the crime catalogue in the Rome Statute, with a comparison with similar Swedish provisions. Here I have used some of the preparatory work of the drafters behind the Rome Statute, together with other official materials from the ICC. Another source has been the continued dialogue with Nils Petter Ekdahl, Secretary of the Swedish working group concerning possible alterations of the Swedish criminal law. He has helped me with their ideas and thoughts, and also given me suggestions on helpful literature.

In chapter seven, which concern the question of immunities and privileges in both the Rome Statute and national law, I have used a number of news articles because of the current interest of the issue, together with a fast moving development. In chapter eight I examined how the Swedish legislation on the topic of the period of limitation can compare with the regulations of this in the Statute. Here I have largely used Swedish legal textbooks concerning the area, and described and analysed if any changes could be possible to make.

The last chapter, number nine, is purely of an analytical character. Here I summarize and discuss my conclusions from the previous chapters. In this final chapter I try to examine if, and to what extent, the Swedish law is in need for any alterations because of the ratification of the Rome Statute. I have tried to use a criminal law perspective, where I look at the actual and existing provisions, and see if it is necessary to change it in order to comply with the Statute. On the other hand, I have also used an international human rights perspective where I strive to find national solutions that will guarantee and benefit the human rights aspect of the work of the ICC.

## **1.5 Outline**

The first initial chapters are quite brief and the intention here is to give a background to the areas of concern. Chapter two deals with for example the Nuremberg Tribunal and the War Tribunals of former Yugoslavia and Rwanda. The idea is here to see how the need for an international criminal court has grown and evolved over time, and to notice why it was possible to create the ICC at this point, something that becomes clearer in chapter three. Here we can find a description of the efforts to create the Rome Statute, the frame for the work of the ICC. Chapter four is also quite brief. It gives a short presentation of the Swedish ratification of the Rome Statute.

One of the most relevant and significant issues in the Statute is the formulation of the crime catalogue. Old crimes have been included, as well as new formulations of existing acts. This issue is discussed in chapter five, where the different crimes is presented with some background information,

as well as the reasoning for the inclusion in the Statute. The following chapter deals with the regulation of these crimes in Swedish national law today. Here I try to examine if the national law is consistent as it is, or if any alterations are needed.

Chapter seven concerns the immunity aspect, both the provisions in the Statute and the regulations in Swedish law. Once again the question is if any changes ought to be done. In chapter eight I describe how the provisions concerning the period of limitation in the Rome Statute differs from Swedish law. Finally, I give my views and thoughts on the future of the Swedish national legislation concerning all of these areas. Are any changes needed, and if so, how should they be done in order to get the best result?

# 2 Early Attempts to Establish International Criminal Procedures

## 2.1 The Nuremberg and Tokyo Trials

The idea of an international court with criminal jurisdiction has been a dream for centuries. This notion was first realised after the Second World War when the Nuremberg Tribunal was created. In this process a number of politicians and military officers were judged and sentenced for their involvement in the war. The Nuremberg Charter was an international agreement, which defined the crimes, which the Tribunal had jurisdiction over. These were the crimes against humanity, war crimes and crimes against the peace.<sup>8</sup>

The purpose of the establishment was to hold the leaders of Germany responsible for their actions during the war. The Tribunal only judged German criminals and this was the result of the legislative powers of the victorious nations.<sup>9</sup> The decision to judge German war criminals was in many ways a success. The winning countries got to punish the war criminals and the creation of the tribunal extended the scope of international humanitarian law by adding international criminal law to it. It can also be said to have brought some morality into international law. But the Nuremberg process was also very much criticised. It was filled with a lot of flaws, such as vague charges. The whole process was highly political and the discretionary powers of the judges were wide. Even so, it was an important step in the process of judging war criminals.<sup>10</sup>

In 1945, General Douglas MacArthur stated that a new military tribunal was to be established. This was the beginning of the Tokyo Tribunal. The purpose of this ad hoc court was to judge and sentence war criminals from the Far East, using the same crime definitions as the Nuremberg Tribunal applied.<sup>11</sup> The Tokyo Tribunal also had the same goal as the Nuremberg trials; to assign individual responsibility for the crimes committed during the war.<sup>12</sup>

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<sup>8</sup> Beigbeder, page 27.

<sup>9</sup> Beigbeder, page 39.

<sup>10</sup> Beigbeder, page 48.

<sup>11</sup> Ferencz, Benjamin B., *An International Criminal Court: A step toward world peace- A Documentary History and Analysis*, Volume I- Half a century of hope, 1980, page 77 f.

<sup>12</sup> Beigbeder, page 55.

Both these Tribunals were later exposed to a large amount of criticism. They were said to have many serious procedural faults, along with an application of *ex post facto*<sup>13</sup> international law regarding the crimes against peace and humanity. Although these procedures were not in any way perfect, they helped to recognise the individual criminal responsibility for war criminals.<sup>14</sup>

## 2.2 The War Tribunals for former Yugoslavia and Rwanda

After the end of the Second World War a lot of attempts were made in order to establish new courts and tribunals like Nuremberg and Tokyo. This was for mostly made on the national level.<sup>15</sup> A big step towards an international criminal court came with the establishment of the International Tribunal for Crimes in the Former Yugoslavia<sup>16</sup>. In 1993, the Security Council decided to set up the Tribunal as a response to the serious violations of humanitarian law, which were committed in former Yugoslavia since 1991. This was not a permanent court, but only an ad hoc-tribunal, which was established under Chapter VII of the Charter of the United Nations<sup>17</sup> in order to prosecute persons responsible for these serious violations.<sup>18</sup> For the first time since the Second World War, a tribunal was created that consisted of highly qualified judges, which could pass judgements on persons that had committed a number of serious crimes. This was a huge success, because the Yugoslavia Tribunal did not have the same flaws as the Tokyo or the Nuremberg Tribunals have had. The Tribunal lives up to the international standards of due process and the principle of fair trial.<sup>19</sup> The Tribunal has been in use for quite some time now and we can see that it has strengthened international humanitarian law, but as always nothing is perfect. Only a small number of

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<sup>13</sup> This means "after the fact". The situation occurs if, after an act take place, a law is passed that have retrospective effects. This will change the legal situation and also the legal consequences of the act that occurred. An "ex post facto law" is therefore a law, which inflict a punishment on a person for an act, which was not criminalized when it happened, but is a criminal offence after the passing of the new law. Black, Henry Campbell, *Black's Law Dictionary, with pronunciations*, 1990, page 580.

<sup>14</sup> Beigbeder, page 73 ff.

<sup>15</sup> Beigbeder, page 76. There were a few efforts made to establish international courts, for example the International People's Tribunals. One of these was the tribunal from 1992, which was a result of the Persian Gulf conflict. Beigbeder, page 137.

<sup>16</sup> The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, which was established pursuant to the Security Council Resolution 827, May 25, 1993, S/RES/827 (1993). Ackerman, John E., and O'Sullivan, Eugene, *Practice and Procedure of the International Criminal Tribunal for the Former Yugoslavia, With Selected Materials from the International Criminal Tribunal for Rwanda*, 2000, page 1.

<sup>17</sup> Charter of the United Nations, signed at San Francisco on June 26, 1945, and entered into force on October 24, 1945, [henceforth called the UNC].

<sup>18</sup> Beigbeder, page 146 ff.

<sup>19</sup> Morris, Virginia and Scharf, Michael P., *An Insider's Guide to The International Criminal Tribunal for The Former Yugoslavia, A Documentary History and Analysis*, Volume I, 1995, page 331 f.

persons have been brought to justice, and many of the major and high-ranking persons have been able to escape the jurisdiction of the Tribunal.<sup>20</sup>

The next step was made when the International Criminal Tribunal for Rwanda<sup>21</sup> was created in 1994. This was once again a huge milestone in the development of international criminal law. The possibility that states could bring persons accused of crimes under international law before an international tribunal is a recognised phenomenon in international law. This is preferred to bringing them to national courts. The Rwanda Tribunal is, as the Yugoslavian Tribunal, only on an ad hoc-basis and therefore questions could be raised about its independence and impartiality. The Tribunal has despite this criticism been quite successful, but some problems, like the ones in the Yugoslavian Tribunal, has arisen. One important aspect of the two Tribunals is that we clearly see the need for a permanent international criminal court. We have learned from the mistakes made and can by that prevent future failures.<sup>22</sup>

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<sup>20</sup> Beigbeder, page 167.

<sup>21</sup> The International Tribunal for the Prosecution of Persons Responsible for Genocide or Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, Between 1 January 1994 and 31 December 1994 ( Res. 995).

<sup>22</sup> Morris, Virginia and Scharf, Michael P., *The International Criminal Tribunal for Rwanda*, Volume I, 1998, page 75 ff.

# 3 The Making of the International Criminal Court

## 3.1 Background

History has told us that there exists a need for establishing a permanent international criminal court. The existence of such an institution would serve as to bring justice to the world and to preserve and maintain peace. It is important to achieve these goals, and to make sure that the Court is made effective. This will to a large extent be dependent on the parties to the court.<sup>23</sup>

An important step towards the creation of the ICC was made in 1989, when the General Assembly held a special session on the topic of drug trafficking. In this session the question of an international criminal court appeared. The result of this meeting was the request from the General Assembly that the International Law Commission (ILC) would prepare a report on the creation of an international criminal court concerning the crimes of drug trafficking. At the same time, a committee of experts, consisted of NGOs, was preparing a draft statute. The difference was now that this draft suggested an international court, which would have jurisdiction over all international crimes. This text was finalised in June 1990, and was then submitted to the Eighth United Nations Congress on Crime Prevention and the Treatment of Offenders. Here the need for a universal court was recognised, and the ILC received a new mandate. This time the goal was to find a way to establish an international criminal court with a wide jurisdiction, not only for drug trafficking.<sup>24</sup>

The idea was now to let the ILC work out a proposal for the establishment of an international criminal court. The ILC presented in 1992 a preliminary report where it discussed different aspects of the proposed court. A Draft Statute followed up the report in 1993. The General Assembly then passed on this draft to governments in order to receive comments. The result of these comments was the revision of the proposed draft, and a final text was submitted in 1994.<sup>25</sup>

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<sup>23</sup> Bassiouni, M. Cherif, *The Statute of the International Criminal Court, A Documentary History*, 1998, page 1 f, [henceforth called Bassiouni (1998)].

<sup>24</sup> Bassiouni (1998), page 16 f.

<sup>25</sup> Nanda, Ved P., The Establishment of a Permanent International Criminal Court: Challenges Ahead, in *Human Rights Quarterly*, Number 20.2, May 1998, page 415.

## 3.2 The Creation of the Rome Statute

The Draft Statute consisted of sixty articles, and stated that the Court would not be created by the Security Council, but by an international treaty. As a result of this the Court would not be a part of the United Nations, but a relationship should be established by a special agreement. One of the most important questions was what jurisdiction the Court would have. The Draft Statute stated that the Court would only have jurisdiction over the most serious crimes, which would be of concern to the international community as a whole. These crimes were genocide, aggression, serious violations of the laws and customs in armed conflict, crimes against humanity and exceptional crimes of international concern.<sup>26</sup>

The next step was to establish an ad hoc Committee. The task of the Committee was to discuss the 1994 draft, and to consider the issues involved with the creation of the Court. At the end of 1995, the Committee delivered their report. This report became the basis for the making of the 1996 Preparatory Committee on the Establishment of an International Criminal Court. This new Committee continued the work of the ILC, and in 1996 the Preparatory Committee presented their report, which was submitted to the General Assembly. The mandate of the Committee was extended in order to make it possible for the Committee to produce a proposal for a convention. During this time, a number of governments started to change their positions on certain topics. The effect of these revisions was that the General Assembly decided in December 1997 to summon a United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. This meeting took place in Rome, Italy, from June 15 to July 17, 1998. The aim was to come up with a convention regarding the establishment of an international criminal court. The Preparatory Committee therefore had to construct such a document before the meeting was going to be held.<sup>27</sup>

In the light of the two ad hoc criminal tribunals that had been set up for former Yugoslavia and Rwanda, it seemed like the world was now ready to agree on the creation of a permanent international criminal court. A Draft Statute was finally completed on April 3, 1998 during the last session of the Preparatory Committee.<sup>28</sup> There was very little time for the officials to examine this text, but some new amendments were suggested. A number of proposals were submitted, but the parties finally agreed upon the adoption of the convention, the Rome Statute. The text was open for signatures on July 17, 1998.<sup>29</sup>

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<sup>26</sup> Beigbeder, 188 f.

<sup>27</sup> Bassiouni (1998), page 17 f.

<sup>28</sup> Bassiouni (1998), page 26.

<sup>29</sup> Lee, page 14 ff.



# 4 Sweden and the Rome Statute

## 4.1 The Ratification Process

When the idea of establishing a permanent international criminal court was introduced in the late 1980s, with the intent to create an international legal order where international law would be respected to a greater extent than before, the country of Sweden was very positive. Sweden has for a long time been involved in the progress of international humanitarian law and human rights, and soon became actively engaged in the work of drafting the Rome Statute. Because of the commitment to the work of the establishment of the ICC, Sweden has, together with other industrialised countries, found it necessary to ratify the Statute as soon as possible.<sup>30</sup>

The first attempt towards this goal was made in October 7, 1998, when Sweden signed the Rome Statute. This was the initial action in order to be able to ratify the text. Three years later, the Department of Justice published their report<sup>31</sup> on the best way to ratify the Statute. It was suggested that the text ought to be ratified, in connection with a statement that prison sentences that have been decided by the ICC should be able to be carried out in Sweden. This memorandum also contained a number of suggestions on what changes in the Swedish national legislation that might be necessary to make in order to comply with the Rome statute.<sup>32</sup>

One question might of course be if it is necessary at all to alter any of the Swedish legal provisions. One of the main principles in the Rome Statute is the principle of complementarity. This means that the national courts always have jurisdiction, and that the ICC will only act when national courts are either unwilling or unable to act.<sup>33</sup> There is no legal obligation for the ratifying states to alter their legislation in order to comply with the Statute, but even so there is a moral duty to do so. The states themselves should also have an interest to be able to prosecute crimes to the same extent as the permanent court. Because of this the Swedish government found it necessary to consider in what way the national legislation needed to be transformed.<sup>34</sup> After this memorandum, the Swedish government prepared a bill<sup>35</sup> for the Parliament, which suggested that Sweden should ratify the Statute. The

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<sup>30</sup> Ds 2001:3, page 119 f.

<sup>31</sup> This report was Ds 2001:3, Romstadgan för Internationella brottmålsdomstolen, which was published by the Government Office and the Department of Justice in 2001.

<sup>32</sup> Ds 2001:3, page 7.

<sup>33</sup> The International Criminal Court, Fact Sheet, page 2.

<sup>34</sup> Ds 2001:3, page 8.

<sup>35</sup> Regeringens Proposition, 2000/01:122, *Sveriges tillträde till Romstadgan för Internationella brottmålsdomstolen*, April 11, 2001.

question of implementation and legislative changes was to be proposed later in a special proposal.<sup>36</sup> This would be presented to the Legislative Council, institutions, NGOs and different national authorities in order to receive comments. The deadline for these comments was due on April 25, 2001. Besides this proposal on implementing legislation, a special working group<sup>37</sup> was formed with the task to review the Swedish penal law regarding international crimes and other issues concerning the Swedish criminal law in the light of the Rome Statute.<sup>38</sup>

The Standing Committee of Justice later considered the bill in the Parliament.<sup>39</sup> The result was that the Committee decided to second the proposal from the Government. The outcome of these considerations was the decision by the Parliament that Sweden should ratify the Rome Statute.<sup>40</sup> On June 28, 2001 Sweden became the thirty-sixth state to ratify the Statute.<sup>41</sup>

In Swedish law today we have a law that concerns the two Tribunals of former Yugoslavia and Rwanda.<sup>42</sup> The two Statutes for these Tribunals contain obligations for states that are similar to the obligations in the Rome Statute. This means that there exists an obligation for Sweden to for example surrender criminals to the Tribunals. When this Tribunal law was passed there were no changes done in the Constitution.<sup>43</sup> One thing that differs from the obligations under the Tribunal law and the future responsibilities under the Rome Statute is that the Tribunals has a precedence over the national regulations, as where the Rome Statute is only a complement to the national legal system.<sup>44</sup>

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<sup>36</sup> This government bill has not been presented at the time of this writing.

