The Crime of Genocide Before Swedish Courts

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1 Introduction

The crime of genocide was introduced into Swedish law in 1964 following Sweden's ratification of the Genocide Convention of 1948. However, the first genocide trial before a Swedish court was not conducted until 2012-2013, with the trial and judgment against Stanislas Mbanenande.[1] Since then, another two genocide trials have been held before Swedish courts; the case against Claver Berinkindi[2] and the case against Theodore Tabaro[3]. All of these cases concern the genocide in Rwanda in 1994.

The definition of genocide in Swedish law corresponds in broad terms to the definition of the crime in international law. Until the end of the 1990s there was hardly any international case law concerning genocide.[4] This changed with the work of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY). A large amount of judgments from these tribunals and the Extraordinary Chambers in the Courts of Cambodia (ECCC) have contributed to a better understanding of this crime. In this article, the author analyses how the crime of genocide has been dealt with by the Swedish courts in the three mentioned cases, against the background of the international case law on genocide.

2 The Crime of Genocide in Swedish Law

The crime of genocide was first regulated in Swedish law in the Genocide Act (1964:169).[5] Pursuant to Article 1 of the Act, genocide is defined as a crime for which the prescribed penalty is at least four years of imprisonment, committed against a national, ethnic, racial or religious group with the intent to destroy the group in whole or in part.[6] The penalty is imprisonment for a fixed term of at least four and at most ten years, or life imprisonment.[7] The Act further prescribes

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1 *Prosecutor v. Stanislas Mbanenande*, District Court of Stockholm, Case B 18271-11, judgment of 20 June 2013, *aff'd Prosecutor v. Stanislas Mbanenande,* Svea Court of Appeal, Case B 6659-13, judgment of 19 June 2014.

2 *Prosecutor v. Claver Berinkindi,* District Court of Stockholm, Case B 12882-14, judgment of 16 May 2016, *aff'd Prosecutor v. Claver Berinkindi,* Svea Court of Appeal Case B 4951-16, judgment of 15 February 2017.

3 *Prosecutor v. Theodore Tabaro,* District Court of Stockholm, Case B 13688-16, judgment of 27 June 2018, *aff'd Prosecutor v. Theodore Tabaro,* Svea Court of Appeal, Case B 6814-18, judgment of 29 April 2019, *cert. denied Prosecutor v. Theodore Tabaro,* Supreme Court of Sweden, Case B 2837-19, judgment of 27 August 2019.

4 Schabas, William, "Article 6 – Genocide" in Ambos, Kai och Triffterer, Otto, *The Rome Statute of the International Criminal Court: A Commentary*, C.H.Beck/Hart/Nomos, 2016, p. 128.

5 Genocide Act (1964:169).

6 Genocide Act (1964:169), para. 1.

7 *Ibid.*

responsibility for attempt, preparation, and conspiracy to commit genocide, as well as failure to reveal an act of genocide, in accordance with the Swedish Criminal Code, chapter 23.[8]

The Genocide Act (1964:169) was adopted following Sweden's ratification of the Genocide Convention of 1948.[9] Following the ratification, the legislator assessed that the Swedish criminal law did not in all respects meet the requirements of the Convention concerning the possibility to punish the crime of genocide but that this could be considered in connection with the major revision of the Swedish criminal code, which was underway at the time.[10] This also happened. The Act does not contain an exact translation of the genocide definition set out in the Convention. In particular, the two definitions differ concerning the underlying acts. The definition in the Convention lists five types of underlying acts:

> a. Killing members of the group;
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> 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.[11]

However, the definition in the Genocide Act (1964:169) does not specify which acts could constitute genocide but includes a more general formulation: any crime for which the prescribed penalty is at least four years of imprisonment. In this respect, the *travaux préparatoires* set out that genocide was connected to "any crime".[12] It was further concluded that the proposal for the new criminal code (what was to become the Swedish Criminal Code of 1962) "relatively well" encompassed the criminal acts in the Genocide Convention and that it was unnecessary to create any new ones.[13] What nevertheless required a separate law for genocide were the provisions concerning attempt and conspiracy and the fact that the penalties set out in the proposed criminal code had not been determined taking into account the particular nature of the crime of genocide.[14] It was

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8 Genocide Act (1964:169), para. 2.

9 Proposition 1964:10 med förslag till lag om införande av brottsbalken m.m. ("Prop. 1964:10"), pp. 4, 34, 202-203.

10 Prop. 1964:10, p. 204.

11 Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention").

12 Prop. 1964:10, p. 204. In the *travaux préparatoires* the term "crime" was changed to "act" (see Prop. 1964:10, p. 204).

13 Prop. 1964:10, pp. 203-204.

14 *Ibid.*

concluded that a separate law, rather than additional provisions in the Criminal Code, was required considering the particular nature of the crime of genocide.[15]

In conclusion, the adoption and formulation of the Genocide Act (1964:169) was based on Sweden's obligations to adhere to international law, and specifically the Genocide Convention, which sets out that ratifying states commit themselves to prevent and punish the crime of genocide.

Through legislative amendments in 2009 the penalty for genocide was changed to imprisonment for a fixed term of at least four and at most eighteen years or for life.[16] In other parts, including the definition of genocide, the law remained unchanged.

