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INVESTIGATION AND PROSECUTION IN SCANDINAVIA OF INTERNATIONAL CRIMES

Edited by
Lydia Lundstedt

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Distributor
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Artillerigatan 67
SE-114 50 Stockholm
Sweden
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Stockholm Institute for Scandinavian Law
Law Faculty, Stockholm University
SE-106 91 Stockholm
Sweden
scandinavianlaw.se
sisl@juridicum.su.se

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Foreword

States have a legal responsibility to provide effective penal sanctions for persons responsible for international crimes. This also entails an obligation to bring such persons to their own domestic courts or extradite such persons to other states that are able and willing to conduct trials. International criminal tribunals and courts are to be a last resort when states fail to meet these obligations. Even with the existence and availability of criminal proceedings at international level, the assumption is, and the practical circumstances require, that most cases will need to be adjudicated at domestic level. Although the emphasis on domestic investigation and prosecution clearly follows from international treaties, this is not reflected in legal scholarship. A substantial amount of scholarship focuses on the International Criminal Court and other international tribunals, not much on domestic proceedings. This tendency is reinforced by the transnational character of international criminal law as an academic discipline where scholars from different countries, through the study of international courts, may collaborate on book projects, conferences and debates. The focus on international courts also allows us to give courses with students from all over the world. However, we must ask ourselves, is this the best way of using our time and resources? Should we not pay greater attention to investigation and prosecution at domestic level? This call for a shift in attention may cause anxiety among some of us. How are we supposed to go to conferences abroad, publish in international law journals and attract exchange students if we focus on what happens in domestic legal settings? This is not an argument for entirely abandoning the study of international criminal tribunals and courts, nor that the mentioned institutions are irrelevant: it is a call for a shift of emphasis towards the domestic setting.

The present volume seeks to remedy this imbalance by examining how the Scandinavian countries investigate and prosecute international crimes within their own domestic legal systems. Although none of the Scandinavian countries have had armed conflicts on their soil since the Second World War, there are in Scandinavia at present war criminals, and witnesses and victims of atrocity crimes. Many of the latter have come to Scandinavia as asylum seekers. Others, who have been born and raised here, travel to conflict areas and later return. The crimes have been committed in different situations outside Scandinavia and it is only lately that the investigation and prosecution of these crimes have gained adequate attention. There is now enough material in terms of number of trials to examine this area of law in a systematic and thorough manner. Based on existing domestic case law, the present volume aims to make an inventory of the issues that have surfaced and of conceivable future challenges. Such an inventory may be of utility for practitioners as well as legal scholars who wish to understand how international law and domestic law interact.

The domestic investigation and prosecution of international crimes gives rise to several questions, including those relating to jurisdictional conditions for domestic courts, applicable law, procedural matters and whether domestic prosecutions contribute to the goals set by states as part of a global community.

The answers to these questions are of both practical and scholarly relevance. Practical in the sense that these matters relate to the most serious of crimes, where the interest in combatting impunity is high. From a scholarly perspective, we may acquire a better understanding of norms, external or from above, that may influence the laws of a domestic legal system. How do domestic rules and case law relate to international law; are they part of the same system (monism), separate systems (dualism) or a mix thereof?

Countries outside Scandinavia have already, or will, meet similar challenges; the need to exchange experience and scrutinize one's own assumptions will remain. This is a call to undertake comparative study of the domestic investigation and prosecution of international crimes, asking how different countries sanction international crimes. This requires that we seek issues and special challenges associated with sanctioning international crimes. The search will sustain and promote the relevance of our scholarly work.

Each contribution to this volume covers a discrete theme or issue. As scholarly articles, they stand on their own. However, they are also connected since the contributions all cover aspects and parts of the process of investigating and prosecuting international crimes. To render this systematic and, if found suitable, replicable in relation to studies of domestic systems outside Scandinavia, the majority of the articles contain certain common elements and modes of analysis. This systematic treatment invites the reader to make comparisons between legal systems and hopefully stimulates additional research.

The contributions in this volume focus on decisions and cases tried at domestic level. However, they are neither case studies nor case summaries: instead they cover certain themes.

The initiative for this volume was originally triggered by a study of the investigation and prosecution in Sweden of international crimes.[1] Thus, a majority of the contributions cover Sweden. The contributions on Norway, Denmark and Finland are fewer but still aim to cover the same themes, albeit in relation to some themes with a more limited scope.

By way of introduction, Mats Deland provides a historic background. Next, Mark Klamberg offers an overview of the Swedish cases that have been adjudicated at trial. Thereafter, Fanny Holm describes, and makes an inventory of the objectives of international criminal law that may be relevant in a domestic setting. Finally, Dennis Martinsson and Mark Klamberg examine jurisdiction and immunities in Sweden when international crimes are investigated and prosecuted, including how prosecutions must be authorized by either the Government or the Prosecutor General.