<sup>37</sup> This working group, headed by Supreme Court Justice Dag Victor, should submit their report to Parliament no later than October 31, 2002. The group was appointed under Committee Directive Dir. 2000:76, and is called "Utredningen om straffansvar för brott mot mänskligheten och andra internationella brott enligt folkkräkten" (Ju 2000:07).

<sup>38</sup> Country-by-Country Ratification Status Report, Sweden, available at: <http://www.iccnw.org/html/country.html#s>.

<sup>39</sup> Justitiekommitténs betänkande, 2000/01:JuU30, *Internationella brottmålsdomstolen*, May 31, 2001. The Standing Committee of Constitution also gave the Standing Committee of Justice a statement concerning the government bill, Konstitutionsutskottets yttrande, 2000/01:KU13y, *Sveriges tillträde till Romstadgan för Internationella brottmålsdomstolen*, May 31, 2001. The Standing Committee of Constitution decided to support the ratification of the Rome Statute.

<sup>40</sup> There were actually three decisions taken by the Parliament concerning the ratification of the Statute. The first one concerned the actual ratification, and the second decision related to the Department of Justice's role in the Court's future requests according to Article 87(1) of the Statute. The last decision regarded the language to be used according to Article 87(2) of the Statute. All of these proposals were approved. The decisions were taken on June 14, 2001. Protocol numbers 2000/01:124-125.

<sup>41</sup> Country-by-Country Ratification Status Report, Sweden.

<sup>42</sup> Lag (1994:569) om Sveriges samarbete med de internationella tribunalerna för brott mot internationell humanitär rätt, [henceforth called the Tribunal Law]. This law came into force on July 1, 1994.

<sup>43</sup> See Prop. 1993/94:142, and Prop. 1995/96:48.

<sup>44</sup> Prop. 2000/01:122, page 85 f.

One big issue has been whether or not any changes have to be done in the Swedish legislation. During the ratification process one problem concerned the relation between the Rome Statute and the Swedish Constitution, Regeringsformen (RF)<sup>45</sup>. A ratification involves a number of obligations, and article 86 of the Rome Statute says that State Parties shall fully cooperate with the Court. Article 88 of the Statute also says that the states should ensure that they have available procedures in their national laws in order to fulfil this co-operation obligation. This means that it is necessary to have certain legislation concerning for example surrender of persons to the Court. RF 10:5, which bring up the question if it is possible to transfer some of the rights to decide and the administration of justice to the Court, is also important in this context.<sup>46</sup> A new law<sup>47</sup> will also be passed which concerns the co-operation with the Court. This law will contain all sorts of aspects that will be relevant when working with the Court.<sup>48</sup> I have neither the intention nor the space to examine these questions in detail, but I can present the final result from the Swedish government, which stated that it was possible to ratify the Rome Statute without any alterations in the Constitution. It is possible that certain changes might be necessary in the future, but as the situation is today the Parliament approved the ratification of the Rome Statute.<sup>49</sup>

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<sup>45</sup> Regeringsformen (1974:152), [henceforth called RF].

<sup>46</sup> Prop. 2000/01:122, page 84 f.

<sup>47</sup> Lag om samarbete med Internationella brottmålsdomstolen.

<sup>48</sup> Ds 2001:3, page 130 f.

<sup>49</sup> Prop. 2000/01:122, page 82.

# 5 The Crime Catalogue in the Rome Statute

## 5.1 Background

In the Draft Statute for an International Criminal Court<sup>50</sup> there were two types of crimes that the Court ought to have jurisdiction over. The first category consisted of the so-called “core crimes”, which were the crime of genocide, the crime of aggression, war crimes and crimes against humanity. The second category were a number of crimes that had been established under different treaties and also included grave breaches of the 1949 Geneva Conventions and the 1977 Additional Protocol I<sup>51</sup>. These crimes became known as “treaty crimes”. It was clear from the beginning that the majority found it best to limit the jurisdiction of the Court to the “core crimes”. The problem was that it was not quite clear what was meant by these “core crimes”, because it was possible to include some of the “treaty crimes” in this category.<sup>52</sup>

The result was that the Court was to have jurisdiction only over the most serious crimes that concerned the international community as a whole.<sup>53</sup> It also laid down the principle of complementarity, which meant that the Court would only exercise its jurisdiction when states are unwilling or unable to exercise their national jurisdiction.<sup>54</sup>

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<sup>50</sup> *Draft Statute for an International Criminal Court*, Report of the International Law Commission on the work of its forty-sixth session, 2 May-22 July 1994, Chapter II.B.I., United Nations General Assembly Official Records, Forty-ninth Session, Supplement No. 10, A/49/10 (1994), [henceforth called the Draft Statute].

<sup>51</sup> Geneva Conventions adopted on August 12, 1949 and Additional Protocols adopted on June 8, 1977. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked, 75 U.N.T.S 31, [henceforth called Geneva Convention I], Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S 85, [henceforth called Geneva Convention II], Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S 135, [henceforth called Geneva Convention III], Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S 285, [henceforth called Geneva Convention IV], Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts ( Protocol I) and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts ( Protocol II).

<sup>52</sup> Von Hebel, Herman and Robinson, Darryl, Crimes within the Jurisdiction of the Court, in Lee, Roy S., *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results*, 1999, page 80 f.

<sup>53</sup> Article 5.1 in the Rome Statute states that the jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole.

<sup>54</sup> United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Background Information, *Crimes within the Court's Jurisdiction*, page 1, available at: <<http://www.un.org/icc/crimes.htm>>, 2001-02-08.

The reasoning for including only the most serious crimes was the need to get universal acceptance of the Court. The goal was to make it possible for countries to ratify the Statute as soon as possible in order to establish the Court in reality, and this could not be done if the crimes in the Statute were controversial. Another reason was that the founders were afraid to overburden the Court if more crimes were to be included.<sup>55</sup> The idea was that the Court should only handle really serious cases and leave the rest to the national courts. The inclusion of these “core crimes” would be the solution.

During the draft of the Rome Statute there was a discussion of the inclusion of other categories of crimes in the Statute, as we have seen above. A considerable number were interested in the insertion of terrorism and drug crimes. One problem was here that it was not possible to agree upon a definition of the term terrorism, and some countries did not want the Court to expand its resources to drug offences. A resolution was passed which stated that the State Parties ought to consider the inclusion of these crimes at a later stage.<sup>56</sup>

The recent terror attacks against the US have given raise to a new discussion concerning the inclusion of terror crimes in the Statute. It would be wise to include these crimes in the jurisdiction of the Court, because it could be more neutral and effective than a court in the country where the terror acts were committed.<sup>57</sup> The attacks also updated the need for the US to ratify the Statute, an action that has been strongly reluctant in the nation. The fact that USA, the most powerful nation in the world, was unable to prevent these actions clearly show the need for enhanced co-operation in the international community in outlawing, investigating and prosecuting these serious crimes. The ICC will help to strengthen the system of international criminal justice. Even if the Statute does not cover terrorism in the crime catalogue, it could be possible to prosecute these acts as crimes against humanity.<sup>58</sup>

Crimes of sexual violence, for example rape and sexual slavery, are included as crimes against humanity if the crimes are committed as part of a widespread or systematic attack directed against any civilian population. These crimes can also be considered as war crimes, if they are committed in international or internal armed conflicts.<sup>59</sup> Crimes against the safety of United Nations and associated personnel have also become a big area of concern. Today we see an increasing amount of cases where peacekeepers and humanitarian workers face threats and are exposed to different types of

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<sup>55</sup> United Nations Conference, page 1.

<sup>56</sup> The International Criminal Court, Fact Sheet, page 1 f.

<sup>57</sup> *Agence France Presse*, Finnish justice minister wants UN court to try terrorists, September 20, 2001.

<sup>58</sup> *Media Statement*, Pace, William R., and Stoyles, Jayne, U.S. Tragedy Highlights Need for an International Criminal Court, July 2001.

<sup>59</sup> The International Criminal Court, Fact Sheet, page 2.

crimes. One question was if these crimes should be part of the ICC's jurisdiction. On December 9, 1994, the General Assembly adopted a convention<sup>60</sup> on this topic. It set up the rights and duties of the State Parties, and announced individual responsibility for attacks against these personnel. The problem is that the convention does not give any guarantees that the perpetrators will be brought to justice. A suggestion has been made to include these crimes to the jurisdiction of the ICC, but nothing has been done to realise this so far.<sup>61</sup>

One thing that the State Parties agreed on was that the crimes within the jurisdiction of the Court should be defined with clarity, precision and in accordance with the principle of *nullum crimen sine lege* (legality). In order to live up to the requirements of clarity and certainty, the concept of Elements of Crimes was brought up. It was not possible to decide on a specific "checklist", so the compromise led to the adoption of article 9 in the Rome Statute.<sup>62</sup> This meant that these Elements of Crimes, which should help the Court in applying and interpreting the crimes in the catalogue, ought to be adopted in the future. The elements should consist of objective criteria for each crime, in addition with subjective criteria, which differs from the general requirement in article 30.<sup>63</sup>

The crime of genocide, war crimes, crimes against humanity and crimes of aggression, are the crimes that are included in the Rome Statute. These traditional international law crimes have one thing in common. The definitions of these crimes are only applicable according to the Rome Statute, which means that they are valid before the ICC. The meaning of this statement is quite important. The definition of the crimes in the Rome Statute is not necessarily the same as customary law in the same area or the same as definitions in national law.<sup>64</sup>

There have been many attempts to establish an international forum where it could be possible to persecute criminals. I believe that one of the most interesting aspects of this work has been the formulation of the crime catalogue in the Rome Statute. In the Rome Statute article 5, we can find the crimes that the parties agreed on. The crimes are genocide, the crime of aggression, war crimes and crimes against humanity. The idea is here to see why it was these crimes, which were included in the Statute, with focus on the crime of genocide, war crimes and crimes against humanity. I have decided to examine the crime of aggression in a somewhat brief section, because of its undecided expression today. Another issue is to study how these crimes are defined, and to examine if they differ from earlier crime catalogues, for example the Statutes of the War Tribunals of former

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<sup>60</sup> Convention on the Safety of United Nations and Associated Personnel, A/RES/49/59, December 9, 1994.

<sup>61</sup> United Nations Conference, page 7.

<sup>62</sup> Von Hebel and Robinson, page 87.

<sup>63</sup> Prop. 2000/01:122, page 29.

<sup>64</sup> Prop. 2000/01:122, page 20.

Yugoslavia and Rwanda. The Swedish aspect will be examined in the following chapter, where the question is if the Swedish legislation must change in order to comply with the new crime catalogue in the Rome Statute or not. Is the Swedish listing of these crimes adequate as they are today, or is it necessary to make new arrangements?

## 5.2 The Crime of Aggression

Article 5.2 of the Rome Statute states:

“The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.”

A big problem concerning the inclusion of the crime of aggression in the Rome Statute has been to work out the role of the Security Council regarding this offence. According to Article 39 of the UNC, the Security Council shall determine the existence of an act of aggression. It has been hard to find a balance between the responsibility of the Security Council and the judicial independence of the Court.<sup>65</sup> The fear is also that the inclusion will lead to political battles, where charges of aggression will be made between rival states.<sup>66</sup> Even so, the main problem has probably been to find an acceptable definition of the crime. It is important that the definition is precise, so that individuals will know which acts are prohibited by law. On the other hand, the definition must be wide enough in order to cover a number of acts that might occur in the future, and that may not have been thought of earlier.<sup>67</sup>

As a result of this debate, the Rome Statute now states that the Court can prosecute the crime of aggression when the State Parties have agreed on a definition and decided on certain conditions under which the Court will be able to exercise its jurisdiction. There is also a requirement which state that the future agreement of the states must be consistent with the UNC, and this means that the Security Council will have to give its prior determination of an act of aggression.<sup>68</sup>

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<sup>65</sup> United Nations Conference, page 2.

<sup>66</sup> Nanda, page 419.

<sup>67</sup> United Nations Conference, page 3.

<sup>68</sup> The International Criminal Court, Fact Sheet, page 1 f.

## 5.3 The Crime of Genocide

### 5.3.1 Background

The term genocide is relatively new and consists of the combination of the Greek word *genos*, which means race or tribe, and the Latin word *cide*, which means killing. Genocide was first intended to describe the Nazi actions in Europe, but the crime of genocide is an offence that has been committed in all times.<sup>69</sup> Earlier in history, attempts were made in order to protect individuals and groups from the abuse of states. One example is the Martens Clause of the preamble to the Hague Convention of 1907. It manifested the international community's recognition of the fact that principles of humanity were evolving, and that they were meant to protect individuals from state abuse.<sup>70</sup>

The results of the Second World War, with the Nazi extermination of Jews and other groups, led to the adoption of the Charter of the Nuremberg Tribunal. Here we can find the first formal definition and punishment of crimes against humanity.<sup>71</sup> It said that persecutions on political, racial or religious grounds were part of the crimes against humanity. It also stated the principle of individual criminal responsibility for these kinds of crimes.<sup>72</sup> These laws of humanity now became more and more connected with the unclear concept of genocide.<sup>73</sup>

### 5.3.2 The Genocide Convention

In 1946, the General Assembly supported the principles of international law that had been recognised by the Charter and Judgements of the Nuremberg Tribunal, the so-called Nuremberg principles. Two years later, in 1948, the United Nations General Assembly decided to adopt the Convention on the Prevention and Punishment of the Crime of Genocide<sup>74</sup>.<sup>75</sup> When drafting the Genocide Convention, the experience from the Holocaust was an important influence. In article 2 of the Genocide Convention, the crime of genocide is defined and we can find five central elements; motive and intent, the extent of destruction, premeditation and the human groups protected.<sup>76</sup>

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<sup>69</sup> United Nations Conference, page 1.

<sup>70</sup> Lippman, Matthew, Genocide, in Bassiouni, M. Cherif, *International Criminal Law*, Volume I, Crimes, 1999, page 589.

<sup>71</sup> Lippman, page 591.

<sup>72</sup> United Nations Conference, page 1.

<sup>73</sup> Lippman, page 591.

<sup>74</sup> Convention on the Prevention and Punishment of the Crime of Genocide, General Assembly resolution 260 A (III) of December 9, 1948, 78 U.N.T.S 277, entry into force 12 January 1951, [henceforth called the Genocide Convention].

<sup>75</sup> United Nations Conference, page 1.

<sup>76</sup> Lippman, page 596 f.



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

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

Under the Genocide Convention it was recognised that genocide was a crime under international law, and in 1951 it had become part of customary international law. Because of this development, states have been reluctant to alter the definition of the crime.<sup>77</sup>

The internal conflicts in both Yugoslavia and Rwanda led to the establishment of two ad hoc Tribunals, which were created in order to prosecute serious violations of international humanitarian law. Both of these courts have jurisdiction over the crime of genocide, and follow the definition in the Genocide Convention.<sup>78</sup>

Even if the Genocide Convention has been recognised as both effective and reliable, there have been attempts to alter the Convention. The Convention has an important function in the system of international criminal law, but suggestions have been made in order to broaden the scope of the crime of genocide. One example is the concept of cultural genocide, which was rejected when the Convention was adopted. The prosecution of criminals has also been a problem, but this has been approved by the War Tribunals for former Yugoslavia and Rwanda.<sup>79</sup>

### 5.3.3 Genocide in the Rome Statute

There was no problem when deciding to include the crime of genocide in the Rome Statute. The support for this proposal was almost universal, and the possibility of trying these crimes in a permanent international court had become very important.<sup>80</sup> During the Conference in Rome the question concerning the definition of genocide was not discussed in any material way. The definition in article 6 of the Statute is almost identical with article 2 in the Genocide Convention. The only thing that differs is the phrase “ For the purpose of this Statute”. The intention with this expression is only to give the text structure, because the other definitions contain the same saying.<sup>81</sup> In the Genocide Convention article 3, we can find a list of actions which give rise to criminal responsibility. In the Rome Statute there exists no such list,

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<sup>77</sup> Von Hebel and Robinson, page 89.

<sup>78</sup> Lippman, page 610.