Section 1 of Act 2014:406 on Criminal Responsibility for Genocide, Crimes Against Humanity and War Crimes introduced a definition of genocide in Swedish law, which corresponds very closely to the one in the Genocide Convention.[17] The purpose of the new Act was to enable prosecution of international crimes in Swedish courts to at least the same extent as before the International Criminal Court.[18] This was considered one of the international obligations following from Sweden's ratification of the Statute of the International Criminal Court (ICC).[19] According to the *travaux préparatoires*:

> Ratification of the Statute does not imply a formal obligation for states to introduce any national regulation of the crimes corresponding to those that exist in part II of the Statute. However, the Statute is based on the principle that the ICC as well as domestic authorities should be able to prosecute the crimes within the ICC jurisdiction. [20]

The amendments of the Swedish law were also desirable, according to the *travaux préparatoires*, for other reasons. For example, it was desirable to collect and organise international crimes into one law.[21] Furthermore, it was necessary that Sweden adhered to customary international law, which in many respects went further than the ICC Statute.[22] Concerning the effect of international law on Swedish law in general, the *travaux préparatoires* set out:

> The legislation is obviously Swedish law. Even if domestic courts will interpret and apply Swedish law, this has to be done taking into consideration the relevant rules

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15 Prop. 1964:10, p. 204.

16 Law on the Amendment of Genocide Act (1964:169), 1 July 2009. See also Proposition 2008/09:118 Straffet för mord m.m..

17 Act 2014:406 on criminal responsibility for genocide, crimes against humanity and war crimes.

18 Proposition 2013/14:146 Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser ("Prop. 2013/14:146"), p. 1.

19 Prop. 2013/14:146, pp. 22, 78.

20 Prop. 2013/14:146, pp. 67 (the author's translation).

21 Prop. 2013/14:146, p. 68.

22 Prop. 2013/14:146, pp. 68-70, 75.

> of international law and how they have been interpreted and applied by for example international tribunals and in particular the International Criminal Court.[23]

However, it was not considered necessary to include any specific provision concerning this in the new Act.[24]

Concerning genocide, particular attention in the *travaux préparatoires* was dedicated to the difference in the formulation of the underlying acts in the Genocide Act (1964:169) compared to those in the Genocide Convention (which has been described above).[25] According to the *travaux préparatoires* there were valid reasons to depart in the Act from how war crimes had been drafted in the ICC Statute.[26] However, there were no such reasons with respect to crimes against humanity and genocide and the proposal was therefore to design provisions which very closely corresponded to those in the ICC Statute.[27] Nevertheless, one of the underlying acts of genocide differs in a certain respect from the text in the Genocide Convention. According to the Convention, the second underlying act is to cause "serious bodily or mental harm". Taking into account the case law of the ICTY and ICTR, the Swedish legislator considered that this would unduly limit the criminal responsibility.[28] In relevant part, the Act therefore reads: "causes a member of the group serious pain or harm or subjects this person to severe suffering".[29]

In all three Swedish cases concerning genocide the courts applied the Genocide Act (1964:169), which was the applicable law at the time of the crime.

3 Genocide in International Law

The crime of genocide was introduced in international law by the UN General Assembly, which in Resolution 96(I) of 1946 declared that genocide was a crime under international law.[30] The General Assembly described the crime as "the denial of the right of existence of entire human groups" and gave the UN Economic and Social Council (ECOSOC) the task to draft a convention on the crime.[31] Two years later, following work in the UN Secretariat, an *ad hoc* committee set up by ECOSOC, and the General Assembly's Sixth Committee, the UN General Assembly adopted the Convention on the Prevention and

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23 Prop. 2013/14:146, pp. 71, 78 (the author's translation).

24 Prop. 2013/14:146, p. 78.

25 Prop. 2013/14:146, p. 68.

26 Prop. 2013/14:146, p. 75.

27 Prop. 2013/14:146, pp. 75-76.

28 Prop. 2013/14:146, pp. 86-87.

29 *Ibid.*

30 UN Resolution 96(I) The Crime of Genocide, UN doc. A/RES/96(I)(11 December 1946).

31 *Ibid.*

Punishment of the Crime of Genocide.[32] The Convention entered into force on 12 January 1951.

The definition of genocide, which is set out in Article II, reads:

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.[33]

This definition has been replicated in a number of international instruments, for example the ICTY Statute, the ICTR Statute, and the ICC Statute.[34] In addition, the International Court of Justice has found that it constitutes customary international law.[35]

The definition of genocide consists of two parts: a list of underlying acts and a specific intent. What distinguishes the crime of genocide from other international crimes is in particular the specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such.

There is considerable international case law on genocide. For example, every case before the ICTR dealt with the crime. The first judgment on genocide by an international tribunal was rendered on 2 September 1998 against Jean-Paul Akayesu. The ICTR convicted Akayesu of, *inter alia*, genocide and sentenced him to life imprisonment.[36] All three Swedish cases refer to the Akayesu judgment. Before the ICTY, all high political and military leaders of the Bosnian-Serb Republic were convicted of genocide for the acts committed in Srebrenica in 1995, when about 7,000 Muslim men and boys were executed during the course of a few days.[37] The ICC has still not tried anyone for the crime of genocide.

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32 For an excellent review of this process, see Schabas, William A., *Genocide in International Law: The Crime of Crimes*, Cambridge: Cambridge University Press, 2009, pp. 59-90.

33 Genocide Convention.

34 Statute of the ICTY, Art. 4; Statute of the ICTR, Art. 2; ICC Statute, Art. 6.

35 Case concerning application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Yugoslavia), ICJ, judgment, 26 February 2007, para. 161.

36 *Prosecutor v. Akayesu*, (Case ICTR-96-4-T), ICTR T. Ch., judgment, 2 September 1998. The Swedish Judge Lennart Aspegren was one of the three judges in the Trial Chamber hearing the case at first instance.

