

Swedish Law and Practice on Victims of International Crimes

Fanny Holm

1	Introduction	330
2	Swedish Law on Victims of Crime	331
	2.1 Rights of Victims of Crime	331
	2.2 Position of the Victim in Investigation, Prosecution and Trial	333
3	Victims of Crime in International Law	336
	3.1 Human Rights and the Protection of Victims in International Law	336
	3.2 Compliance	341
4	Swedish Legislation concerning the Position of Victims of Crime in Light of International Legal Obligations	342
	4.1 Measures Taken by the Legislator as a Response to International Legal Obligations concerning Victims of International Crimes ..	342
	4.2 Does Swedish Legislation Correspond to International Legal Obligations regarding Specific Rights?	345
	4.3 Conclusion.....	346
5	Swedish Cases concerning International Crimes from the Perspective of Victims	347
	5.1 Selection of Preliminary Investigations	347
	5.2 Crime Victim Aspects of Trials	349
	5.3 Is Legal Practice Informed by the Special Nature of the Crimes and International Legal Sources?	352
6	Analysis	353

1 Introduction

Issues of crime and its consequences for victims were already established on the international agenda in the 1980s, linked to the increased attention paid nationally to the needs, support and rights of victims. Over time, attention has come to focus on specific groups of victims, such as women, children and the elderly, but also on various types of crimes, such as trafficking in human beings, enforced disappearances and terrorism. A number of international and regional instruments have been adopted that grant victims certain rights or impose obligations on states regarding victims. Over the last twenty years, victims of international crimes have also received attention in legal and political contexts, not least through the establishment of the International Criminal Court with its far-reaching rights for victims.

In parallel with legal developments, more and more research has come to focus on victims of international crimes. These studies have been able to demonstrate the unique needs of this group and the specific nature of the crimes. In particular, the magnitude that typifies international crimes, both in terms of the number of offences and the number of victims, can be mentioned here. The crimes are also often characterised by ethnic, political or other clashes and by ongoing armed conflict, frequently with the involvement of state actors.¹ The research has also pointed out that legal proceedings concerning these crimes can fulfil purposes other than those usually invoked in support of punishment.² One such additional purpose is reconciliation of war-torn societies.

This increased focus on victims of international crimes and the specific issues that arise in relation to these victims within the framework of criminal procedure demonstrates the importance of investigating how Swedish trials have been carried out from a victim's perspective. Of particular interest is that one of the purposes of international criminal law is to satisfy the interests and needs of victims.³ This article therefore addresses the following issues:

- To what extent does Swedish legislation on the status and rights of victims of crime in legal procedures live up to international law obligations?
- To what extent is the application of the law informed by the special nature of the crimes and by Sweden's international legal obligations?

In the final analysis, the conclusions of the article are linked together with the overall issues of the volume,⁴ namely i) how interaction between authorities and actors takes place; (ii) how the processes and mechanisms for implementation of international law and foreign sources of law into Swedish law are identified and (iii) how the objectives of international criminal law are realised.

¹ A review of the specificities of the crimes can be found in Heikkilä, Mikaela, *Coping with International Atrocities through Criminal Law: A Study into the Typical Features of International Criminality and the Reflection of These Traits in International Criminal Law*, Åbo: Åbo Akademi, 2013.

² E.g. retribution and prevention, see Holm, Fanny, *Objectives of International Criminal Law*, Scandinavian Studies in Law, 2020, vol. 66.

³ See Holm, 2020.

⁴ Scandinavian Studies in Law, 2020, vol. 66.

2 Swedish Law on Victims of Crime

The framework for the position of victims in criminal procedures is defined by the rules contained in the Code of Judicial Procedure (CJP),⁵ and has remained relatively unchanged since the introduction of the Code in 1948. The term ‘victims of crime’ is not used in the CJP, but victims are referred to as injured parties (*målsägande*).⁶ According to the definition in the legal text, the injured party is the party against which the offence has been committed or which has been offended or suffered damage. Usually it is obvious who is the victim of a crime, but not always. The three-part definition of an injured party in the CJP has proved difficult to interpret.⁷ For a victim to benefit from the majority of rights in criminal proceedings, it is crucial for them to be covered by this definition as the rights stated are only granted to the injured party. The term ‘injured parties’ is used when reference is made to rights and obligations linked to a status as injured party. The term ‘victims of crime’ is used in discussions about rights and obligations that are provided victims of crime more generally and not linked to a status as injured party.

2.1 Rights of Victims of Crime

What rights are granted to victims of crime in general and the injured party in particular? Over time, a wide range of legal measures have been introduced that favour victims of crime, some in the form of rights, some as obligations for the system of administration of justice and others as optional rules. One such reform was the introduction in the late 1980s of a law providing the right of the injured party to legal counsel (*målsägandebiträde*).⁸ According to this law, the court, in the event of certain serious offences, such as assault, sexual offences and violation of integrity, may appoint legal counsel. The counsel assists the victim before the trial, for example by attending their examination and making claims for damages. Ten years later, legislation was introduced giving a child the right to a special representative (*särskild företrädare*) when subjected to a crime where a guardian, or someone with whom the guardian is in a close relationship, is suspected of the crime. The special representative shall safeguard the rights of the child during the investigation and during the trial.⁹

Since the 1970s, injured parties who do not speak Swedish have been given the opportunity to be heard before the court through an interpreter. However, the provision of an interpreter has not been formulated as a right for injured parties but rather as an opportunity for the court. It has been linked to the situation where an injured party is to be heard by the court or is formally a party to the trial (e.g. by claiming damages). Following the adoption of the EU Victims’ Rights

⁵ Rättegångsbalk (1942:740).