<sup>79</sup> Malekian, Farhad, *International Criminal Law, The legal and critical analysis of international crimes*, Volume I, 1991, page 306 ff.

<sup>80</sup> United Nations Conference, page 1.

<sup>81</sup> Von Hebel and Robinson, page 89 f.

but instead the general rules for individual criminal responsibility is applied.<sup>82</sup> Even so, it is probably so that the same actions are penalised.<sup>83</sup>

Article 6 of the Rome Statute defines the crime of genocide as:

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

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

The definition of genocide follows the classification made in the Genocide Convention. The reason why this was not altered in any way was for example that the Genocide Convention was the first human rights instrument adopted by the United Nations. It was considered as a very important and courageous step. Some might say that the Convention is in need for some kind of change, but over and over we can see how the Genocide Convention plays an essential role in the world today. Situations have occurred when attempts have been made in effort to interpret the Convention in the light of political interests, but it is vital to remember that the Convention was adopted for purely humanitarian and civilising purposes.<sup>84</sup> The definition in the Rome Statute follows a well-established and functional rule, and there is no reason why this ought to be changed. The fact that the definition in the Genocide Convention also is regarded as part of customary law is another additional explanation why it was better to use the existing definition rather than working out a new one.

## 5.4 Crimes Against Humanity

### 5.4.1 Background

The concept of crimes against humanity has its origin as an extension of war crimes, but later became an independent and separate category of international crimes. The first international instrument, which contained a definition of the crime against humanity, is the 1945 Charter of the International Military Tribunal for the Prosecution of the Major War Criminals of the European Theater<sup>85</sup>. This definition was clearly affected by

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<sup>82</sup> See articles 25 and 28 in the Rome Statute.

<sup>83</sup> Prop. 2000/01:122, page 20.

<sup>84</sup> Lippman, page 612 f.

<sup>85</sup> Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, Aug. 89, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, also called the London Charter. In article 6(c) of this Charter we can find the definition of the crime against humanity. Bassiouni, M. Cherif, Crimes Against

the horrid actions that took place during the Second World War. Since then, the legal nature of the crime against humanity has evolved and is now part of international humanitarian law and international human rights law.<sup>86</sup>

The Security Council has elaborated the definition of crimes against humanity several times, for example in 1993 and 1994. The purpose was to come up with two different types of definitions that were intended to be used in the two new War Tribunals. In 1993, the Security Council adopted the Statute of the International Criminal Tribunal for the Former Yugoslavia and in article 5 we can find the definition of this crime. The new factor was that the definition made a connection between the crime and the existence of internal conflicts. It also added torture, rape and imprisonment to the contents of the crime. One year later, in 1994, the Security Council adopted the Statute of the International Criminal Tribunal for Rwanda. In article 3 the crime against humanity is defined, and here there are no link to either war or armed conflicts.<sup>87</sup>

#### **5.4.2 Crimes Against Humanity in the Rome Statute**

Article 7.1 of the Statute defines the crimes against humanity.

“For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”

During the draft of the Rome Statute the inclusion of crimes against humanity was not a controversial issue. It was agreed that this crime was a very serious one, and that it was a necessity to incorporate it in the Statute. The definition of the crime in article 7 has a lot of influences. It is based on

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Humanity, in Bassiouni, M. Cherif, *International Criminal Law*, Volume I, 1999, page 521, [henceforth referred to as Bassiouni (1999)].

<sup>86</sup> Bassiouni (1999), page 521 ff.

<sup>87</sup> Bassiouni (1999), page 568 f.

the Nuremberg Charter, together with succeeding developments of international law. The Statutes of the Criminal Tribunals of Rwanda and former Yugoslavia has been very important for the formulation of the definition in the Rome Statute.<sup>88</sup> The four Geneva Conventions of 1949 and the two 1977 Protocols contains certain aspects of crimes against humanity as actions prohibited in conflicts of international character. This has also been an influence on the formulation of the Statute.<sup>89</sup>

The formulation of the crimes against humanity in the Rome Statute lacks a connection with war or armed conflicts. On the other hand, article 7 borrows from article 3 of the Statute of the Tribunal of Rwanda, and includes the criterion of “widespread or systematic” attack upon civilian populations, and these attacks must be seen as the result of a certain policy. The definition in the Rome Statute is far more detailed and wide than any other formulations before. The specific contents that are included in the formulation try to reflect the existing definitions of all similar crimes that are contained in legal texts around the world. The intention might be to embody this as general principles of law, because the crimes could be found almost in all legal systems.<sup>90</sup>

The definition of the crimes against humanity has not, like the crime of genocide, copied an existing and established formulation of the crime. Of course article 7 has been influenced by a number of instruments and practices, but the classification is far more detailed and enlarged than ever before. The definition is also not exhaustive, which means that other crimes can also be included than the ones listed. The idea of criminalizing crimes against humanity has been to avoid future human damages and to increase the possibilities of peace. By adding the crime to the Rome Statute the world community once again show their condemnation of these crimes.<sup>91</sup>

## **5.5 War Crimes**

### **5.5.1 Background**

The idea that certain restrictions were necessary during armed conflict has been recognised for a very long time. Even in the Old Testament we can find limitations by God in warlike situations. The first generally accepted international agreement concerning war crimes was the Declaration of Paris in 1856 that concerned the Crimean War. More important might the 1864 Geneva Convention be, which concerned the wounded in the field. The 1864 Convention was later revised in a series of Geneva Conferences. The end

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<sup>88</sup> United Nations Conference, page 6.

<sup>89</sup> Bassiouni (1999), page 575.

<sup>90</sup> Bassiouni (1999), page 569 ff.

<sup>91</sup> Bassiouni (1999), page 588.

result was the 1949 Geneva Conventions, together with the two 1977 Additional Protocols. These instruments comprised a broad body of international humanitarian law, which regulated the treatment and protection of people involved in conflicts. These rules are also known as Geneva Law.<sup>92</sup>

The role of war crimes also became very important after the end of the Second World War, when the Nuremberg Charter was written. Here the Tribunal had jurisdiction over crimes against peace, war crimes and crimes against humanity. Regarding the prosecution of war crimes, the Tribunal stated that the accused, even as Head of State or commander-in-chief, was not immune from prosecution.<sup>93</sup>

### **5.5.2 War Crimes in the Rome Statute**

Article 8 in the Rome Statute lists a number of acts that constitutes as war crimes. These crimes can be divided into four major categories. The first two groups are applicable in international armed conflicts and are mainly based on well-established principles of international law. The inclusion of these two types was widely supported. The first category consists of grave breaches of the four Geneva Conventions. These Conventions give a special protection for specific groups of persons, for example for civilians during war. Article 8 prohibits grave breaches of these rules, which for instance means wilful killing and torture. The second category contains other serious violations of the laws and customs applicable in international armed conflicts. These provisions are originated from the Hague Law, and limit the methods of warfare. The rules here are quite extensive, and are mainly based on customary law in this area of international law. Here we can find regulations on rape in wartime.<sup>94</sup>

The next two categories of crimes are offences that are being performed in an armed conflict of non-international nature. These rules originate from common article 3 in the four Geneva Conventions and from the Second Additional Protocol. As always when it comes to regulations in internal conflicts, the question of inclusion was debated and controversial. The same goes for these two crime categories. The third crime type regulates serious violations of common article 3 in internal conflicts. Common article 3 of the Geneva Conventions regulates specifically armed conflicts with a non-international character. It gives protection for people who are not taking an active part in the conflicts. The last, and fourth, category concerns other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the establishment of international law.

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<sup>92</sup> Green, Leslie C., *International Regulation of Armed Conflicts*, in Bassiouni, M. Cherif, *International Criminal Law*, Volume I, 1999, page 355 ff.

<sup>93</sup> Green, page 369.

<sup>94</sup> United Nations Conference, page 4.

The rules originate mainly from the Second Additional Protocol, which protects victims of internal conflicts.<sup>95</sup>

Article 8 of the Rome Statute contains several types of actions that constitute war crimes. It is the first time in a legal text where violations of non-international conflicts are regarded as war crimes. As we can see, the four Geneva Conventions, together with the 1977 Protocols, heavily influenced the definitions of war crimes. The formulation has then gone beyond the existing texts in some cases and extended the humanitarian law by adding new elements to it.<sup>96</sup>

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<sup>95</sup> United Nations Conference, page 4 f.

<sup>96</sup> Prop. 2000/01:122, page 22

# 6 The Swedish Considerations Concerning the Crimes in the Rome Statute

## 6.1 General Reflections

In October 2000, the Swedish Department of Justice appointed a special working group that should examine the Swedish criminal legislation, in comparison with the content of the Rome Statute. The focus would be to study those international crimes that according to international law give rise to individual criminal responsibility. The group should also consider the recent developments in international law when performing their work. One important example is the fact that individuals now, more than ever, can be carriers of both rights and responsibilities. The War Tribunals of former Yugoslavia and Rwanda can bring people to justice for serious crimes against international law. This development has made it possible for the work on the Rome Statute to take place. Other tasks are to look into for example the questions of period of limitations and immunities.<sup>97</sup> These issues will be handled in the forthcoming chapters.

The Swedish criminal provisions concerning these types of crimes can be said to comply with the Statute as they already are today. The principle of complementarity says that no restrictions are to be made on the Swedish jurisdiction when it comes to the prosecution of the crimes in the Statute. This means that Sweden will be able to prosecute these crimes in the national courts, and that the ICC and the Swedish national courts will have parallel authority. Even so, in some cases it might not be possible for the national courts to prosecute and in those situations it will be necessary to hand over the case to the ICC.<sup>98</sup>

Today the Swedish legislation contains some criminal provisions concerning international crimes. The Rome Statute does not state that any criminal provisions must be incorporated in the national legislation, with the exception of crimes aimed against the Court's activity in Article 70 of the Statute. This does not mean that Sweden should not examine their criminal legislation. Instead, nations ought to have a moral obligation to make sure that they are able to prosecute crimes to the same extent as the ICC. Today Sweden has an extensive international jurisdiction and some material criminal provisions in this area. We must although remember that international law has gone through a lot of changes over the years, and this

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<sup>97</sup> Dir. 2000:76, page. 1

<sup>98</sup> Ds 2001:3, page 120 f.

could mean that some changes are needed.<sup>99</sup> The question is now for the Swedish working group to see if any alterations are needed, and if so, how should they be composed? Should we change the Swedish law so that it look exactly like the crime catalogue in the Rome Statute, or is it perhaps better not to change the legislation at all, because it already covers the relevant crimes? Or might there be another solution?

## 6.2 The Crime of Genocide

After the end of the Second World War, Sweden decided to incorporate provisions concerning the crime of genocide together with other crimes against international law.<sup>100</sup> In 1964, a special law<sup>101</sup> was passed that concerned the crime of genocide. When passing this law it was stated that the General Assembly of the United Nations had adopted the Genocide Convention on December 9, 1948 by a resolution, and on May 9, 1952, Sweden ratified the instrument.<sup>102</sup> This instrument of ratification was later, on May 27, 1952, deposited at the United Nations Secretary General.<sup>103</sup> Because of this ratification it was possible to adopt a law concerning this area that relied on the Convention text.<sup>104</sup> Sweden had ratified the Convention, and the new law was meant to transform the Convention text into a national legal statement. The law concerning genocide contained the provisions that, besides the existing rules in the national Penal Code, *Brottsbalken* (BrB)<sup>105</sup>, were needed in order to fulfil the obligations for Sweden according to the Genocide Convention.<sup>106</sup>

This act, that only contains two paragraphs, states that any person who commits an act, for which the punishment is set at prison for four years or longer, and is directed against a national, ethnical, racial or religious group of people, with the intent to destroy the whole or a part of the group, shall be sentenced for the crime of genocide. The punishment for this crime is prison for a certain time period, a minimum of four years and a maximum of ten years, or prison for life.<sup>107</sup> The law also outlaws attempt, preparation and conspiracy to commit this crime.<sup>108</sup>

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<sup>99</sup> Ds 2001:3, page 129.

<sup>100</sup> Dir. 2000:76, page 1.

<sup>101</sup> Lagen (1964:169) om straff för folkmord, [ henceforth called the Swedish Genocide Act]. For preparatory work see Prop. 1964:10, 1LU 1964:3, Rskr 1964:79.

<sup>102</sup> Sweden's International Agreements, SÖ 1952:64, and preparatory work can be found in Prop. 1952:71.

<sup>103</sup> Berg, Ulf, Berggren, Nils-Olof, Munck, Johan, Werner, Anita, Victor, Dag, and Örn, Claes, *Kommentar till Brottsbalken, Del III (25-38 kap.), Påföljder m.m., Följdförfattningar*, 1994, [henceforth called Berg and others], page 568. This book contains comments to the different articles in the Swedish Penal Code.

<sup>104</sup> Prop. 1964:10, section 7, page 34.

<sup>105</sup> *Brottsbalk* (1962:700).

<sup>106</sup> Berg and others, page 569.

<sup>107</sup> 1§ The Swedish Genocide Act.

<sup>108</sup> 2§ The Swedish Genocide Act.



The Swedish Genocide Act did not present any crimes that did not already exist in the Penal Code. The only new thing was that the act did complement the Penal Code concerning the sentence scale in article 1 of the Swedish Genocide Act. The relevant crimes in the Penal Code covers to a large extent the acts that are covered by the Genocide Convention, but the problem arose when trying to determine what sentence to pass for these crimes. The existing crimes in the Penal Code could not consider the special circumstances that constitute a crime of genocide. The solution was that in article 1 of the Swedish Genocide Act, any act that by law had a set sentence on a minimum of four years could be found guilty of genocide. The result is that any crime that have a set sentence for at least four years can be seen as a crime of genocide, if the act is committed against a group of people with the intent to destroy the group. It is also understood that this type of crime can only be committed by persons that have some sort of governmental powers, either having the power themselves or by having the consent of the people that have the power.<sup>109</sup>

As we can see Sweden has no elaborate criminal provisions concerning the crime of genocide. We have a short law that states that genocide is prohibited by law, and the reason for this is the fact that Sweden has ratified the Genocide Convention and by that it is regarded as a part of the Swedish legal system. The question is now if this protection is enough, or if it is necessary for Sweden to complement its legislation with new provisions. The first thing to observe is that the definition of the crime of genocide in the Rome Statute is the same as the definition in the Genocide Convention. Another fact is that the definition in the Genocide Convention is regarded as customary law. Sweden has transformed the Genocide Convention into Swedish national law, and these circumstances support the conclusion that there is no actual need for Sweden to alter their existing provisions concerning this crime.

## **6.3 Crimes against Humanity**

### **6.3.1 Crimes against Humanity in Swedish law today**

The Swedish regulation of crimes against humanity is probably something that will have to be modified after the ratification of the Rome Statute, because of the lack of any explicit regulations on this matter. There exists today no clear provisions concerning this crime, but it is possible to prosecute acts that fall under the crime by using other criminal provisions.<sup>110</sup>

The expression “crimes against humanity” was first brought into international law after the Second World War. The Military Tribunals of

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<sup>109</sup> Berg and others, page 569 f.

<sup>110</sup> Dir. 2000:76, page 1.

Nuremberg and Tokyo recognised the crime, and later other international instruments started to use the term. The Geneva Conventions are good examples of the inclusion of crimes against humanity in international law. The crime has a strong connection with war, but it is not limited to wartime. A crime against humanity is any inhuman activity, which is committed before or during a war. It is a systematic or extensive attack against the civilian population.<sup>111</sup> In Swedish legislation there is no provisions that regulate this behaviour explicitly, but in BrB 22:6 para 3 it is said that it is prohibited to attack civilians and persons that are not in a belligerent condition. This might be considered as a protection against these crimes, but even so it is not very precise for this purpose.