37 See, for example, *Prosecutor v. Mladić*, (Case IT-09-92-T), ICTY T. Ch., judgment, 22 November 2017.

The international judgments concerning genocide are characterised by complex and often lengthy reasoning, in particular concerning the specific intent. In this respect, the judgments also deal with political policy implemented by central and local authorities, historical events, and political and military structures; all in an effort to catch the complex character of the crime of genocide.[38] The international doctrine distinguishes in this respect between two ways to assess the specific intent: purpose-based and knowledge-based approach. The first approach focuses on the individual and his or her consideration while the latter approach focuses on the contextual elements, for example if the acts were carried out in accordance with a plan or a policy.[39] As will be further discussed below, the Swedish case law differs from the international case law when it comes to assessment of the specific intent.

4 Swedish Case Law

4.1 Three Genocide Cases

The limited Swedish case law concerning the application of the genocide provision in Swedish law consists of only three cases, all completed during the last few years. All three cases were adjudicated before the District Court of Stockholm (*Stockholms tingsrätt*) and the Svea Court of Appeal (*Svea Hovrätt)* as the second instance.[40] The cases concern the genocide in Rwanda in 1994 and the applicable law was therefore the Genocide Act (1964:169).[41] The three accused were convicted and sentence to life imprisonment.[42]

The three were Swedish citizens when they were indicted. They had fled Rwanda after the genocide and made it to Sweden and eventually obtained Swedish citizenship.[43] All three had also been convicted *in absentia* by *gacaca* courts to several years of imprisonment for crimes committed during the genocide.[44] Rwandan authorities requested or intended to request their

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38 See Schabas, 2009, pp. 264-267.

39 Schabas, 2009, pp. 242-243; Kress, Claus, *The Crime of Genocide Under International Law*, International Criminal Law Review, 2006, vol. 6, no. 4, 461, pp. 492-498; Greenwalt, Alexander, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*, Columbia Law Review, 1999, vol. 99, no. 8, 2259, pp. 2288-2294.

40 The Tabaro Defence appealed to the Supreme Court, which denied certification (see Tabaro, 27 August 2019, pp. 5-6).

41 *Mbanenande*, 20 June 2013, p. 2; *Berinkindi*, 16 May 2016, pp. 5, 35; *Tabaro*, 27 June 2018, p. 1.

42 *Mbanenande*, 20 June 2013, p. 2, 106; *Mbanenande*, 19 June 2014, p. 21; *Berinkindi*, 16 May 2016, pp. 5, 137-138; *Berinkindi*, 15 February 2017, p. 52; *Tabaro*, 27 June 2018, pp. 8, 179; *Tabaro*, 29 April 2019, p. 67.

43 *Mbanenande*, 20 June 2013, pp. 11, 33; *Berinkindi*, 16 May 2016, p. 15; *Tabaro*, 27 June 2018, pp. 10-11.

44 *Mbanenande*, 20 June 2013, p. 11; *Berinkindi*, 16 May 2016, p. 15; *Tabaro*, 27 June 2018, p. 11

extradition to Rwanda but since the three were Swedish citizens this was denied and the criminal investigations were taken over by Swedish authorities.[45]

The Defence mounted a similar defence in all three cases, arguing that Rwandan authorities and other high-placed people in Rwanda had launched false accusations against the accused and constructed the cases accordingly.[46] The District Court considered this argument and heard in at least the *Tabaro* case expert testimony in this respect.[47] In all cases the District Court rejected the Defence's arguments and concluded that there was no reason to doubt the reliability and robustness of the criminal investigations.[48]

The cases concern crimes committed in different parts of Rwanda. Stanislas Mbanenande was born in the village of Kibuye in the prefecture with the same name in western Rwanda and most of the crimes he was charged with had taken place in or in the vicinity of the village.[49] Claver Berinkindi lived in 1994 in the village of Nyamiyaga, Muyira commune (prefecture of Butare in the south of Rwanda) where most of the crimes in the indictment against him had taken place.[50] Theodore Tabaro was born and lived at the time of the genocide in Winteko, Cyimbogo commune (in the prefecture of Cyangugo in the south-west of Rwanda) and the crimes set out in the indictment against him were committed in Winteko and two nearby areas.[51]

The prosecutor made successful efforts to demonstrate that the accused had important roles, albeit on a local level, with regard to the execution of the genocide in the village or in the surrounding areas. Mbanenande, a civil engineer with studies in, among other places, the Soviet Union and Canada, was at the time of the genocide employed at different universities in Rwanda.[52] He was known in his village as the only one who had studied abroad.[53] The District Court found that Mbanenande during the genocide had an informal leadership role on a lower level among young Hutus who sympathized with or came to sympathize with Hutu extremism.[54] Berinkindi had at the time of the genocide a grocery store in the centre of Nyamiyaga and had a butcher business in the village.[55] The District Court concluded from this that he was known among the local

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45 *Mbanenande*, 20 June 2013, pp. 11-12; *Berinkindi*, 16 May 2016, pp. 15-16; *Tabaro*, 27 June 2018, p. 11.

46 *Mbanenande*, 20 June 2013, pp. 34, 40; *Berinkindi*, 16 May 2016, pp. 40-42; *Tabaro*, 27 June 2018, pp. 146-147.

47 *Mbanenande*, 20 June 2013, pp. 40-41; *Berinkindi*, 16 May 2016, pp. 42-53; *Tabaro*, 27 June 2018, pp. 148-171.