The second part of this volume deals with general principles and matters of criminal law. The contributions here relate to rules in substantive criminal law that are common to all (or a substantial part of all) crimes; for example: perpetration and accomplice liability, *mens rea* and grounds for excluding criminal responsibility. Although cumulative charging and cumulative convictions and sentencing are not normally characterized as general principles of criminal law, these matters may still be perceived as general and as such placed in this part of the volume. One question that may arise in domestic-level

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[1] Klamberg, Mark (ed.), *Lagföring i Sverige av internationella brott*, Stockholm: Jure, 2020.

cases is whether the general principles of criminal law of the country concerned should be applied to international crimes or whether general principles as applied by international criminal courts should be considered. In other words, does Part III of the Rome Statute of the International Criminal Court have any relevance in domestic criminal trials when one is confronted with issues such as individual criminal responsibility, *mens rea* and grounds for excluding criminal responsibility? Alternatively, should rules of customary international law – which may be codified in Part III of the Rome Statute – be binding or provide guidance in general principles of criminal law in domestic criminal proceedings? These questions figure in five contributions: Erik Svensson on perpetration and accomplice liability, Ebba Lekvall and Dennis Martinsson on the *mens rea* element of intent in the context of international criminal trials in Sweden, Annika Norée and Dennis Andreev on grounds for excluding criminal responsibility in Swedish case law, Fredrik Björklund on charging of international crimes in Sweden, and Axel Holmgren on the application of international norms to Swedish national sentencing.

The third part of the volume deals with the substance of international crimes starting with Mark Klamberg's article on the evolution of Swedish legislation on international crimes. Next, Mark Klamberg and Anna Andersson discuss the contextual elements in war crimes; including the requirement that there is a nexus to armed conflict in order for an act to be characterized as a war crime. The remaining contributions deal with issues brought to the fore by Swedish court cases or that for other reasons deserve attention. Anna Andersson examines the war crime of outrage upon the personal dignity of the dead. Maria Sjöholm writes about sexual violence and gender-based crimes. Jonas Nilsson gives an account of how genocide has been and is regulated in Swedish law and the three cases that have been adjudicated at trial. There have not yet been any trials on crimes against humanity, and the crime of aggression is not yet criminalized under Swedish law.[2]

The fourth part of the volume deals with procedural matters. There is no discussion in legal scholarship or court decisions on the procedural law applicable to trials in Sweden: such proceedings are to be conducted pursuant to Swedish criminal procedure as set out in the Swedish Code of Judicial Procedure (*Rättegångsbalken*). However, even if the Swedish Code is applicable, trials involving international crimes may raise special challenges that warrant a discussion. The main challenge is that the alleged criminal acts have been committed in other states, and this makes investigation more complicated and difficult. This in turn may have consequences for the trial and the assessment of whether the defendant is guilty. Thus, a crucial tool is international legal assistance and cooperation. Even with the assistance and cooperation of other states, compensatory measures may be needed. One should read the contributions of Fanny Holm (victims), Miriam Ingeson (structural criminal investigations) and Mark Klamberg (evidentiary matters) against this

[2] However, there is a proposal in the Swedish Government Official Report to introduce such a crime, see SOU 2018:87, Aggressionsbrottet i svensk rätt och svensk straffrättslig domsrätt, Slutbetänkande av Aggressionsbrottsutredningen (The crime of aggression in Swedish law and Swedish criminal jurisdiction, Final Report of Inquiry on the Crime of Aggression).

background. Finally, Hevi Dawody Nylén examines exclusion from asylum for persons who have committed, or are believed to have committed, international crimes.

The final part of the volume covers the investigation and prosecution of international crimes in other Scandinavian legal systems: Norway by Sofie Høgestøl, Denmark by Lars Plum, and Finland by Mikaela Heikkilä.

All the contributions in this volume are structured to cover how distinct issues are dealt with in domestic law, international law, domestic decisions and court cases, followed by an analysis. Part of the analysis examines to what extent and how international law and other foreign sources are considered and/or implemented in the domestic system. The analysis also involves a discussion of how the objectives of international criminal law are brought into action.

To conclude, hopefully this volume will contribute to the study of the domestic investigation and prosecution of international crimes and invite further, not least comparative, research.

Stockholm, March 2020

Mark Klamberg

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The series Scandinavian Studies in Law is published by a non-profit trust. The first volume was presented in 1957 and to date some 900 articles have been made available in the series. The overall objective of the series is to present Scandinavian law and legal theory to a wide English-language readership. The scientific coordinator for this volume has been professor Mark Klamberg, Stockholm University.

More information about Scandinavian law and the series is available at scandinavianlaw.se.

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