The definition of crimes against humanity in the Rome Statute enumerates a number of actions that can constitute this crime. Among these acts we find murder, slavery, kidnapping and sexual violence. As said earlier, there exist no legal provision in Swedish law today, which explicitly regulates the crimes against humanity. Even so, it is possible to prosecute the crimes that are listed as part of the crime against humanity. Sweden has laws on murder, rape, aggravated assault, and several other acts that can be considered as a crime against humanity. Questions have although been raised concerning the matter of aggravating circumstances when judging a case of this kind. It has been said that the Swedish criminal provisions do not sufficiently consider the severe circumstances and intentions behind these crimes. The systematic or extensive attack against the civilian populations should be of great importance when judging crimes of this kind. It might not be possible to consider this according to the Swedish provisions of today. If that would be the case, then Sweden might face problems in the future when co-operating with the ICC. The fact that there is no distinct national criminal regulation concerning crimes against humanity can result in Sweden not being able to adequately prosecute these crimes nationally. This will especially be the case when serious crimes have been committed as a systematic or extensive attack against civilians in a non-armed conflict.<sup>112</sup>

But is the only option for Sweden to create new provisions governing these crimes against humanity, or might it be possible to somehow use the legislation that exist today? The criticism against the Swedish system does not have to be entirely accurate. Many of the crimes mentioned above, like aggravated assault and murder, have high maximum sentences in the Swedish national legislation. The Swedish courts are able to pass rather high sentences for these types of crimes. One example is aggravated assault that is regulated in BrB 3:6. The article states that if an act of assault is to be considered as serious as aggravated assault, the sentence for this crime reaches from one to ten years in prison. This is a high sentence for this type of crime, and it might be possible to say that this maximum sentence of ten years could be appropriate to use when looking at crimes against humanity.

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<sup>111</sup> Malekian, page 263 ff.

<sup>112</sup> Dir. 2000:76, page 1 ff.

Another factor is that when a court is deciding on what sentence to choose, BrB 29:1-2 is guiding. In BrB 29:1 the sentence should be determined by the applicable scale, but it is also possible to look at the specific crime and value what sentence would be appropriate. When deciding the seriousness of the action, it is for example necessary to examine what damage resulted from the act. It is also essential to examine the intent and motive of the accused. Other factors can also play a part when determining what sentence to pass. BrB 29:2 lists a number of circumstances that can negatively affect the length and extent of the punishment. These aggravating circumstances are for example if the accused showed particular cruelty when committing the act, according to BrB 29:2 para 2, or if the motive for committing the crime was to violate a person, ethnic group or any other group based on race, colour, origin, religion or any other similar circumstance, according to BrB 29:2 para 7. When a crime against humanity has been committed in Sweden these regulations could be helpful. It is possible to find fitting criminal provisions for these crimes in the national law today, and long sentences can be passed.

### **6.3.2 Possible Future Developments**

The recent development concerning the prosecution of ex-dictator Pinochet has lead to a lot of different questions. Does a Swedish court have the prospect to prosecute foreign dictators or ex-dictators for crimes like torture as a crime against humanity? The question is if Sweden will have the possibility to prosecute crimes that falls under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>113</sup>. Earlier Sweden has declared that the national criminal provisions correspond to the requirements of the Torture Convention. Recent developments has lead to the question if it might be appropriate to once again look over the Swedish provisions concerning these crimes, and make sure that the Swedish courts can try accusations on torture crimes that has been committed abroad.<sup>114</sup>

Another question has been how Sweden ought to act in order to live up to the new crime catalogue in the Rome Statute. One solution would be to write a new law that would gather all the international law crimes. This law would then stand on its one, and change how international crimes are regulated today. The reason for creating a new law is mainly the fact that crimes against humanity do not have a proper regulation at present. The Swedish working group will probably suggest this idea when they are

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<sup>113</sup> The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc A/Res/39/46, [henceforth called the Torture Convention], adopted on December 10, 1984 and entered into force on June, 26, 1987. Sweden has ratified the Convention by SÖ 1986:1. Preparatory work , see Prop. 1985/86:17.

<sup>114</sup> Dir. 2000:76, page 4.

presenting their work at the end of next year.<sup>115</sup> A new law would have the advantage, besides a specific provision for the crimes against humanity, because the national legislation concerning international law crimes has gone through a lot of changes during the recent years. The provisions concerning this area have been found to be both hard to access and hard-to-grasp. International law has over time gone through a vast development, and this might also be a reason for why the old provisions need to change.<sup>116</sup>

On the other hand, many advantages can be gained from not writing new provisions. There is always a danger when one set of rules becomes separated from the rest of the system. It is possible that when writing new laws and provisions concerning international law, these new regulations can be seen as divided from the rest of the legal instruments. The last thing anyone wants is that the international law will be looked upon as something different from the other laws, a system within the system, instead of being part of a unified structure. It is very important that these rules will be integrated with the rest of the legislation, and not a separate organ. So, is it better not to change the system at all? One thing that would favour this idea is that it is meaningless and pointless to change a system if it really works satisfactory. The problem is here that we have no idea if the existing rules would live up to the requirements of the Rome Statute. We do not want to risk having a system, which do not have the capability to prosecute persons for crimes committed according to the crime catalogue in the Rome Statute. The criminal provisions concerning crimes that could constitute crimes against humanity might be adequate enough in some cases, but it is not a sure thing. Even if it is not useful to change existing provisions that work, it might be the right thing to do in this case. There are today no distinct provisions concerning the crimes against humanity, and this can be a problem in the future. A new law that could gather the scattered provisions on international law can be helpful for all once the ICC has started to function.

## 6.4 War Crimes

There exist a number of definitions of the term war crimes, but traditionally it is said that these crimes are committed by members of armed forces, or by individuals, in violation of the rules of war. The crime itself relates to the fact that the conflicting parties must respect certain rules of conduct in an armed conflict.<sup>117</sup>

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<sup>115</sup> Interview with Nils Petter Ekdahl, assistant judge with the Court of Appeal of Skåne/Blekinge and Secretary in the Swedish working group, on June 19, 2001.

<sup>116</sup> Dir. 2000:76, page 4.

<sup>117</sup> Malekian, page 101.

In Swedish law we can find these types of crimes in the Penal Code. BrB 22:6<sup>118</sup> contain the definition of **the crime against international law**. It states that any person who seriously violate an agreement with a foreign power, or violate a generally agreed principle<sup>119</sup> concerning international humanitarian law in armed conflicts, will be sentenced to prison for a maximum of four years. If the crime is considered to be a serious offence, then the sentence will be prison for a maximum of ten years or prison for life. When trying to determine whether or not the crime is serious, a number of circumstances must be taken into account. Special consideration should be taken to examine if the crime was committed as a number of separate actions, if many people were killed or hurt, and if massive damage to property was done due to the crime. Another matter is that this crime is not considered as a military crime, which means that the person committing the crime does not have to be in the military.<sup>120</sup> Sweden has, besides this legal provision, entered several international covenants that concern this area.<sup>121</sup>

The fact that only serious violations of international law are outlawed here arises from the saying of the four Geneva Conventions and the First Additional Protocol from 1977.<sup>122</sup>

Art. 49. The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the *grave breaches* of the present Convention defined in the following Article.<sup>123</sup>

An exemplified list of acts, which can constitute these sorts of crimes, can be found in BrB 22:6 section 2. One example is BrB 22:6 section 2 para 1, which says that it is prohibited to use weapons that are not allowed by international law. It also forbidden to initiate an attack against buildings and installations that has special protection by international law.<sup>124</sup> These acts

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<sup>118</sup> Law 1994:1721 changed this paragraph. Preparatory work can be found in Prop. 1994/95:7, and 1994/95:FöU2. In the new saying, violations of international law concerning a more human warfare were outlawed.

<sup>119</sup> This means that the regulations of international law, that this paragraph is set to protect can have its origin in customary law as well as in the existing written provisions. One example of this can be found in Swedish case law, NJA 1946:65, which said that customary law could have a binding effect for the Swedish courts. . Blom, Birgitta(ed.), Karnov: svensk lagsamling med kommentarer, 2000/01, [henceforth called Karnov], footnote 935, page 2554.

<sup>120</sup> Karnov, footnote 935, page 2554. The fact is that if the person committing the crime is in the military, it is stated that his supervisor will be prosecuted as well. This will of course depend on to what extent the supervisor could have anticipated the crime, and if he in that case did not do enough to prevent it from happening, according to BrB 22:6 section 4.

<sup>121</sup> See for example SOU 1979:73 (Krigets lagar) concerning the rules of war, and SOU 1984:56 (Folkrätten i krig) concerning international law and the conduct in wartime.

<sup>122</sup> Karnov, footnote 935, page 2554.

<sup>123</sup> Article 49 of Geneva Convention I. Similar paragraphs can be found in article 50 of Geneva Convention II, article 129 of Geneva Convention III, article 146 of Geneva Convention IV and article 86 of the First Additional Protocol.

<sup>124</sup> BrB 22:6 section 2 para 5.

originate in most cases from the international agreements that Sweden has entered.<sup>125</sup>

Another provision concerning war crimes is BrB 22:6 a<sup>126</sup>. This provision relates to the unlawful use of chemical weapons. It is for example forbidden to develop, produce and in other ways store these weapons, BrB 22:6 a para 1. The explicit use of chemical weapons is also prohibited, BrB 22:6 a para 2. Persons breaking this prohibition will be sentenced to prison for a maximum of four years, if it is not prosecuted as a crime against international law under BrB 22:6<sup>127</sup>. The definition of chemical weapons according to BrB 22:6 a follows the definition that is included in the United Nations Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction<sup>128</sup>, BrB 22:6 a section 2.

BrB 22:6 b<sup>129</sup> concerns the unlawful use of mines, and relates to the use, development, production, acquisition, possession, and transfer of troop mines<sup>130</sup>. The sentence for this crime is prison for a maximum of four years, but if the crime is considered to be serious, the sentence will be prison for a maximum of ten years or prison for life, according to BrB 22:6 b section 4.<sup>131</sup> The outlawed acts in this article are mainly focused on situations of military kind, but it is also possible to use it in other contexts. This is often not done because these acts in non-military situations are regularly prohibited in other regulations.<sup>132</sup> The Swedish courts have a wide jurisdiction of these types of crimes according to BrB 2:3 para 6-7. Sweden has jurisdiction of crimes that has been committed outside the country, if the

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<sup>125</sup> Karnov, footnote 936, page 2554.

<sup>126</sup> Preparatory work to this article can be found in Prop. 1993/94:120, and 1993/94:UU12. Other articles concerning this area can be found in BrB 2:3 para 6 and Lagen (1994:118) om inspektioner enligt Förenta nationernas konvention om förbud mot kemiska vapen. Karnov, footnote 938, page 2554.

<sup>127</sup> This means that BrB 22:6 a is subsidiary to BrB 22:6.

<sup>128</sup> Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction. The convention was adopted on January 13, 1993, and entered into force on April 29, 1997. Sweden ratified the convention on June 17, 1993.

<sup>129</sup> This article was introduced on May 1, 1999, with the intent to answer to Sweden's international commitment according to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (often called the Ottawa Convention), which was adopted in September 18, 1997. Sweden ratified the convention on November 30, 1998. Karnov, footnote 939, page 2555.

<sup>130</sup> The definition of these troop mines follows the definition of the term antipersonnel mine in the Ottawa Convention, article 2.1: " "Anti-personnel mine" means a mine designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons". Karnov, footnote 941, page 2555.

<sup>131</sup> This crime is, as BrB 22:6 a, subsidiary to BrB 22:6, according to BrB 22:6 b section 1.

<sup>132</sup> Karnov, footnote 940, page 2555.

crime involves the unlawful use of mines, and if the sentence is set at four years in prison or more.<sup>133</sup>

The definition of war crimes in the Rome Statute, article 8, differs quite a lot from earlier definitions. For the first time in a legal text, war crimes now include violations of non-international conflicts. Article 8 has a clear influence from the four Geneva Conventions and the 1977 Protocols, but it goes further than its models. The new definition of war crimes has extended humanitarian law and this will probably change how we define war crimes in the future.<sup>134</sup> This is a very important step, and something that Sweden ought to follow. We have some provisions today that regulate this area, but it needs to be revised. The new development, with the new definition of war crimes in the Rome Statute, indicates that Sweden ought to see how the national law can conform to these new ideas. Additional provisions might be needed in order to make it possible to have the same level of protection as the Rome Statute.

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<sup>133</sup> This jurisdiction also includes the crimes against international law in BrB 22:6, and the unlawful use of chemical weapons in BrB 22:6 a according to BrB 2:3 para 6-7.

<sup>134</sup> Prop. 2000/01:122, page 22.

# 7 Immunities and Privileges

## 7.1 Background

It is basically assumed that a state can decide by its own powers how to regulate the conduct of people who are present at the territory of the state. Even so, customary international law states that diplomats can be exempted from the exercise of criminal jurisdiction so called diplomatic immunity. Diplomats would of course be expected to comply with a country's criminal law, but in cases where they do not do so, the diplomats can not be prosecuted. This is a principle that has evolved over time, and one of the theories that have come up is the one concerning functional necessity. It says that it is necessary to look at the need to have diplomatic immunities and privileges in order to make sure that the idea of having embassies and diplomats are being realised in the receiving state. This principle was recognised in the Vienna Convention on Diplomatic Relations<sup>135</sup> in 1961.<sup>136</sup> Diplomatic immunity can be said to include diplomatic and consular officers and the Head of State in his private capacity, and is a personal immunity.<sup>137</sup>

Another aspect of the immunity principle concerns state immunity. State immunity means that entities of sovereign status, including the Head of State in his public capacity, are immune from civil processes.<sup>138</sup> State immunity can be considered as a customary rule of international law and is based and justified on various general principles of international law. Both international human rights and the law of state immunity have gone through a dynamic development. The creation and protection of international human rights law has drastically changed, with a specific focus on the integration of the individual in a legal order that once was only concerned with the relationship between states and a few subjects of international law. The law of state immunity has also been modified by for example the idea that absolute immunity should be replaced by restrictive immunity.<sup>139</sup>

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<sup>135</sup> Vienna Convention on Diplomatic Relations, adopted on April 14, 1961 by the United Nations Conference on Diplomatic Intercourse and Immunities in Vienna, and it entered into force on April 24, 1964, 95 U.N.T.S 500, [henceforth called the Vienna Convention]. It also adopted the Optional Protocol concerning the Acquisition of Nationality and the Optional Protocol concerning the Compulsory Settlement of Disputes.

<sup>136</sup> George Jr, B.J., Immunities and Exceptions, in Bassiouni, M. Cherif, *International Criminal Law*, Volume II, Procedural and Enforcement Mechanisms, Second Edition, 1999, page 107 f.

<sup>137</sup> George Jr, page 107 f.

<sup>138</sup> Lewis, Charles J., *State and Diplomatic Immunity*, 1985, page 2.

<sup>139</sup> Bröhmer, Jürgen, *State Immunity and the Violation of Human Rights*, International Studies in Human Rights, Volume 47, 1997, page 1 ff.



## 7.2 Recent Developments

### 7.2.1 The Development Concerning the Exclusion of Immunity

#### 7.2.1.1 General Reflections

Recent trends in the development of international law has shown a tendency to hold persons responsible for crimes against humanity, for example acts of torture, and not approving claims concerning immunity. The principle that Heads of State and public officials should be able to be individually responsible for crimes against humanity is nothing new. In the Treaty of Versailles from June 28, 1919, it was said that Heads of State had limited immunities, and this was particularly the case when crimes under international law were at hand. The adoption of the Nuremberg Charter, which stated that Heads of State could be responsible for crimes of international law, clearly showed the wide acceptance of this principle. The Nuremberg Tribunal confirmed that sovereign immunity of the state could not be applied when a state had authorised acts like crimes against humanity. It also stated that individuals commit crimes, and the only way is to punish these individuals in order to enforce the rules of international law.<sup>140</sup>

#### 7.2.1.2 Customary International Law

The Statute of the emerging International Criminal Court, following the principles laid down at Nuremberg, states that: "official capacity as a Head of State or Government, shall in no case exempt a person from criminal responsibility." Similar provisions are contained in the Statutes of the International Criminal Tribunal for Rwanda and the former Yugoslavia, which in 1999 indicted Slobodan Milosevic, the President of the Federal Republic of Yugoslavia. This principle has not yet been applied in national courts, however Belgium's new law on crimes against humanity and war crimes specifically rejects any state immunity.<sup>141</sup>

The principle that Heads of State can be held criminally responsible for crimes against humanity have been recognised as part of customary international law. It states that Heads of State and public officials do not enjoy immunity from these types of crimes, and this practice of general law has been affirmed in a number of ways. One example is the UN General Assembly, which endorsed the principles of international law that had been

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<sup>140</sup> Amnesty International, International Secretariat, United Kingdom, Universal jurisdiction and the absence of immunity for crimes against humanity, page 15 ff, September 3 2001, available at: <<http://www.web.amnesty.org/ai.nsf/index/EUR450011999>>.