48 *Mbanenande*, 20 June 2013, pp. 42, 50-51; *Berinkindi*, 16 May 2016, p. 53; *Tabaro*, 27 June 2018, pp. 154-155, 168, 170-171. See also *Berinkindi*, 15 February 2017, p. 12 and *Tabaro*, 29 April 2019, pp. 21-23.

49 *Mbanenande*, 20 June 2013, pp. 9-11, 13-14.

50 *Berinkindi*, 16 May 2016, pp. 13-15, 22.

51 *Tabaro*, 27 June 2018, pp. 9-10, 43.

52 *Mbanenande*, 20 June 2013, pp. 31-32.

53 *Mbanenande*, 20 June 2013, pp. 33, 52-53.

54 *Mbanenande*, 20 June 2013, p. 63.

55 *Berinkindi*, 16 May 2016, p. 56.

population.[56] Concerning his role in connection with the genocide, the District Court concluded (in almost identical wording as the District Court in the *Mbanenande* case) that Berinkindi in different ways had an informal role in Nyamiyaga and surrounding areas as a leader on a lower level among Hutus who sympathized with or came to sympathize with Hutu extremism.[57] Tabaro, finally, was according to the District Court known in the area where the crimes had been committed.[58] Concerning Tabaro's role in connection with the criminal acts, the District Court characterized it as a leading role on a local level.[59]

4.2 Evidence

The evidence before the District Court in the three cases was primarily oral testimony.[60] Since the testimonies concerned traumatic events that had occurred a long time ago, the prosecutor also presented expert evidence about memory functions and the difficulties in retelling traumatic events.[61] The hearing of this kind of evidence is to some extent connected to the special character of the cases but is otherwise not remarkable. The District Court's consideration of other evidence (than oral testimony) is, however, notable. The District Court in the *Mbanenande* case stated:

> The prosecutor's account of historical background facts of the genocide in Rwanda 1994, the geographic division in the country, leadership structure and military organization 1994 and the general description of the genocide and in particular in the Kibuye prefecture [...] find strong support in the evidence referred to and presented in the case.[62]

The District Court added, however, that this was also supported by facts of common knowledge.[63] In this respect, the District Court referred in a footnote generally to a number of cases before the ICTR, without specifying any decisions or judgments. In addition, it referred to the book *Gérard Prunier, The Rwanda Crisis 1959-1994, History of a Genocide.*[64] The accuracy of the facts of common knowledge was also confirmed, according to the District Court, by Timothy Longman, the expert witness on the genocide in Rwanda.[65]

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56 *Ibid.*

57 *Berinkindi*, 16 May 2016, p. 72.

58 *Tabaro*, 27 June 2018, pp. 8, 43-44, 51.

59 *Tabaro*, 27 June 2018, pp. 7, 51, 57, 60.

60 *Mbanenande*, 20 June 2013, pp. 7-8, 28-30, 38; *Berinkindi*, 16 May 2016, pp. 12, 32-34; *Tabaro*, 27 June 2018, pp. 8, 34-35.

61 *Mbanenande*, 20 June 2013, pp. 29, 39; *Berinkindi*, 16 May 2016, pp. 33, 38-39; *Tabaro*, 27 June 2018, pp. 35-38.

62 *Mbanenande*, 20 June 2013, p. 51 (the author's translation).

63 *Ibid.*

64 *Ibid.*

65 *Ibid.*

Facts of common knowledge are dealt with in the Swedish Code of Judicial Procedure, chapter 35, paragraph 2, which sets out that "proof of a circumstance that is generally known is not required". The District Court's reasoning concerning facts of common knowledge therefore appears odd. It mixes facts of common knowledge with expert evidence, written evidence (in the form of a book), and cases from an international tribunal, perhaps for the purpose of demonstrating the certainty of the facts in the case. However, the approach of the District Court creates doubts as to what really was demonstrated in the case. The Court of Appeal did not clarify this aspect but relied fully on the District Court's reference to facts of common knowledge and concluded that "it is a fact that the attacks described in the indictment have occurred".[66]

The District Court in the *Berinkindi* case adopted a similar approach, with the important difference that it did not even refer to "the evidence referred to and presented in the case"; it stated:

> The Defence has not challenged the prosecutor's general description of the genocide, the description of the leadership structure and military organization 1994, or the account of the historical background facts. The prosecutor's account in this respect consists primarily of facts of common knowledge and the account has in relevant parts been confirmed by the ICTR [...]. In addition, Timothy Longman has confirmed that the prosecutor's account is accurate.[67]

The District Court's superficial reasoning concerning the evidence on background facts is problematic and in stark contrast with how it dealt with the evidence concerning the underlying acts, with regard to which it is meticulous. At a first glance it might seem self-evident that the District Court focused on the underlying acts rather than background facts. However, as will be discussed below, the background facts could play an important role in demonstrating central aspects of a genocide case, namely the specific intent.

It is also notable that the District Court in the three cases relied to a relatively high degree on facts and conclusions set out in ICTR judgments. For example, concerning the events surrounding specific massacres, the District Court in the *Mbanenande* case relied in particular on conclusions set out in judgments by this tribunal.[68] The District Court in the same case also relied to some extent on conclusions in judgments by the ICTR concerning the understanding of a protected group in the genocide definition, and more specifically whether Tutsi should be considered an ethnic or racial group.[69] This was done without any specific review of the evidence on which these conclusions were based and it implies a very high reliance of the District Court on the work of the ICTR.

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66 *Mbanenande*, 19 June 2014, p. 5 (the author's translation).

67 *Berinkindi*, 16 May 2016, p. 54 (the author's translation).