<sup>141</sup> Amnesty International, page 17 ff.

recognised by the Nuremberg Charter in its GA Res. 95(I) of December 11, 1946. Another example is articles in the two ad hoc Tribunals and also in the Rome Statute of the ICC<sup>142</sup>. Different declarations and recommendations have also been made by several intergovernmental organisations. In 1998, the UN High Commissioner for Human Rights said that the judgement in the Pinochet case<sup>143</sup> showed that the international community emerged towards a consensus against impunity.<sup>144</sup>

## 7.2.2 The Pinochet Case

On October 16, 1998, the London Metropolitan Police arrested General Augusto Pinochet. But the real story did not begin here, but instead took place in Chile during the years between 1973 and 1990. This was the time of the dictatorship of Pinochet, a time that was permeated by horrid actions and bloody deeds. During this time human rights activists started to document the crimes committed by Pinochet's forces. In 1996, a couple of Spanish lawyers filed criminal complaints against Pinochet, among others. These lawyers represented victims of the military repression in both Argentina and Chile. Most of these crimes had been committed in these two countries, but even so the Spanish courts decided that the case could proceed in Spain. This decision was based on the principle of "universal jurisdiction"<sup>145</sup>.<sup>146</sup>

This principle says that every state has an interest in bringing perpetrators, who have committed crimes of international concern to justice, regardless of where the crime was committed or the nationality of the perpetrator. This meant that the Spanish judge had the power to arrest Pinochet for crimes that had been committed mostly in Chile and mostly against the Chileans. The reason why international law provides for universal jurisdiction is to make sure that there is no "safe haven" for those responsible for the most serious crimes. The crimes that give rise to universal jurisdiction under international law can be found in international treaties like the Torture Convention and in customary international law under which genocide and crimes against humanity are considered as crimes of universal jurisdiction. The fact that a certain crime can be subject of universal jurisdiction is not

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<sup>142</sup> Article 7 (2) of the Statute of the International Tribunal for the former Yugoslavia, article 6 (2) of the Statute of the International Criminal Tribunal for Rwanda, and article 27 of the Rome Statute.

<sup>143</sup> Read more about this case in chapter 7.2.2.

<sup>144</sup> Amnesty International, page 18 ff.

<sup>145</sup> The principle of "universal jurisdiction" has been recognised under international law for a long time. In the Nuremberg Tribunal, the court had jurisdiction over crimes against humanity regardless of where the crime had been committed. The principle was also recognised as part of international law by the General Assembly in 1946 (Resolution 95(I)). Other crimes, as genocide and torture, can also be the subjects of universal jurisdiction. Amnesty International, page 6.

<sup>146</sup> Brody, Reed, *The Case of Augusto Pinochet*, in Brody, Reed, and Ratner, Michael, *The Pinochet Papers, The Case of Augusto Pinochet in Spain and Britain*, 2000, page 8.

enough. It is essential to look at the specific laws in the country, in which the case is brought, which is the prosecuting state.<sup>147</sup>

Two years later, in October 1998, General Pinochet was visiting England, when Spanish judge Baltasar Garzón issued a request that Pinochet should be held for questioning. A rumour was started that Pinochet was leaving England in order to return to Chile, and this led to the issuing of the arrest for Pinochet. The result was that the Metropolitan Police decided to arrest Pinochet based on a provisional warrant. The warrant, which was later suspended, stated that General Pinochet allegedly had murdered Spanish citizens in Chile between September 11, 1973, and December 31, 1983. This arrest was met with a lot of controversy. One of the cornerstones of the criticism was that General Pinochet, as a former Head of State, had immunity from arrest and extradition in the United Kingdom. Only twelve days after the arrest the High Court for England and Wales ruled the case. They stated that General Pinochet was right, and that the arrest was barred because of Britain's State Immunity Act, which gives immunity to the Head of State. The Crown Prosecution Service, which was acting on behalf of the Spanish authorities, appealed this decision to the judicial committee of the House of Lords, which is the highest court in Britain. The question that became valid here was how the term immunity for a former Head of State ought to be interpreted, and how far the scope of this immunity goes.<sup>148</sup>

The proceedings before the court became stretched over time and a lot of issues were debated. Developments in international human rights law, the British State Immunity Act and similar issues were brought up for discussion. One important question was whether or not torture and other crimes could be considered to be official functions of a Head of State and in consequence by that attract immunity. Under customary international law, a former Head of State enjoys immunity for *official* acts committed in his *function* as a Head of State. The question whether or not the crimes at issue can be considered as an official act or part of the functions of a ruler was the question considered by the House of Lords. The result of these proceedings (*Pinochet I*) was at the end that the court ruled in favour of the appeal.<sup>149</sup> The court said that on one hand a former Head of State enjoys generally immunity for acts that have been committed in his functions as Head of State, but on the other hand, international crimes like torture can not be considered as functions of a Head of State.<sup>150</sup> This meant that General Pinochet had no right to claim immunity in this case. This ruling got a lot of

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<sup>147</sup> Human Rights Watch, The Pinochet Precedent, How Victims Can Pursue Human Rights Criminals Abroad, The Pinochet Case- A Wake-up Call to Tyrants and Victims alike, page 2, available at: <[http://www.hrw.org/campaigns/chile98/precedent.htm#What Is Universal Jurisdiction](http://www.hrw.org/campaigns/chile98/precedent.htm#What_Is_Universal_Jurisdiction)>, September 18, 2001.

<sup>148</sup> Brody, page 8 f.

<sup>149</sup> The result of the proceedings was that the vote was tied at two against two at first, but was later finalised when the last judge, Lord Hoffman, voted in favour of the appeal, Brody, page 10 ff.

<sup>150</sup> Human Rights Watch, page 1 f.

attention, and it was said that this was a “wake-up call” for all dictators. A lot of political pressure was put on the British legal system, and after the discovery that one of the Lords in the court had certain links with Amnesty International, which was one of the intervenors in the case, a new panel was established.<sup>151</sup>

The second hearing began, and the end ruling stated that once Britain and Chile had ratified the Torture Convention, it was no longer possible for Pinochet to claim that he had immunity for the crimes of torture. A British magistrate court later ruled that Pinochet could be extradited to Spain based on the charges of torture. In March 2000, medical tests showed that Pinochet no longer had the medical capacity to stand trial. This led to Pinochet’s release and his return back to Chile.<sup>152</sup>

The Human Rights Watch stated that the arrest of Pinochet should scare all torturers in the world, and also said that it was important to see how the case could affect the hope for victims in the way that they can bring their perpetrators to justice abroad. This statement has already become reality. In January 2000, Human Rights Watch helped the Chadian victims to bring a criminal prosecution in Senegal against the exiled dictator of Chad, Hissein Habre, who has been indicted and awaits trial on torture charges.<sup>153</sup> The prosecution of Pinochet is a sign of the development that we have seen after the genocide in former Yugoslavia and Rwanda. The trend is that the international society will try to put an end to the worst and most serious violence in the world. The ad hoc tribunals for crimes committed in former Yugoslavia and Rwanda, together with the establishment of the ICC, all show how the quest for justice continues. The fact that the former Yugoslav President Slobodan Milosevic has been brought before the tribunal clearly shows that immunity is not a defense in cases like this.

Even if the Pinochet case was a huge and important step in the development of international law it is important to remember that it was not easy. One of the key factors of making this prosecution possible was the fact that a large amount of information had been documented over the years, documents that could prove the crimes of Pinochet. Another thing that is necessary for these types of actions is the political will of the involved states. There exist a number of difficulties when trying to build up a case like the Pinochet one, but the fact remains that General Augusto Pinochet was the first former Head of State to be arrested by another country for human rights crimes. The claim for immunity could not help him.<sup>154</sup>

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<sup>151</sup> Brody, page 10 f.

<sup>152</sup> Human Rights Watch, page 1 f.

<sup>153</sup> Human Rights watch, page 1 f.

<sup>154</sup> Brody, page 20 ff.

### 7.2.3 The Carmi Gillon Case

Another case that has been given a lot of attention in the press is the one concerning the new ambassador for Israel in Denmark. The ambassador that has become so controversial is Carmi Gillon, and is the former head of General Security Service, Shin Beth, in Israel. Gillon was the head of this organisation during the 1990ies and has been blamed for the torture of approximately 850 Palestinian prisoners, including one prisoner that later died from a very extensive and hard treatment in April 1995.<sup>155</sup> Gillon has admitted that he authorised the torture of prisoners during his time as head of the Shin Beth. The Israeli Supreme Court outlawed torture of any kind last year.<sup>156</sup> Gillon has also given raise to a lot of outrage when he stated that he advocated the use of “moderate physical pressure” on detainees during the recent violence.<sup>157</sup> The fact is that the use of this form of interrogation was banned in Israel in 1999, but Gillon now states that it might be necessary to start using it again. He has also claimed that the use of torture can be seen as a mean of “self-defence against terrorism”.<sup>158</sup>

The decision by the Danish authorities to welcome Gillon as the new Israeli ambassador led to a lot of controversy. Different groups started to call for Denmark to reject Gillon’s appointment and the diplomatic relations between Denmark and Israel went through a crisis. The Israeli Information Center for Human Rights in the Occupied Territories, B’Tselem, made a request to the Foreign Affairs Minister, Shimon Peres, that the appointment of Gillon as the new ambassador should be withdrawn. The reason for this was based on the opinion that it would be wrong to give a person that has been involved in the torture of hundreds of persons such a representative position.<sup>159</sup> Peres did not agree on this criticism, and declared that he continued to stand by the appointment of Carmi Gillon.<sup>160</sup>

The most important question might be whether or not it is possible to prosecute Carmi Gillon. He has defended the use of torture as a means of self-defence against terrorism, and also stated that the use of “moderate physical torture” might need to be introduced again. The Danish Rehabilitation Centre for Torture Victims (RCT) reacted strongly to these statements. They claimed that these announcements are in direct contravention to the Torture Convention. Other organisations have also reacted by calling for legal proceedings against Gillon, for the actions that he were responsible for during his time in Shin Beth, as soon as he arrived

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<sup>155</sup> Yahoo! Nyheter, Israelambassadör möttes av protester, August 15, 2001.

<sup>156</sup> Kiley, Sam, Danes Hint At Arrest Of Israeli ‘Torture’ Envoy Carmi Gillon, in *The Times*, London, July 26, 2001, available at: <<http://www.rense.com/general12/grm.htm>>.

<sup>157</sup> Keinon, Herb, Denmark: We won’t arrest Gillon, in *The Jerusalem Post Newspaper: Online News From Israel*, July 26, 2001, available at: <<http://www.jpost.com/Editions/2001/07/26/News/News.31235.html>>.

<sup>158</sup> Shuman, Ellis, Something rotten in Denmark, in *Israelinsider*, July 26, 2001, available at: <[http://www.israelinsider.com/channels/diplomacy/articles/dip\\_0066.htm](http://www.israelinsider.com/channels/diplomacy/articles/dip_0066.htm)>.

<sup>159</sup> Article, Shuman.

<sup>160</sup> Article, Kiley.

in Denmark. Professor Bent Sorensen, the assistant director of the Torture Convention until the year 2000, stated that it could be possible to prove that Gillon, as chief for the secret police, was responsible for torture as it is described in the Torture Convention. He also says that Denmark ought to take actions in this case. There exist an obligation in the Torture Convention to prosecute those who have participated in torture acts, and if a person acknowledges torture, actions should be taken. The question then arises concerning the scope of diplomatic immunity.<sup>161</sup>

The Justice Department together with the Foreign Ministry decided on July 24, 2001 that Denmark is unable to arrest Carmi Gillon when he arrives to the country. The reason is that Gillon has diplomatic immunity, and this protects him from any allegations of crimes of torture. It has been said that the Torture Convention applies to all, including diplomats, but the answer is not that easy. The Minister of Justice says that it is necessary to look at other regulations of international law as well. The Vienna Convention was here considered to have precedence over the Torture Convention. This decision was highly criticised, and the need for a trial where the immunity question could be solved was once again called for.<sup>162</sup> The latest news concerning this issue came when Frank Jensen, Minister of Justice, discussed the balance between the Vienna Convention and the Torture Convention. Jensen stated that the Vienna Convention has priority over the Torture Convention, and this means that Gillon can not be prosecuted in Denmark. Based on this statement, Michael Chan, police commissioner in Gentofte, said that there would be no trial in Denmark against ambassador Gillon, and the report to the police concerning alleged crimes against the Torture Convention has been rejected.<sup>163</sup>

## **7.3 Immunities and Privileges in the Rome Statute**

### **7.3.1 Article 27 of the Rome Statute**

In article 27 of the Rome Statute the matter of official status is regulated. The article states that official capacity is irrelevant before the Court. It is stated in article 27(1) that the Rome Statute should be applied equally to all, and without any distinction based on official capacity. This is of special importance when it comes to for example a Head of State or Government, or a Member of Parliament. If a person has these capacities it will not in any

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<sup>161</sup> Engmann, Rebecca K., and Knowles, Howard R., Prosecution of new Ambassador?, in the Copenhagen Post, 2001, available at:

<<http://cphpost.periskop.dk/default.asp?id=15674>>.

<sup>162</sup> DR Online, DR Nyheder, Danmark kan ikke anholde Gillon, July 25, 2001, available at: <<http://www.dr.dk/nsapi.dr/newton/newtonnews.asp?traad=83077>>.

<sup>163</sup> Article from TT, Tidningarnas Telegrambyrå, Ingen rättegång mot Israels ambassadör, in *Sydsvenska Dagbladet*, September 6, 2001.

way exempt the person from criminal responsibility under the Rome Statute.

Article 27(2) concerns regulations on immunities under national or international law. Even if provisions on immunities attached to an official capacity exist in these systems, it does not stop the ICC from exercising its jurisdiction over that person.

The earlier precedents of the tribunals of Nuremberg, Tokyo, former Yugoslavia and Rwanda showed that there was a great support for the inclusion of a provision that did not allow a official capacity to relieve an accused of criminal responsibility.<sup>164</sup> When drafting article 27 of the Rome Statute, the State Parties did not object to the inclusion of these principles. The participants did not have any large problems when formulating the article, with the exception of Mexico that had some objections concerning the language. This objection was later withdrawn.<sup>165</sup> The idea that an official capacity is irrelevant to criminal responsibility is, as seen above, not new. In the Statutes of the two tribunals for former Yugoslavia and Rwanda we can find regulations concerning the same matter. One recent example of this is the arrest and indictment against the then President in former Yugoslavia, Slobodan Milosevic.<sup>166</sup> A question that has come up is whether or not the Court could have jurisdiction in a case similar to the Pinochet case. In one aspect the answer would be no, since the Statute does not operate retrospectively. On the other hand, the Statute states that there exists no immunity for Heads of State. If a Head of State was charged with crimes within the jurisdiction of the Court, then it would be possible to try the case before the Court if the state of nationality or the state with the territorial jurisdiction was a State Party to the Statute.<sup>167</sup>

A problem has come up after the drafting of the Statute. This concerns the relation between article 27 and article 98(1) of the Rome Statute. Article 98(1) is connected with the co-operation with respect to the waiver of immunity and consent to surrender. This article relates to cases when a third party is involved.<sup>168</sup>

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<sup>164</sup> UN. Preparatory Committee on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Volume 1, Proceedings of the Preparatory Committee during March-April and August 1996, UN GAOR, 51<sup>st</sup> Sess., Supp. (No. 22), UN Doc. A/51/22, 1996, para. 193.

<sup>165</sup> Saland, Per, *International Criminal Law Principles*, in Lee, Roy S., *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results*, page 202.

<sup>166</sup> Prop. 2000/01:122, page 40.

<sup>167</sup> McGoldrick, Dominic, No more getting away with murder?, in the *Life & Peace Institute Magazine New Routes*, Number 4, 1998, page 7, available at:

<<http://www.life-peace.org/nroutes/murder498.htm>>.

<sup>168</sup> Saland, page 202.