68 See *Mbanenande*, 20 June 2013, pp. 75-76, 80-81, 89-90.

69 *Mbanenande*, 20 June 2013, pp. 103-104.

4.3 The Underlying Acts

As explained above, the Genocide Act (1964:169) does not confine genocide to a number of specific acts. As opposed to the definitions in the Genocide Convention and in Act 2014:406, the Genocide Act (1964:169) encompasses every crime for which the prescribed penalty is at least four years of imprisonment. In the indictments against Mbanenande, Berinkindi, and Tabaro under this law, the prosecutor did not have to limit him- and herself to the acts enumerated in the international definition. In the indictments, the underlying acts were: murder (*Mbanenande*,[70] *Berinkindi*,[71] and *Tabaro*[72]), attempted murder (*Mbanenande*,[73] *Berinkindi*,[74] and *Tabaro*[75]), instigation to murder (*Mbanenande*[76]), promotion of murder or attempted murder by advice or deed (*Mbanenande*[77]), kidnapping and unlawful deprivation of liberty (*Mbanenande*,[78] *Berinkindi*,[79] and *Tabaro*[80]) and gross rape (*Tabaro*[81]). However, the District Court only found that some of these acts were proven: murder (*Mbanenande*,[82] *Berinkindi*,[83] and *Tabaro*[84]), attempted murder (*Mbanenande*,[85] *Berinkindi*,[86] and *Tabaro*[87]), instigation to murder

[70] *Mbanenande*, 20 June 2013, pp. 19-23.

[71] *Berinkindi*, 16 May 2016, pp. 23-25.

[72] *Tabaro*, 27 June 2018, pp. 13-18.

[73] *Mbanenande*, 20 June 2013, pp. 19-21, 23.

[74] *Berinkindi*, 16 May 2016, pp. 23-25.

[75] *Tabaro*, 27 June 2018, pp. 13-16, 18.

[76] *Mbanenande*, 20 June 2013, pp. 22-23.

[77] *Mbanenande*, 20 June 2013, pp. 22-23.

[78] *Mbanenande*, 20 June 2013, pp. 20-21.

[79] *Berinkindi*, 16 May 2016, pp. 23-24.

[80] *Tabaro*, 27 June 2018, p. 13.

[81] *Tabaro*, 27 June 2018, pp. 13-14, 17.

[82] *Mbanenande*, 20 June 2013, p. 103.

[83] *Berinkindi*, 16 May 2016, p. 135.

[84] *Tabaro*, 27 June 2018, pp. 174-175.

[85] *Mbanenande*, 20 June 2013, p. 103.

[86] *Berinkindi*, 16 May 2016, p. 135.

[87] *Tabaro*, 27 June 2018, pp. 174-175.

(*Mbanenande*[88]), and kidnapping (*Mbanenande*,[89] *Berinkindi*,[90] and *Tabaro*[91]).[92]

One disputed matter in the cases was the specificity of the underlying acts. The reasoning by the District Court in the *Tabaro* case is illustrative in this respect. The indictment against Tabaro covered three incidents. The first "incident" encompassed all genocide acts that had been committed in Winteko from 9 April to and including May 1994.[93] The prosecutor had also included a number of specific incidents (murder, attempted murder, and rape) in the indictment as examples and therefore only a part of that which Tabaro should be held responsible.[94] However, the District Court did not follow this approach. It acknowledged that the prosecutor's approach that all acts in Winteko should be considered as one attack was understandable considering the character of the crime.[95] Genocide is, according to the District Court, "criminality of a certain scope in which several people participate and some form of planning or strategy to be able to destroy the group is as a rule also required".[96] At the same time, with regard to acts that were not specifically referred to in the indictment, the District Court found:

> It is to be understood from the Indictment that the Prosecutor argues that Theodore Tabaro is to be considered co-perpetrator because he had a leading position in relation to other perpetrators and promoted all criminality in the sector by organising, recruiting or inducing other perpetrators to commit crimes. From the evidence concerning Theodore Tabaro's leadership role it cannot be concluded that he promoted all criminality in the sector. [...] There are therefore reasonable doubts about Theodore Tabaro's leadership role having been such that he can be held criminally responsible for an unknown number of genocide acts in the sector.[97]

The District Court limited its consideration to the enumerated specific acts under the first "incident".[98] They are twelve and specific with regard to time, place, and victims (all the victims are named).[99] The second and third incidents are also specific with regard to time and place, although the indictment is vague

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88 *Mbanenande*, 20 June 2013, p. 103.

89 *Ibid.*

90 *Berinkindi*, 16 May 2016, p. 135.

91 *Tabaro*, 27 June 2018, pp. 174-175.

92 This was confirmed by the Court of Appeal in the three cases, even if it made other assessments than the District Court with regard to specific acts (*Mbanenande*, 19 June 2014, pp. 16-17; *Berinkindi*, 15 February 2017, pp. 51-52; *Tabaro*, 29 April 2019, p. 66).

93 *Tabaro*, 27 June 2018, pp. 13-14, 60.

94 *Tabaro*, 27 June 2018, pp. 14-17, 60.

95 *Tabaro*, 27 June 2018, p. 60.

96 *Tabaro*, 27 June 2018, pp. 60-61 (the author's translation).

97 *Tabaro*, 27 June 2018, pp. 61-62 (the author's translation).

98 *Tabaro*, 27 June 2018, p. 62.