Article 98(1) states:

“The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.”

This means that the Court can not request for surrender if the third state by obeying that request would violate its obligations of immunity under international law. There may be a contradiction between article 27 and article 98(1). It is not quite clear what is meant by “the third state”, and if the term is used as including both non-party states as well as parties to the Statute there might be a lot of confusion in the future.

### **7.3.2 Article 48 of the Rome Statute**

The ICC has a set goal to put an end to impunity for those who have committed certain crimes, and also to make sure that these crimes are prevented. In order to do so, it is necessary that the Court and its staff have specific immunities and privileges.<sup>169</sup>

These immunities and privileges are regulated in article 48 of the Rome Statute. It says that the Court should enjoy in each territory of the State Parties such immunities and privileges which are necessary in order to fulfil the purposes of the Court.<sup>170</sup> In the future an agreement concerning immunities and privileges will be worked out. It is also stated in article 48(2) that the judges, the Prosecutor, the Registrar and the Deputy Prosecutors will have the immunity equivalent to a head of diplomatic missions. Even when their term of office has expired, they will continue to be immune from legal processes in respect to the work they performed. The other members of the staff will also enjoy immunity to such an extent that will make it possible for them to fulfil their assignments according to article 48(3) of the Statute. It is furthermore possible to waive these immunities by certain specific decisions.<sup>171</sup> Sweden has proposed that the Swedish law<sup>172</sup> concerning immunities and privileges for international organisations, and persons connected with these organs, should be altered in order to comply with the Statute. The proposal includes in para. 62 that the ICC and its staff should enjoy immunity.<sup>173</sup>

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<sup>169</sup> Fariello Laux, Maria, *Background Paper for the Consultation with Representatives of the International Criminal Tribunals for former Yugoslavia and Rwanda on Privileges and Immunities of the International Criminal Court*, Prepared for the Development of International Law and the World Federalist Movement, July 3, 2001, page 2.

<sup>170</sup> Article 48(1) of the Rome Statute.

<sup>171</sup> Prop. 2000/01:122, page 18.

<sup>172</sup> Lag (1976:661) om immunitet och privilegier i vissa fall.

<sup>173</sup> Ds 2001:3, page 17.



## **7.4 Immunities and Privileges in Swedish Law**

### **7.4.1 General Reflections**

Most of the European countries have specific regulations relating to immunities and privileges for the Head of State or Government, or for Members of the Parliament. These provisions have given rise to a lot of problems, including constitutional challenges, when these countries now ratify the Rome Statute. These immunities can in many cases contravene with the saying of article 27 of the Statute, which states that the Statute shall be applied equally to all persons without any distinction based on official capacity. It also says that national or international rules concerning this matter does not stop the Court from exercising its jurisdiction over a person. This requires that political leaders are unable to escape criminal responsibility by claiming immunity before the ICC, or before the national court.<sup>174</sup>

### **7.4.2 The Rules concerning Immunity in the Swedish Constitution (RF)**

#### **7.4.2.1 Immunities for Members of Parliament and other Officials**

Article 27 of the Rome Statute states that the official capacity of a person shall not affect the criminal responsibility, and that national rules will not change this fact. This is a very important rule in the Statute, and is necessary for the Court in order to function as a forum where the responsible persons can be prosecuted for crimes that have been committed. This provision governs the work of the Court, and does not require that the State Parties nationally prosecute persons who have immunity in that country. Even so, this does raise a number of questions.<sup>175</sup>

According to the Swedish Constitution some officials enjoy immunity from criminal responsibility. RF 4:8 states that it is prohibited to bring a legal action against a Member of Parliament for acts committed in office. This immunity can be revoked if the Parliament approves to do so by a certain decision. This means that the immunity for Members of the Parliament is not absolute. It is also possible to prosecute Members of the Government, but only if the person has seriously disregarded the obligations of his

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<sup>174</sup> Venice Commission, *Report on constitutional issues raised by the ratification of the Rome Statute of the International Criminal Court*, adopted by the Commission at its 45<sup>th</sup> Plenary Meeting, Venice, December 15-16, 2000, page 3, available at: <[http://www.venice.coe.int/docs/2001/CDL-INF\(2001\)001-e.html](http://www.venice.coe.int/docs/2001/CDL-INF(2001)001-e.html)>.

<sup>175</sup> Ds 2001:3, page 123 f.

office.<sup>176</sup> The crimes within the jurisdiction of the Court are all serious offences, and as we have seen earlier they are either now or possibly in the future outlawed in the Swedish national legal system. This means that it is possible that these officials could be prosecuted in Sweden, and if that would not happen, they could be surrendered to the Court.<sup>177</sup> The Court could in a specific case make a valid request based on international law, and the Swedish Constitution would here become an obstacle. The principle of complementarity is another matter that will affect the national situation. The result could be that Sweden is unable to prosecute a person because of the national rules on immunity.<sup>178</sup> It is of course not likely that any of the Members of Parliament would face a situation where the crimes in the Statute would be relevant. The main reason for this is that a single Member does not have the power to commit these crimes alone. You could although imagine situations where a group of Members join together and commits crimes like the ones in the Statute, however this is also a highly unlikely scenario.<sup>179</sup>

#### **7.4.2.2 Immunity for the Head of State**

Another central viewpoint of the immunity question is the status of the Head of State. According to RF 5:7, the Swedish Head of State can under no circumstances be prosecuted for actions committed. This includes both acts committed in office, and acts as a private person. The reason why the Head of State enjoys this absolute immunity is to avoid any persecution of the Head of State.<sup>180</sup> It is of course very unlikely that the Swedish Head of State, or any of the Members of Parliament, will ever face a situation where they stand trial for any of the crimes within the jurisdiction of the Court. One has to remember that the Swedish Head of State, unlike many other monarchy countries in the world, only has a constitutional position in society. The power is vastly limited, and the Head of State is unable to make any binding decisions. This would mean that the Swedish Head of State would not have any possibilities to order or carry out decisions that would fall under the crime catalogue in the Statute.<sup>181</sup> Another development could be a future coup d'état, but once again this is only an improbable theory.

#### **7.4.2.3 Does the Swedish Constitution need to change in order to comply with the provisions in the Rome Statute?**

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<sup>176</sup> RF 12:3. It is also possible to prosecute Members of the Supreme Court and the Supreme Administrative Court for crimes committed during the time in office, according to RF 12:8. Ds 2001:3, page 124.

<sup>177</sup> Ds 2001:3, page 124.

<sup>178</sup> Prop. 2000/01:122, page 90.

<sup>179</sup> Prop. 2000/01:122, page 90 f.

<sup>180</sup> Justitiekommitténs betänkande, 2000/01:JuU30, page 6.

<sup>181</sup> Konstitutionsutskottets yttrande, 2000/01:KU13y, page 12.

It is clear that the provisions in the Swedish Constitution are only applicable in Sweden and to the Swedish officials. This must be kept apart from the restrictions that can be made in international law concerning state immunity. The immunity that Swedish officials enjoy abroad will then follow from the international law provisions alone, and not the national rules. From this aspect the regulations in the Swedish Constitution would not be an obstacle in the ratification of the Statute.<sup>182</sup> The Court can come to a decision that is binding according to international law, a decision that could place Sweden in a situation where it is unable to follow the decision because of the saying in the Constitution. This would of course be a big problem, but even so it might not be such a large obstacle that it would obstruct the ratification.<sup>183</sup>

Before the writing of the government bill concerning the ratification of the Rome Statute, the report from the Department of Justice was referred for consideration to different institutions. A number of these bodies, to which the proposed measure was sent, had diverse statements concerning the question of immunity for a Head of State. The Faculty of Law at the University of Uppsala stated that it was quite obvious that there existed a conflict between the immunity regulation in the Rome Statute and the absolute immunity for the Swedish Head of State. The Court will have the capability to prosecute a Head of State on one hand, and the Swedish Head of State could on the other hand claim immunity under the national Constitution. According to the Faculty this would mean that the international undertaking with the ratification of the Rome Statute would be in direct contrast with the Constitution. The Faculty argued that it in some situations was hard to anticipate any future conflicts between national and international obligations, but that the contradiction in this case was quite obvious. As the provisions concerning immunities in the Rome Statute clearly follows the development in international law today, the Faculty said that it was important that Sweden changed their regulations on the matter of immunity for the Head of State. However the Faculty also stated that this alteration was not needed before the ratification.<sup>184</sup> This would mean that the alterations in the Constitution could be done at a later stage.

The Swedish Attorney General also gave a statement that among other things concerned the question of immunity. According to RF 5:7, the Swedish Head of State has an absolute immunity for all actions. According to the Attorney General it was vital that Sweden changed this provision in order to make sure that the country could fully co-operate with the Court. However the Attorney General stressed that it was highly unlikely that a situation would ever occur where the Head of State would be a suspect for any of the crimes in the Rome Statute. The Attorney General therefore found

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<sup>182</sup> Sweden has of course already ratified the Rome Statute, but I feel a need to examine the thoughts behind this decision.

<sup>183</sup> Prop. 2000/01:122, page 91.

<sup>184</sup> Uppsala Universitet, Juridiska fakultetsnämnden, Andersson, Torbjörn and Saldeen, Åke, *Remissyttrande Dnr 2001/191, Departementspromemorian (Ds 2001:3) Romstadgan för Internationella brottmålsdomstolen (avsnitt 5.1)*, March 8, 2001, page 2.

that an alteration of the Constitution was not urgent, and that the ratification could be done without any changes being done today. Another aspect which the Attorney General pointed out was that the immunity that the Head of State enjoys abroad can be affected by the Swedish ratification. It is possible that other State Parties to the Statute could surrender the Head of State to the Court in a situation where the Head of State is abroad. This surrender would then not require the prior consent of the Swedish nation. Even so, the Attorney General found that this question can be examined in the future.<sup>185</sup>

In the Constitution, RF 4:8, we can also find the immunities for Members of the Parliament. Here it is said that these Members only can be prosecuted for acts committed during office if the Parliament gives its consent. The Attorney General also found that this immunity was not consistent with the provisions of the Statute. As said earlier, a separate Member of Parliament does not have the power to commit any of the crimes in the Statute, but a possible scenario could be if a large group of Members of Parliament joined together in order to commit these crimes. If this would happen it is not likely that a decision could be made by the Parliament to revoke the immunity according to RF 4:8. In this case, there would be no prosecution in Sweden and the Members could not be surrendered to the Court. The Attorney General considered that this would mean that Sweden have to change this regulation in order to fulfil the obligation in the Statute.<sup>186</sup>

The district court of the city of Stockholm stated to begin with that the Statute does not seem to mean that any national regulations on immunity will be obstacles for the jurisdiction of the Court. This follows from the principle of complementarity, and represents the fact that the ICC could prosecute if national rules on immunity stopped a trial in the country. Even if the Court will have the possibility to prosecute, it is vital that the national provisions on immunity are consistent with the rules in the Rome Statute. The district court declared that it was not very likely that the Head of State will have to claim immunity in a case that involves a crime in the Statute, but even so, the district court found that it is important to change RF 5:7. The district court stated that RF 5:7 is not consistent with article 27 (2) in the Statute, and this means that it is necessary to change the Constitution.<sup>187</sup> The thing that differs from the opinions of the Attorney General and the Faculty of Law at the University of Uppsala is that the district court found it necessary to alter the constitution before a ratification, as where the other statements said that these changes could be done in the future.

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<sup>185</sup> Justitiekanslern, Bröms Lumpus, Kerstin and Regner, Hans, *Remissyttrande, Dnr 518-01-80, Departementspromemorian (Ds 2001:3) Romstadgan för Internationella brottmålsdomstolen, (JU2001/582)*, March 7, 2001, page 2 f.

<sup>186</sup> Justitiekanslern, page 3.

<sup>187</sup> Stockholms tingsrätt, Bondeson, Bengt, Fenborn, Ingrid, Wigén, Måns and Öhman, Jan, *Delyttrande, Dnr 2001/0072, ADM 5:1, Betänkandet (Ds 2001:3) Romstadgan för Internationella brottmålsdomstolen- särskilt såvitt avser frågan om Sverige skall tillträda stadgan, avsnitt 5.1 I promemorian*, April 4, 2001, page 2.

I believe that it is important to alter the Swedish provisions in the Constitution concerning immunities. I agree with the viewpoint that it is highly unlikely that either the Head of State or the Members of Parliament, as well as other officials, will face a situation where this question will be relevant. But even so, I think that it is vital that Sweden shows the world that the nation does not want to protect persons who have committed severe crimes. The development in international law goes towards a viewpoint where all persons have an individual criminal responsibility for acts committed<sup>188</sup>, and this involves a new view on the status of officials, and especially the position of the Head of State. The starting point in all nations should be that no person is excluded from responsibility for these serious crimes, and this would create a stabile ground for the work of the Court.<sup>189</sup>

There is a number of ways one could use to change the national provisions concerning the issue of immunity. One way could be to amend the Constitution in order to comply with the Statute. France and Luxembourg did this, and it has been suggested that for example both Greece and Turkey should do this. In France and Luxembourg clauses were added to the constitutions which stated that nothing in their legal systems should constitute obstacles to the Statute. The process of amending the national constitutions is in most countries a difficult and complicated procedure, and may also be quite sensitive from a political perspective. Another way could be that states choose to interpret the relevant constitutional rules in such a way that avoids conflicts with the Statute. This could mean that these provisions would only confer immunity in the national courts, and not in the international court. The result would be that there would be two sets of responsibility for officials, one at the national level and one at the international level. These levels would then be separated from each other.<sup>190</sup>

Many of the countries of Central and Eastern Europe have provisions in their constitutions that says that international treaties in the field of human rights have a precedence over conflicting regulations of the constitutions. In these countries the Rome Statute then would prevail. A different method would be to say that the constitution has an inherent exception from immunity. Here a state could justify the surrender of one of its officials, which had immunity under national law, by interpreting the constitution in the light of this purpose. The court has a task to avoid and combat impunity, and if a Head of State commits a crime under the jurisdiction of the Court it could be said that he then also violates the constitution. This violation could then justify the surrender, even if the constitution guarantees immunity. An alternative interpretation would be to say that the lifting of immunity of a Head of State has become customary practice in international law, which could be done by referring to the Pinochet case. Here it was said, among

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<sup>188</sup> These acts are not all types of actions, but involve only the most horrific ones. These include genocide, crimes against humanity and war crimes.

<sup>189</sup> Prop. 2000/01:122, page 91.

<sup>190</sup> Venice Commission, page 3.

other things, that international law now find certain types of conduct no longer acceptable, including acts by a Head of State.<sup>191</sup>

Which of these methods of altering the Swedish Constitution that would be best for Sweden is hard to say. A specific change in the Constitution is not easily done, and is quite a large step to take. The method of interpretation is possible, but may not be adequate enough. One wonders if it is also sufficient only to say that the lifting of immunity is customary practice. I am not sure on which way the Swedish legislators ought to go, but I do believe that something have to be done in order to be more consistent with the provisions in the Rome Statute.

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<sup>191</sup> Venice Commission, page 4.

# 8 The Question of the Statute of Limitation

## 8.1 The Statute of Limitation in the Rome Statute

When drafting the Rome Statute, the majority of the participating states were in favour of a principle where the crimes within the jurisdiction of the Court should not be the subject of any statute of limitations. This meant that these crimes could be prosecuted without any specific time limitations. A number of the involved countries had already different types of statutory limitations in their legal systems, but even so they accepted this proposal. France objected to the idea that this should include all the crimes within the jurisdiction of the Court, and said that only genocide and crimes against humanity should be included. The result was that France, together with China, got to have their positions concerning this matter expressed in a footnote in the working group's report, but accepted in the end the saying of the article as a whole.<sup>192</sup>

Article 29 of the Rome Statute regulates the non-applicability of the statute of limitations. It says that the crimes within the jurisdiction of the ICC shall not be subject to any statute of limitations.<sup>193</sup> This rule does not include the crimes listed in article 70 of the Rome Statute. These are the offences against the administration of justice, and are crimes directed against the Court and its activity.<sup>194</sup>

The regulation on the absence of a statute of limitation is only valid on the jurisdiction before the ICC. This means that the ratifying states do not have any obligations to change their laws concerning this issue. On the other hand, a possible situation can be that a state has a statute of limitation on a crime that the ICC has jurisdiction over, and the limitation period has passed. In that case the state has no longer the opportunity to prosecute anyone for this crime. Article 29 of the Rome Statute gives under those circumstances the Court the option to prosecute the crime on their own.<sup>195</sup>

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<sup>192</sup> Saland, page 204 f.