99 *Tabaro*, 27 June 2018, pp. 63-119.

concerning the description and number of victims ("many hundred Tutsi/civilians, among which many are children"; "around 60 people").[100]

The indictments in the cases against Mbanenande and Berinkindi concern six and five, respectively, relatively specific incidents.[101] The number of victims in the different incidents varies between one person and tens of thousands.[102] In the *Mbanenande* case, the accused was also charged with having exhorted others - "many young Hutus" - to participate in the killing, which was categorised as instigation to murder and promoting murder or attempted murder.[103] The District Court found that the prosecutor had not proven this part of the case. [104]

The five incidents in the *Berinkindi* case consisted of two major massacres, each with thousands of victims, and three attacks on homes where Tutsis had sought shelter. The number of victims for these three incidents was three, six, and about 20. It is notable that Berinkindi for each incident was found to be "merely" a co-perpetrator. The District Court concluded for example that he had organised and instructed attackers about how the attack should be carried out, organised and recruited helpers, instructed attackers to kill, and distributed weapons to attackers, and based on this, found that he had taken on such an active and central role that he was to be considered a co-perpetrator.[105] The District Court did not, however, find it proven that Berinkindi personally had committed murder or attempted murder. With regard to one of the incidents, the District Court considered that he together and in agreement with others, with spears, clubs, and machetes had directly participated in the murder and he was therefore convicted as a co-perpetrator.[106] As part of this incident he was also convicted as a perpetrator of attempted murder of one of the victims.[107]

Of the three cases, the District Court in the *Mbanenande* case appears to have gone furthest in its evaluation and discussion when it concerns criminal liability. The second incident in this case concerned an attack on 17 April 1994 against Tutsis at the Catholic Church and hotel Home St. Jean.[108] The District Court found it proven beyond a reasonable doubt that Mbanenande together and in agreement with others during the organised attack participated in the unlawful deprivation of liberty of thousands of people and then purposefully participated in murdering thousands of them.[109] The District Court found that Mbanenande personally had shot at people.[110] Since it could not be proven that he killed anyone, the District Court found that he at least had attempted to murder many

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[100] *Tabaro*, 27 June 2018, pp. 124-145.

[101] See *Mbanenande*, 20 June 2013, pp. 13-14; *Berinkindi*, 16 May 2016, pp. 12, 15, 22.

[102] See *Mbanenande*, 20 June 2013, pp. 13-14.

[103] *Mbanenande*, 20 June 2013, p. 23.

[104] *Mbanenande*, 20 June 2013, pp. 102-103.

[105] *Berinkindi*, 16 May 2016, pp. 87, 98, 111.

[106] *Berinkindi*, 16 May 2016, pp. 122-123.

[107] *Ibid.*

[108] *Mbanenande*, 20 June 2013, p. 20.

[109] *Mbanenande*, 20 June 2013, pp. 79-80.

[110] *Mbanenande*, 20 June 2013, p. 80.

people.[111] The third incident concerned an attack on Tutsis who were at the Gatwaro stadium. This attack lasted for two days; 18 and 19 April 1994.[112] The District Court found it proven beyond a reasonable doubt that Mbanenande together and in agreement with others during the organised attack on 18 April 1994 participated in the unlawful deprivation of liberty of many thousands of people and then participated in murdering them.[113] As for the second incident, the District Court found that Mbanenande had shot into crowds of people.[114] Since it was not demonstrated that he killed anyone, the District Court found that he at least had attempted to murder many people.[115]

The situation was similar with regard to the fourth and fifth incident. The fourth incident concerned the execution of eight fleeing Tutsis on a road not far from Guesthouse Kibuye in Wagasirika sometime between 20 April and 30 June 1994.[116] According to the prosecutor, Mbanenande had during this attack personally killed one of the Tutsis by repeatedly hitting the victim on the head with a stone or a lump of cement.[117] The fifth incident concerned the murder of a man who was hiding in an attic at Guesthouse Kibuye at the end of May or the beginning of June 1994 and Mbanenande was charged with killing him, together and in agreement with others.[118] The District Court reasoned that the fourth and fifth incidents were based exclusively or primarily on the testimony of one person who had himself been accused of participating in the events but then acquitted and therefore considered that the prosecutor had not met the burden of proof.[119] The charges concerning the fourth and fifth incidents were therefore dismissed in their entirety.[120]

The sixth incident, finally, is the most comprehensive and concerned attacks against many thousands of Tutsis who had sought shelter in Bisesero, a mountain south of the commune of Gitesi in the Kibuye prefecture.[121] This group was attacked on several occasions during the period 9 April to 30 June 1994.[122] Mbanenande was charged with having promoted others to participate in the attacks and with having organised and selected groups of Hutus who were transported to Bisesero for the purpose of taking part in the killings, which the prosecutor labelled instigation of murder and promotion of murder and

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111 *Ibid.* The Court of Appeal confirmed in large parts the assessment by the District Court concerning this incident (*Mbanenande*, 19 June 2014, pp. 14, 16).

112 *Mbanenande*, 20 June 2013, pp. 20-21.

113 *Mbanenande*, 20 June 2013, p. 84.

114 *Ibid.*

115 *Ibid*. The Court of Appeal confirmed in large parts the assessment by the District Court concerning this incident (*Mbanenande*, 19 June 2014, p. 16).

116 *Mbanenande*, 20 June 2013, p. 21.

117 *Ibid.*

118 *Mbanenande*, 20 June 2013, p. 22.

119 *Mbanenande*, 20 June 2013, pp. 85-88.

120 *Mbanenande*, 20 June 2013, pp. 86, 88.

121 *Mbanenande*, 20 June 2013, p. 22.