<sup>193</sup> The crimes include the crime of genocide, crimes against humanity, war crimes and eventually the crime of aggression, see article 5 of the Rome Statute.

<sup>194</sup> Prop. 2000/01:122, page 40.

<sup>195</sup> Dir. 2000:76, page 5.

## 8.2 The Statute of Limitation in Swedish Law

### 8.2.1 Background

Sweden has for over 150 years had different regulations concerning the statute of limitation. It plays a big part in the national criminal system, and has its foundation in several ideas of legal security and limits of state interference against the individual.<sup>196</sup> One of the basic conditions for the criminal law system's function is that it has credibility. This means that the threat of penalty, which is contained in the different penal regulations, can be implemented if an outlawed act takes place. It is not necessary that legal measures are taken against every crime that has been committed, but in order to keep the credibility of the system it is vital that the threat of penalty is realised as much as possible. This demand for a credible criminal law system is closely connected with the idea that the penal law ought to have a general preventive effect<sup>197, 198</sup>.

The question is if this idea of a credible penal system has to be realised in all cases. If an extensive time has passed from the moment when the crime was committed, and the possible prosecution of the crime, it is possible that the need to react on this act has lost its significance. Another aspect is that it is essential that both the society and the individual are aware that the legal order is clear and stabile. This implies that it is not satisfactory to have a system where the threat of a penal sanction is impending for a long period of time. The consequence is that a balance must be reached between not having a too extensive threat, and by not prosecuting these crimes on behalf of other values.<sup>199</sup>

### 8.2.2 The Statute of Limitation concerning Prosecution

There are a number of reasons why there exists specific statutory limitations concerning prosecution. One is, which was mentioned earlier, that the general preventive aspect is not so strong when the crimes are old, and instead it is more important to prosecute the more recent crimes. Another thing is that if a person, who has committed a crime, does not receive a

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<sup>196</sup> Dir. 2000:76, page 4.

<sup>197</sup> The idea that a penal legal system should have a general preventive effect means that the punishment of criminals should deter people in general from committing crimes. This prevention can be done in a number of ways, immediate discouragement, non-immediate discouragement, or by setting up rules on ethics. Today the execution of penalties is done by the non-immediate discouragement method. This means that the threat of penalty should work as an incentive not to commit crimes. It is not the execution of punishments by itself that has the preventive effect, but instead it is the threat that penalty can be executed if a crime is being committed. Jareborg, Nils, and Zila, Josef, *Straffrättens påföljdslära*, 2000, page 75.

<sup>198</sup> Zila, Josef, *Det straffrättsliga påföljdssystemet*, 1998, page 89.

<sup>199</sup> Zila, page 89 f.



sentence for committing an act for a very long time, it is better that this person can feel safe instead of being constantly exposed to the risk of having his or her new life destroyed by this crime.<sup>200</sup>

The statutory limitation concerning prosecution can be found in the Penal Code chapter 35 1, 3, 4 and 6 §§. BrB 35:1 does not say that it is prohibited to prosecute an action after the specific time limit has passed, but instead it states that it is forbidden to sentence a penalty if the limitation period has passed since the crime was committed.<sup>201</sup> The reason why the article is formulated like this, is the fact that it can initially only be established at a hearing of the case, if a crime is no longer punishable. This is connected with what the court chooses to classify the crime as, and thereby by what article the act is to be according to.<sup>202</sup>

The length of the period of limitation is determined after the sentence that is connected with a crime. The penalty of the crimes refers to the different levels of penalty that can be sentenced. The period of limitation is usually set according to the maximum penalty for a specific crime. The statutory limitation period is calculated in whole years from the day the crime was committed, and until the day which has the same date as the prior one. This is regulated in BrB 35:4 section 1. The length of the various statutory limitations can be found in BrB 35:1. The shortest period of limitation is two years, and is valid when the penalty is not over one year in prison, BrB 35:1 para 1. The longest limitation period is 25 years, which is the case if the penalty for an act is set at a maximum of prison for life, BrB 35:1 para 5.<sup>203</sup> The extent of the period of limitation is consequently established according to the maximum penalty of a specific crime. This does not only mean the penalty in the sentence scale, but also the actual punishment that can be sentenced.<sup>204</sup>

According to BrB 35:1 section 2, it is possible to prevent a crime from being declared statute-barred. This can be done either by detaining the suspect in custody, or by making sure that the suspect receives the indictment concerning the crime that was committed. There are although some

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<sup>200</sup> Berg and others, page 406.

<sup>201</sup> This means of course indirect that it is also prohibited to prosecute an action if the limitation period has passed, because the prosecutor can not prosecute if there is not any probable causes. This is regulated in BrB 15:5 section 3, which handles unjustified prosecutions. In this case where the limitation period has passed, there do no longer exist any probable causes. If the prosecutor prosecute a crime even if the period has passed he can be guilty of unjustified prosecution, but only if he acted with premeditation. If the prosecutor only acted negligent, he can be guilty of malpractice, BrB 20:1 section 1. Zila, page 90.

<sup>202</sup> Zila, page 90.

<sup>203</sup> Berg and others, page 411 ff.

<sup>204</sup> This means that the actual penalty can differ from the set penalties in the scales, because different regulations can effect the length of a penalty. For example, BrB 26:3 says that a relapsed criminal can get a longer sentence than general, and BrB 29:7 section 2 states that the penalty prison for life can not be set if a person under the age of 21 commits the crime. These provisions will effect the length of the various statutory limitations. Zila, page 90.

exceptions to this rule. In BrB 35:3 it is said that if the detention in custody is not followed by an indictment, or if the received indictment is dismissed, these preventive actions are not valid any longer. This means that the statutory limitation will continue as it did before these measures were taken.<sup>205</sup> Another fact is that it is never possible to sentence a penalty for a crime if the absolute limitation day has passed, which is regulated in BrB 35:6. One example of this limitation is BrB 35:6 para 2 which says that the absolute period of limitation, for a crime where the maximum penalty is not over two years, is fifteen years. These absolute periods are valid irrespective of detention or received indictments.<sup>206</sup>

### **8.2.3 The Statute of Limitation concerning Penalty**

The statutory limitations concerning penalty is found in BrB 35:7-9. These provisions concern already adjudged sentences, but only penalties as fines and prison. It means that it is forbidden to enforce an already adjudged penalty. The length of the limitation periods is determined the same way as the limitations concerning prosecution. The decisive factor is the length of the set penalty. One difference from statutory limitations concerning prosecution is that the limitations concerning penalties are generally longer. In BrB 35:8 regulate the length of these time periods. The shortest period is here five years, which is the case when the penalty is a maximum of one year according to BrB 35:8 para 1. The longest period is thirty years, and this occurs when the penalty is prison for life. When it comes to the limitation on fines, this can be found in BrB 35:7. Fines reach the period of limitation five years after the sentence has gained legal force.<sup>207</sup>

## **8.3 Article 29 of the Rome Statute and the Regulations on Statutory Limitations in Swedish National Law**

When ratifying the Rome Statute, one important question is whether or not to change the Swedish provisions concerning the statute of limitation. As seen earlier, the statutory limitations on crimes have existed for a very long time in the Swedish legislation. It has become an essential and integrated part of the national legal system.<sup>208</sup> There are a number of reasons why these limitations are included in the law, and one of the most vital ones are the general preventive aspect that plays a big part in Swedish law.<sup>209</sup> It is also hard to carry out a trial after a long period has passed since the crime was committed. For example might it be difficult to find evidence, and it can

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<sup>205</sup> Berg and others, page 414 ff.

<sup>206</sup> Berg and others, page 447.

<sup>207</sup> Zila, page 94.

<sup>208</sup> Dir. 2000:76, page 4.

<sup>209</sup> Zila, page 89.

also be complicated to even verify that a crime was actually committed. Another aspect is that the burden on the different prosecuting authorities would be especially hard if no limitation existed that could make it possible to dismiss certain cases.<sup>210</sup>

As we can see, there are a lot of reasons why it is essential that the Swedish regulations on statutory limitations should continue to exist. The Rome Statute on the other hand states that it is very important that the crimes within the jurisdiction of the ICC should not be the subject of any statutory limitations. Of course this does not mean that the ratifying states have to change their legislation in order to comply with this, but the result of this can be that the states with statutory limitations in some cases can not prosecute these actions. There are factors that speak in favour of removing these time limitations on the gravest crimes of international law.<sup>211</sup> It is desirable that states that ratify the Rome Statute work together towards the goal where people all over the world are held responsible for their actions. When it comes to the severe crimes like genocide and crimes against humanity it is easy to see why the period of limitation on these crimes should be removed. The aim is to see to that nobody can feel safe after committing a horrid crime, when the possibility of getting away after a certain time extent will be eliminated. The aspect earlier, that the need to prosecute a person diminish when a extensive period of time has passed since the crime was committed, might not be valid here when the crime in question is as serious as for example genocide. In these cases, the necessity to prosecute probably will not decrease after time. Here the call for justice is both more vital and extensive.

Another matter that has been up for discussion is what should happen with crimes that has already been committed, but where the limitation period has not passed. If the period of limitations is removed on these crimes, it is possible that specific provisional regulations will come into force that says that these crimes are from now on punishable. This means that the statutory limitations will from this point cease to exist.<sup>212</sup>

Is it necessary or desirable that Sweden changes the legislation, so that the gravest breaches of international law are not the subject to any statutory limitations? I believe that the traditions of statutory limitations in Swedish law, as well as in the other Nordic countries, are so deeply integrated and inherited that the decision to remove these time limitations will be one step too far. A decision like that would mean a huge alteration in the national law, and I do not believe that Sweden is either willing or ready to take this step today. The fact that Sweden might be in a situation in the future where the national courts are unable to prosecute a certain crime because of a national time limitation will not mean that the crime goes unpunished. The ICC will

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<sup>210</sup> Jareborg and Zila, page 21.

<sup>211</sup> Dir. 2000:76, page 4 f.

<sup>212</sup> Dir. 2000:76, page 4 f.

still have the opportunity to prosecute. Maybe in the future when the Court has functioned for a while and the time is right, a decision can be made concerning the removal of the statutory limitations on crimes within the jurisdiction of the ICC.

# 9 Analysis and Concluding Remarks

## *Background*

The ratification of the Rome Statute by Sweden has led to a lot of questions. Is it necessary to change the national legislation or not? My idea has not been to cover all types of possible alterations, but instead to focus on a few instances where problems can come up. I decided to look at the crime catalogue in the Statute, and compare it with the relevant provisions in the Swedish legal system. By that I hoped to find out whether or not the Swedish regulations are consistent with the provisions in the Statute, and as a result determine if any changes are necessary to make. Another issue that I thought was interesting when comparing the Swedish legislation with the Rome Statute was the matter of immunities. This is a question that has got a lot of attention during the last years, mainly because of the Pinochet trials. The problem has been to decide if and how former or present Heads of State could be prosecuted for their actions or not. I have related the provisions governing this in the Statute with the specific regulations in the Swedish Constitution. These sets of rules differ quite a lot, which makes the question of possible changes very interesting. The last subject that I chose to examine concerns the question of periods of limitations. In Swedish law there is a long and strong tradition of having different statutes of limitations, and this solid practice differs from the new provision in the Statute concerning this matter.

## *The Crime Catalogue*

When preparing the Rome Statute of the ICC, the drafters took a lot of influences from earlier writings. Among many others, the Nuremberg Charter, the Geneva Conventions and the Charters of the two War Tribunals of former Yugoslavia and Rwanda helped to form the crime catalogue in the Statute as it appears today. One of my intentions with this essay has been to see which inspirations effected the work of the Statute when drafting the new crime catalogue, and also to compare the new definitions with earlier attempts. Another issue has then been to compare these results with the definitions and regulations of the crimes with the Swedish national legislation.

During the draft of the Statute it was quite clear that one of the most important things was to find a solution that could reach universal acceptance. The goal was to find a writing that would be able to gather the different countries and by that make it possible to agree on a text. Because of this, it was not achievable to include crimes that were controversial or debated. The result of the considerations was instead the insertion of the so-

called “core crimes” in the Rome Statute. These were the crime of genocide, the crime of aggression, crimes against humanity and war crimes. It was said that the Court ought to have jurisdiction over the most serious crimes that concerned the international community as a whole. The goal was once again to make it possible for states to ratify the Statute as soon as possible in order to realise the dream of the Court.

The drafters did of course also discuss the possibilities of including other crimes as well in the Statute, but ran into trouble when trying to find common definitions. One example of this is the crime of aggression, which became one of the most difficult tasks when drafting the Statute. The State Parties were unable to find a common solution, and decided instead that the Court would have jurisdiction over the crime in the future, depending that an agreement could be reached on an acceptable definition. I believe that the drafters of the Statute made a wise decision to only include the most serious crimes. Countries have proven to be very cautious when it comes to the delegation of powers. With that in mind, the idea that only the most serious crimes should be included from the start seems quite evident. My aspiration is that in the future, countries will realise that they are in fact not giving up their national powers, but instead are helping to make it possible for the international community to reach justice in the world. The principle of complementarity is here also very important, because of the fact that the Court only has a subsidiary jurisdiction towards the national courts. The future work of the Court will hopefully lead to the adoption of more crimes, for instance acts of terrorism, and will by that become more and more important for criminal justice.

### **The Crime of Genocide**

When deciding to incorporate the crime of genocide in the Statute, the drafters were heavily influenced by the definition of the crime in the Genocide Convention. The definition in article 2 in the Convention is almost identical with article 6 of the Statute. The reasons for this were that the definition had become a well-established rule and also part of customary law, and there were no reasons why a change ought to be done.

When comparing the regulation on genocide in article 6 of the Rome Statute with Swedish law, we find that there is practically no difference. Sweden has incorporated the Genocide Convention by adopting a special law, the Swedish Genocide Act from 1964. This law relies on the text of the Convention, and the regulations only transformed the contents of the Genocide Convention into national law. The law concerning the crime of genocide completely fulfilled the international obligations according to the Genocide Convention. The Act did not include any crimes that was not already in the Penal Code, but did add a more appropriate sentence scale when trying to determine a sentence for this type of crime. Swedish law today regulates the crime of genocide by this law from 1964. It is consistent

with the definition in the Genocide Convention, and the Convention constitutes a part of the Swedish legal system.

I believe that this protection is enough when comparing it with the provision in the Statute. It is indisputable to say that the definitions of the crime of genocide in the Rome Statute and the Genocide Convention are almost identical. The definition in the Convention is also said to be part of international customary law. The fact that Sweden has ratified and transformed the sayings in the Genocide Convention into national law, should mean that Sweden by that also is consistent with the Rome Statute concerning the crime of genocide. The Swedish legal system is consistent with the text of the Statute and should therefore not need any changes.

### **Crimes Against Humanity**

The crimes against humanity were included in the crime catalogue of the Rome Statute without any controversy. The only problem was that there did exist any clear and universal definitions of the crime in the existing human rights instruments. The result became a mix of different sources, and turned out to be a detailed and extensive list of prohibited actions. This comprehensive list will probably turn out to be very useful in the future work of the Court.

Swedish law today lacks a proper regulation concerning crimes against humanity. The Penal Code contains some provisions that could become applicable if a situation would occur that included an act that could be classified as a crime against humanity. The definition in the Rome Statute of crimes against humanity includes a number of actions that constitute as inhuman activities that have been committed before or during a war. The Swedish legal system does not have a specific provision concerning these crimes, but it could be possible to prosecute certain crimes that fall under the definition in the Statute according to the national provisions in the Penal Code.

There exist specific regulations in Swedish law today on for example murder, rape and assault. All of these actions can be considered as part of crimes against humanity. Even so, it is important to remember the circumstances surrounding a crime against humanity. These crimes are systematic or extensive attacks against the civilian population. Crimes against humanity are a very serious category of criminal human rights abuse. In international law, crimes against humanity are distinguished from the domestic crimes by virtue of their "scope", or their "mass nature". The large number of victims, and/or the systematic state policy can define this mass nature. It must also be shown that the targeted groups, for example social and racial groups, were targeted for mass murder because of their status as a group.