122 *Ibid.*

attempted murder.[123] Further, Mbanenande was charged with having participated, together and in agreement with others, in many attacks and killed Tutsis.[124] With regard to at least two of the attacks, he was charged with personally having killed, or attempted to kill, people.[125] The District Court found that the charges had been proven and with regard to Mbanenande's personal involvement it found that since it had not been demonstrated that he had killed anyone, he had at least tried to kill several people.[126]

4.4 Genocidal Intent

The genocidal intent is the element that distinguishes this crime from other crimes and "gives the crime a special position as the most serious crime".[127] The intent can be very difficult to prove since it is usually not expressed in written or oral words and can often not be fully inferred from the acts. The international genocide judgments include long and complex reasoning to deal with if and how this element has been proven. Lacking direct evidence concerning the intent, the courts often consider evidence about background facts, for example about other crimes in the area or the country to demonstrate a pattern, evidence about central or local policy to commit genocide, and evidence about political and military institutions which were involved in the genocide and the accused's position within them. Compared with most international case law, the District Court did not discuss the genocidal intent in much depth.

In the *Mbanenande* case, the District Court briefly described, in the chapter called "Background", the geography of Rwanda, Mbanenande's general background and dealings from 1994 to his arrest, and the procedural history of the case.[128] It is however notable that the District Court, among these facts, included the following sentence: "During 100 days between 6 April and 18 July 1994, there was a genocide in Rwanda in which approximately 800,000 civilians were killed".[129] This sentence contains a number of conclusions which, it seems, require reasoning and support in the evidence.[130] This includes the findings of "genocide" and "civilians". The judgments by the District Court in the *Berinkindi* case and the *Tabaro* case contain similar sentences in their respective Background chapters.

The reasons for the District Court's seemingly summary conclusions in this respect can be partly found in the accused's positions vis-à-vis the charges.

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123 *Ibid.*

124 *Ibid.*

125 *Mbanenande*, 20 June 2013, p. 23.

126 *Mbanenande*, 20 June 2013, pp. 101-102. The Court of Appeal confirmed in large parts the assessment by the District Court concerning this incident (*Mbanenande*, 19 June 2014, pp. 13-14, 16-17).

127 *Tabaro*, 27 June 2018, p. 175 (the author's translation).

128 *Mbanenande*, 20 June 2013, pp. 9-12.

129 *Mbanenande*, 20 June 2013, p. 9 (the author's translation).

130 *Berinkindi*, 16 May 2016, p. 13; *Tabaro*, 27 June 2018, p. 9.

Mbanenande denied all the acts that he was charged with.[131] However, he did not dispute that there had been a genocide in Rwanda. Further, he did not dispute that some of the incidents described in the indictment had taken place, even if he did dispute that he had taken any part in them. With regard to other incidents, he claimed that he had no knowledge about whether they had taken place.[132] Similarly, Berinkindi and Tabaro did not dispute that there had been a genocide in Rwanda in 1994.[133] Further, they did not dispute that the acts described in the indictment had taken place.[134] However, they did deny that they had been at the sites of the crime and that they in any way had taken part in them.[135]

The genocidal intent in the *Mbanenande* case was dealt with by the District Court in two paragraphs, which can be restated in full:

> 201. Concerning whether the so-called intent element has been met, the District Court wants to emphasize the following circumstances. Already on 11 January 1994, commander of the UN forces UNAMIR, Roméo Dallaire, sent a coded telegram to UN headquarters, in which he requested to be allowed to launch attacks against weapons caches in Rwanda, which had come to his knowledge from a reliable source. In the telegram is mentioned that the source had been ordered to register all Tutsis in Kigali, which the source suspected was to be done for the purpose of killing them.
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> 202. The investigation has further shown specifically concerning Kibuye prefecture that the massacres there were prepared and planned by the officials. There were hate speeches against Tutsis in the prefecture and subordinates were mobilised to execute the genocide. There was written communication between the mayors in the communes and the prefect Clément Kayishema, including lists of RPF-supporters and questions about whether the work had started, and communication between the prefecture and the central government about requests for reinforcement in order to cleanse Bisesero. The attacks in Kibuye were carried out continuously and systematically and resulted in the killing of many Tutsis.[136]

It is notable that the District Court did not mention Mbanenande at all in these two paragraphs. In its conclusion, the District Court stated that the evidence shows that the purpose of the acts, in which Mbanenande had taken part, had been to destroy the Tutsi group in whole or in part.[137] In addition, it referred to two judgments by the ICTR in which it had been concluded that the killings had this purpose.[138]

The Court of Appeal in the *Mbanenande* case developed the reasoning on the genocidal intent somewhat. It found that through the attacks in which

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131 *Mbanenande*, 20 June 2013, pp. 26, 32.

132 *Mbanenande*, 20 June 2013, p. 26.

133 *Berinkindi*, 16 May 2016, p. 31; *Tabaro*, 27 June 2018, pp. 33, 41.

134 *Berinkindi*, 16 May 2016, p. 31; *Tabaro*, 27 June 2018, pp. 33, 40.

135 *Ibid.*

136 *Mbanenande*, 20 June 2013, pp. 104-105 (the author's translation).

137 *Ibid.*

138 *Mbanenande*, 20 June 2013, p. 104, note 31.