These aggravating circumstances could mean that the domestic regulations on crimes in Swedish law are not adequate to prosecute acts that could be a crime against humanity. The question is therefore if the Swedish national provisions sufficiently can judge crimes like these. Several of the acts that were mentioned earlier do have high maximum sentences in the Penal Code. It is possible to judge long prison sentences for certain crimes. One example is BrB 3:6 which regulate the crime of aggravated assault. Here it is stated that if an act of assault is considered as a serious assault, the person that committed this act of aggravated assault can be sentenced from one to ten years in prison. It is not common that the highest sentence is set, but in a case where this act of assault is part of a crime against humanity this sentence could be appropriate.

Another matter concerns BrB 29:1-2, which contains guidelines for the Swedish courts when trying to set a proper sentence. According to BrB 29:1, it is not only the sentence scale in the specific provision that is of importance when setting a sentence. It is also possible to look at the explicit crime and by that value an appropriate sentence. Here the damage resulted from the crime can play a big part, and also the intent and the motive are important factors. The intent is of course very important when looking at a crime against humanity. BrB 29:2 list several circumstances that negatively can affect the extent of the punishment. One aggravating circumstance is if the accused showed particular cruelty when committing the crime, and another factor is if the motive was to violate a person or group because of for example their origin or race. These conditions could be applicable if a crime against humanity had been committed. By using these articles it could be possible to sentence the accused to a long prison sentence.

Are the Swedish domestic regulations on these crimes enough to live up to the provisions regulating crimes against humanity in the Rome Statute? I believe that there are some advantages of not changing the Swedish legislation concerning the crimes against humanity. If the provisions in the Penal Code could be satisfactory applicable on crimes that fall under crimes against humanity, then there would be no point in altering the provisions. It would be meaningless to change a system that works. But I am not completely sure that the existing rules in the Penal Code can fully comply with the provisions in the Rome Statute. We do not know how cases like these would be judged according to domestic law, and here there exist a big problem. Sweden could face obstacles in the future work with the Court. If there do not exist any provisions in the national legal system that is consistent with the Statute, the Court could say that Sweden is unable to prosecute these crimes. The result would be that the case will be judged in the ICC, and not by a national court. I believe that even if we have some regulations that could cover some crimes against humanity in the Swedish legal system today, there still exist a need for a regulation that could cover all the acts defined in the Rome Statute.



One suggestion has been to pass a new law that would include all the international law crimes. This law would change how international law is regulated in the system today, and would create a new provision concerning crimes against humanity. The regulations on international law crimes in Swedish law have gone through a lot of changes over the years. Criticism has been raised against the scattered and unavailable regulations. The idea of a new law could change this situation, and bring all the provisions together as a unified system. It is at the same time important to keep these new rules integrated with the rest of the legal system. One problem could be if people thought of the new law as separated from the rest of the legal system. The international law crimes are a part of the national system, and they should in no way be seen as a different set of rules. We do not want to create a system within the system. Even so, I do not believe that these prospects should be determining. It is possible that some could find the new law as being separated from the legal system, but there are always uncertain features when creating a new law. I believe that a new regulation on international law crimes would benefit the legal system. The provisions would be more accessible and there would exist a regulation on crimes against humanity that would be consistent with the Rome Statute.

## **War Crimes**

Article 8 of the Rome Statute contains the definition of war crimes. This is a list of several crimes that are prohibited in armed conflicts. The list is divided into four major categories of crimes, where the first two concern crimes committed in international armed conflicts and the last two groups relate to internal conflicts. The adoption of the two former categories was highly controversial because of its internal nature. The influences for the definition of war crimes can be found in for example the four Geneva Conventions and the two Additional Protocols. The new definition in the Statute has reached further than earlier formulations, and the scope of international humanitarian law has been widened.

War crimes consist of a number of acts that are usually committed by members of armed forces, or by individuals, in violation of the rules of war. When examining the Swedish law from a war crimes perspective, we find some provisions concerning this area. In BrB 22:6, crimes against international law can be found. These concern serious violations of an agreement with a foreign power, or the violation of a generally agreed principle. This crime is not a military crime, and means that the person that committed the crime does not have to be in the military in order to be prosecuted. There are several acts listed in the article that can constitute as a crime against international law. One example is if a person use weapons that are not allowed according to international law. The crimes in this article are only acts that are considered as serious violations of international law. This statement has its origin in the Geneva Conventions and the First Additional Protocol which state that the Parties to the Conventions are obliged to enact legislation that sanction persons who commit grave breaches of the law.

BrB 22:6 a contains a provisions concerning the unlawful use of chemical weapons, and BrB 22:6 b regulate troop mines. Both of these provisions are the response to international agreements that Sweden has signed.

As said earlier, the definition of war crimes in article 8 of the Rome Statute is quite different from earlier sayings. One important change is the inclusion of violations in non-international conflicts. The definition in the Rome Statute has in many ways gone further than its precursors. Humanitarian law has been extended, and this change will be very vital when it comes to how we see and modify international humanitarian law in the future. Sweden ought to examine this new approach, and try to follow its way. There exist some provisions on war crimes in the national legislation at present, but a revision is needed. The new definition of war crimes should give Sweden an incentive to follow the development by altering the provisions in order to comply. The idea that a new law should replace the different provisions in the Swedish legal system concerning international law crimes, and gather them all in a unified law, could mean a good opportunity to see how the regulation of war crimes could be modified. Additional provisions could be needed in order to comply with the new rules in the Statute, and to make sure that Sweden has the same scope of protection as the Statute.

As we can see, the inclusion of the core crimes has been quite successful. The end result will be shown as soon as the ICC comes into use, and the crime catalogue will be put to a test. I believe that the insertion in the Rome Statute of these crimes will form a good and stabile basis for the work of the Court. The real challenges will be to make people and states trust the ability of the Court, and not to be afraid of its impending capacities.

### ***Immunities and Privileges***

The field of immunities and privileges in international law has gone through a lot of changes during the last years. One strong development has been the tendency to hold persons responsible for crimes against humanity, and not approving any claims for immunity. History has shown that the idea of holding Heads of State and different public officials responsible for crimes against humanity is not a new principle. One example is the Nuremberg Charter, which said that Heads of State could be responsible for crimes against international law. Another issue is that this principle of criminal responsibility for Heads of State has been recognized as customary international law. It is not possible in cases like these to claim immunity from prosecution. The ICC and the Rome Statute have recognized this principle.

One important step in this new development was the Pinochet case. This case shows that even if a former Head of State enjoys immunity for acts committed in his functions as Head of State, international crimes such as torture and crimes against humanity are not "functions" of a Head of State.

The Pinochet arrest could be seen as a "wake-up call" to tyrants everywhere. Another effect of the case could be to give hope to other victims that they can bring their tormentors to justice abroad. A former Head of State does under customary international law enjoy immunity for official acts that fall under his functions as a Head of State. It is then to determine if the acts are considered as part of the functions as a Head of State or not.

Another case concerning the question of immunity came when a new ambassador for Israel was appointed in Denmark. Carmi Gillon, the former head of the General Security Service, Shin Beth, in Israel, filled the position. The controversy surrounding Gillon led to a call for Denmark to reject Gillon as the new ambassador for Israel. Another question which was raised was if it was possible to prosecute and arrest Gillon for the alleged crimes. His statements concerning torture, including his opinion that torture could be seen as self-defence against terrorism, could be in direct contradiction with the Torture Convention. Calls have also been made in order to prosecute Gillon for his actions as the head of Shin Beth. Even so, the Danish Justice Department decided that Denmark was unable to prosecute and arrest Gillon upon his arrival. The reason behind this decision was that Gillon was under diplomatic immunity. This immunity would then protect him from any allegations of torture.

The Statute of the emerging ICC, following the principles laid down at Nuremberg, states in article 27(1) that "official capacity as a Head of State or Government, shall in no case exempt a person from criminal responsibility". Similar provision can be found in the Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia, which in 1999 indicted Slobodan Milosevic, the President of the Federal Republic of Yugoslavia.

The inclusion in the Statute of a provision that excludes immunity of all forms is of course of great importance. Criminal responsibility will by that be equal to all, no matter what official capacity a person has. If for example a Head of State is charged with crimes within the jurisdiction of the Court, then the Court could try the case if the state of nationality or the state with the territorial jurisdiction is a State Party to the Rome Statute. The trend in the world today is to make sure that the international society will help to end the worst and most serious violence of mankind. The development with the Tribunals of former Yugoslavia and Rwanda, the prosecution of Milosevic and the emerge of the ICC all help to fulfil this goal. The fact that the Statute now recognises that no one is free from criminal responsibility is a vital step forward.

In most states it is common to have certain regulations that concern immunities and privileges for the Head of State and other officials. When these countries now ratify the Statute, some problems arise concerning the question on how to regulate the question of immunities. Constitutional

issues, as well as political ones, can be hard to resolve. It is stated in article 27(2) of the Rome Statute that even if there exist provisions on immunities for official capacities in national or international law, it does not obstruct the ICC from exercising its jurisdiction in a specific case.

In Swedish law there exist some provisions regulating this area. In the Constitution we can find RF 4:8, that regulate the immunity for the Members of Parliament. It is here prohibited to bring a legal action against a Member of Parliament for acts committed in office. This is not an absolute immunity, because the Parliament can revoke the immunity by a special decision. A future scenario, if the Swedish immunity provisions are not altered, could be that the ICC wants to prosecute a Swedish Member of Parliament. The principle of complementarity states that the ICC will have the right to prosecute if the national court is either unwilling or unable to do so. The Swedish Constitution could in a case like this become an obstacle for a prosecution, and by that the national courts would be unable to prosecute. It is of course not very likely that a Swedish Member of Parliament would be prosecuted for any of the serious offences in the Rome Statute. The reason for this is that a single Member of Parliament lacks the power to commit a crime of this sort. It is of course possible that a large number of Members of Parliament could join together and commit a crime listed in the Statute. This situation is not very likely, but it is not impossible.

The Swedish Head of State is protected by the Constitution according to RF 5:7. The Head of State can under no circumstances be prosecuted for official or private acts. The idea behind this absolute immunity is the fact that any persecution of the Head of State should be avoided. As with the Members of Parliament, it is not very likely that the Head of State will commit any of the crimes in the Rome Statute. A very strong reason for this is that the Swedish Head of State does not have any real powers but instead only a constitutional position. The Head of State can not make any binding decisions, and would not be able to carry out any decisions that would constitute as a crime in the Statute.

The provisions in the Swedish Constitution concerning immunities differ quite a lot from the articles on immunities in the Rome Statute. At the time of the ratification of the Statute by Sweden, these provisions were said not to stop the ratification. It was possible to ratify the Statute without any specific changes of the Constitution concerning immunities. Even so, the question still remains whether or not the Swedish regulations on immunities in the Constitution need to change. My opinion is that the provisions concerning immunities in Swedish law today need to change in order to comply with the Rome Statute. I agree that it is highly unlikely that either a Member of Parliament or the Head of State will face a situation where they are accused of having committed any of the crimes in the Statute. Even if these scenarios seem quite impossible, it is still important that it technically could happen. Sweden would then be in a situation where the national courts are unable to prosecute these acts, and where the ICC would have to prosecute the

perpetrators itself. Sweden ought to follow the recent developments in the world where persons are held criminally responsible for serious crimes, without any possibilities to claim immunity from indictment. I am not proposing that the Head of State or other Swedish officials should be held criminally responsible for all acts, but only for the serious crimes in the Rome Statute.

There are a number of ways on how to change the laws on immunities. The Venice Commission has proposed several approaches to this problem. One method is to amend the Constitution in order to comply with the Rome Statute. This is of course a rather hard and complicated procedure, and can raise some political conflicts. It is on the other hand a recognised and accurate way to change the very important Constitution. Another direction would be to say that the Constitution has an inherent exception from immunity. I am quite sceptical towards this approach, when considering the rule of law and legal security aspect. In my opinion the best way would therefore be to try and make a decision to alter the Constitution.

### ***The Statute of Limitation Question***

Article 29 of the Rome Statute say that there should be no applications of a period of limitation in the work of the ICC. This means that the crimes in the Statute can be prosecuted without taking a specific time limitation into consideration. The crimes within the ICC are by that not subject to any statutory limitations, and can be prosecuted without any limits in time. The exception to this rule can be found in article 70 of the Statute, which concerns offences against the Court and its activity.

The absence of a statute of limitation is only valid before the ICC. This means that the ratifying states do not have to alter their laws concerning this matter. But even so, a situation could occur where a state has a statutory limitation, which is applicable on a specific crime in the Statute, and where the state is unable to prosecute the crime because the period of the statutory limitation has passed. In that case, the ICC still has jurisdiction over the crime, even if the national statutory limitation states that the crime can not be prosecuted in the national state.

Sweden has for a very long time, for over 150 years, had different provisions concerning statutory limitations. The institute has a long and strong tradition in the legal system, and it has its origin in both the concept of legal security and limits of state interference of individuals. A criminal system has to be credible, and this means that the threat of a penalty should be implemented if a crime is committed. This threat should be realised to the greatest extent possible, but there are exceptions. If an extensive time period has passed since a crime was committed the need to react has lost some of its meaning. It is vital that the society and the individual can trust the legal system, and it is as a consequence also important that a threat of penalty does not exist

after an extensive period of time. A certain balance has to be reached in order to have a trustworthy system.

There are two types of statutory limitations in Swedish law. The first kind is the statutory limitation concerning prosecution. A reason behind this limitation is the fact that if a person has not been sentenced for an act for a long period of time, it is better if that person can feel safe instead of worrying that a penalty will be set. This means that a person will not have to live in a constant fear of being caught. These limitations can be found in the Penal Code, BrB 35:1, 3, 4 and 6 §§. Here it is not said that it is prohibited to prosecute an act after a specific time period has passed, but instead it says that it is forbidden to sentence a penalty if the statutory limitation period has passed. The reason for this saying is the fact that a crime can only be decided to be unpunishable before a hearing of the case. The length of the statutory limitation period is determined according to the sentence that is connected with the crime committed. The longest time period is 25 years. The other type of statutory limitations is the limitation concerning penalty. These provisions can be found in BrB 35:7-9. These statutory limitations concern already adjudged prison and fine sentences. The idea is that it is prohibited to enforce an already adjudged penalty after a specific time period has passed.

The Swedish provisions concerning the statutory limitations are not consistent with the provision concerning this matter in the Statute. There exist no legal obligation to alter the national legislation, but there might be an aspiration to be consistent with the Statute. One thing that we have to remember is that the tradition of having provisions governing statutory limitations in Swedish law is very strong and of great essence to the whole legal system. The institute has become an integrated part of the system, and the origins of the principle goes back to for instance the basic idea of legal security. There exist a number of reasons why the principle was introduced, as well as reasons for why the principle is important to keep. One factor is the difficulty of finding valid evidence in a case when a long period of time has expired.

The Rome Statute does not have any statutory limitations on the crimes within the jurisdiction of the Court. There are several reasons why this idea is good and necessary for the work of the ICC, including the fact that it is desirable that State Parties to the Statute work together towards the aim where people responsible for crimes of these serious types are being prosecuted without exceptions. Persons responsible for these grave acts, like genocide and war crimes, should never be able to get away with these horrid actions no matter how long time has passed since the crime was committed. The desire to prosecute persons for these crimes will not diminish as time goes by.

The Swedish provisions concerning statutory limitations have a strong root in the legal system. It might be a good idea for Sweden to be as consistent as

possible with the regulations in the Statute, but in this case I do not think that it is possible or desirable to alter the Swedish provisions. Sweden, together with the Nordic countries, consider the provisions on statutory limitations to be such an integrated and vital part of the legal system that it in my view would take a lot of consideration until a change could be a reality. A decision like that would be a vast alteration in the national law, and I do not feel that Sweden is ready to take that step today. It is possible that in the future, when the ICC has functioned for a while, it might be good to reconsider this question, and see if any changes could be done. It is also vital to remember that even if the time period has passed for a certain crime in the future, the act will not go unpunished. The ICC will still have the opportunity to prosecute the crime.

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