Mbanenande had taken part, thousands of people were killed.[139] In these attacks, Mbanenande had been "a leader on a lower level" and further that he "as a leader had participated in the attacks by, for example, leading and organizing groups of perpetrators and exhorting them to attack Tutsis".[140] The Court of Appeal stated that it is "undisputed that at the time of the crime a genocide took place in Rwanda against the Tutsi group (see for example, ICTR-95-1-T, *Kayishema*, p. 291)".[141] Following this, the District Court's entire reasoning about Mbanenade's intent consisted of only three sentences:

> It has been demonstrated in this case that Stanislas Mbanenande had a political interest and engagement, among other things in the Hutu nationalist party MDR and that he during a visit to Kabgay and in Kibuye associated with people who had leading roles during the genocide. Several testimonies have also indicated that Stanislas Mbanenande made statements during the genocide, promoting attacks on Tutsis. Finally, through a large amount of witness observations it has been shown that Stanislas Mbanenande participated in attacks on Tutsis that undisputedly occurred within the scope of the genocide.[142]

The District Court's assessment of the genocidal intent in the *Tabaro* case is also brief; limited to one paragraph in the judgment.[143] The District Court drew conclusions from Tabaro's acts, and more specifically the type of acts and the number of victims. However, the District Court focused primarily on how Tabaro's acts fit into the events in Rwanda at the time:

> The objective of the genocide in Rwanda was to destroy the Tutsi group (see, among other things, ICTR-96-4-T, Akayesu, pp. 112-128). Theodore Tabaro has together with others who had a leading role at the local level executed the Government's policy [...].[144]

The District Court's perfunctory conclusion concerning background facts, as described above, has an important role in this respect. That there was a genocide is "undisputed" and the remaining challenge is to place Tabaro somewhere in this. That would be sufficient for a positive finding on the specific intent.

The specific intent is the element that distinguishes genocide from other crimes and transforms for example a murder or serious assault to the most serious international crime. Generally, this element is also very difficult to prove. The Swedish courts' somewhat summary dealing with this element is therefore unfortunate and in clear contrast to how it has been treated in judgments by international courts and tribunals.

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139 *Mbanenande*, 19 June 2014, p. 17.

140 *Mbanenande*, 19 June 2014, pp. 17-18 (the author's translation).

141 *Mbanenande*, 19 June 2014, p. 18 (the author's translation).

142 *Mbanenande*, 19 June 2014, p. 19 (the author's translation).

143 *Tabaro*, 27 June 2018, pp. 175-176.

144 *Ibid* (the author's translation).

5 Conclusions

The introduction of the crime of genocide in Swedish law was triggered by Sweden's strive to comply with its obligations pursuant to international law. This is clear from the *travaux préparatoires* to the Genocide Act (1964:169). States' ratification of the Genocide Convention implies a commitment to prevent and punish the crime of genocide and the original Swedish legislation originated from the ratification of the Convention.

In a similar way, Act 2014:406 was adopted following Sweden's ratification of the ICC Statute. In the *travaux préparatoires* to this law the focus was not only on the ICC Statute but also on customary international law; even if Sweden might have been able to prosecute and try people for the crimes set out in the Statute, the new law was nevertheless required considering Sweden's obligations with regard to customary international law. The obligations emanating from the ratification of the ICC Statute are however indirect. It was acknowledged in the *travaux préparatoires* that the ratification of the ICC Statute does not require introduction into domestic law of any of the international crimes set out in the Statute. The obligation follows rather from the very foundation of the ICC system, which is that the Court should complement the domestic justice systems. Thus, it is necessary that the international crimes can be prosecuted and tried both internationally and nationally. One can detect a certain amount of self-interest in the Swedish legislator's action in this respect. Sweden wants to avoid that a case with Swedish interests (for example, with one of more Swedish indictees) ends up before the ICC on account of inadequate Swedish legislation.

In the *travaux préparatoires* to Act 2014:406 it is clarified that Swedish courts are set to apply and interpret Swedish law concerning genocide and other international crimes. This was of course the case also with regard to the prior legislation, the Genocide Act (1964:169). The legislator added, however, that the application and interpretation should be done with great consideration given to international law and how it has been applied and interpreted by for example international tribunals and in particular the ICC.[145] The legislator thus opened the door for direct application, or at least consideration, of international law by Swedish courts. Did the courts dealing with the three genocide cases seize this opportunity?

This appears not to be the case. Concerning the application and interpretation of the genocide provision, the District Court's references to international law is very limited. As explained above, the District Court did refer to the judgments by the ICTR in another respect. The Court relied on and referred to these judgments to a certain extent with regard to facts and conclusions. This could be criticised since it appears to be done without specific review of the evidence on which the ICTR reached those conclusions.

Finally, how are the purposes of international criminal law realised in the three Swedish genocide cases.[146] Concerning the purpose of preserving the rights of victims it should be noted that victims in the Swedish criminal justice system generally have a prominent role. Even if victims have been given a more

[145] Prop. 2014/14:146, pp. 71, 78.

[146] For a discussion about the purposes, see Holm, Fanny, *Objectives of International Criminal Law*, Scandinavian Studies in Law, 2020, vol. 66.

significant role in international law in recent time, they were for example before the ICTR confined to the role of witnesses. The Swedish system fits in this respect well into the tendency of increased attention to victims in international criminal law. As opposed to many international judgments and decisions, the judgments in the three Swedish cases do not touch upon the purposes of reconciliation or truth-seeking in a broader sense (history writing). As discussed above, the Swedish courts dedicate very little space in the judgments to background facts, even when this might have a direct impact on the responsibility of the accused.

The prosecution and trial of international crimes before Swedish courts during the past few years is remarkable in many respects. Even if the international case law in this area has developed significantly during the last 20 years, there is limited case law before national courts. In this respect, the Swedish case law can provide lessons not only for courts in future Swedish cases but for national courts in other countries as well.

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