⁶ Ch. 20 Sec. 8 CJP.

⁷ Bring, Thomas, & Diesen, Christian, *Förundersökning*, 5th ed., Stockholm: Norstedts juridik, 2019, p. 92.

⁸ Lag (1988:609) om målsägandebiträde.

⁹ Lag (1999:997) om särskild företrädare för barn.

Directive, protection was strengthened in such a way that the court is now obligated to provide an interpreter for injured parties who do not speak Swedish.¹⁰

In addition to a general obligation under the Police Act (1984:387) to provide all individuals with protection,¹¹ the police have an added obligation to protect victims of crime. Section 13(f) of the Decree (1947:948) on Preliminary Investigation establishes an obligation for the police to carry out an individual protection assessment concerning injured parties.¹² The police provide protection through, for example, special crime victim coordinators and personal safety officers and offer some victims a so-called protection package, including alarms with a GPS function. The most far-reaching protection is provided under the special personal safety program.¹³ The legislation is designed to provide the police with the opportunity to decide on the measures, not to grant a right to the victims. A person who has been subject to the measures may be entitled to compensation for loss of income and other costs related to the measures.¹⁴

In 1988, to provide better protection for victims of crime, a law concerning restraining orders (*kontaktförbud*, previously *besöksförbud*) was introduced.¹⁵ The idea was to protect victims of violence and threats in close relationships and the aim was to prevent threatening and dangerous situations. The law allows victims of crime to have a restraining order issued. The person to whom the order is directed may not visit, contact or follow the person protected by the order. Anyone who is protected may also not be contacted by e-mail, telephone or letter and the order is not limited to certain places but applies everywhere.

Victims of crime have the opportunity to have their personal data protected through measures of confidentiality (*skyddade personuppgifter*),¹⁶ *kvarskrivning*¹⁷ and the provision of fictitious personal data (*fingerade*

¹⁰ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, Article 7; Prop. 2014/15:77 Genomförande av brottsofferdirektivet, p. 15, and Ch 5 Sec. 6 CJP in its wording after 1 November 2015.

¹¹ Secs. 1-2 polislagen (1984:387).

¹² Förundersökningskungörelse (1947:948) Sec. 13(f). See also Polismyndighetens riktlinjer för brottsoffer- och personsäkerhetsverksamheten, PM 2017:06, p. 6.

¹³ The Police's special safety measures are regulated in Sec. 2 a polislagen (1984:387) and in förordningen (2006:519) om särskilt personsäkerhetsarbete m.m.

¹⁴ Förordning (2006:519) om särskilt personsäkerhetsarbete m.m., Secs. 11-14.

¹⁵ Lag (1988:688) om kontaktförbud.

¹⁶ Confidentiality marking means that the Swedish Tax Agency (*Skatteverket*) inserts a mark on the personal data in the population register indicating that no one is allowed to disclose the information without permission and prior security check. The confidentiality mark is transferred to other government records.

¹⁷ *Kvarskrivning* means that the old address is removed and the person is registered simply as 'living in the municipality' in the municipality of the former registered residence. The address of the tax office is given as a special postal address. A mark on protected personal data is communicated to other authorities along with the address of the tax office. *Kvarskrivning* is a more comprehensive protective measure than confidentiality because it means that the person must move to a new, secret address. Mail is sent to a regional tax office where special

personuppgifter).¹⁸ For victims of violence, there is also the possibility to obtain temporary shelter (*skyddat boende*) through the municipal social welfare board. This follows the general obligation under Ch. 5 Sec. 11 of the Social Services Act¹⁹ and Ch. 4 Sec. 1 of the Social Services Act, to provide victims of crime and all inhabitants of the municipality with the support they need.²⁰

Several professions have an obligation to provide *information* to victims of crime on various issues. For those regarded as injured parties, there is an obligation for the police to provide information, as evidenced by the Decree (1947:948) on Preliminary Investigation Sec. 13(a) to (c).²¹ The prosecutor has a corresponding obligation to inform injured parties about certain issues, such as the decision to prosecute (Sec. 13 d of the same Decree) and the decision not to take action for damages (Ch. 22 Sec. 2 CJP). The courts are obligated, pursuant to Sec. 26 of the Regulation (1996:271) on cases before the general courts,²² to send judgments or a final decision to the parties, and to injured parties not formally party to the trial, if so requested (Sec. 27 of the same regulation). The court shall also provide parties with insight (*partsinsyn*), while injured parties who are not party to the trial have limited rights to such insight.²³

Victims of crime have an opportunity to claim *damages* under the Damages Act.²⁴ They have a right to be assisted in preparing this claim, by prosecutors (Ch. 22 Sec. 2 CJP) or by injured parties' legal counsel.²⁵

2.2 Position of the Victim in Investigation, Prosecution and Trial

In international comparisons, victims of crime have a strong criminal procedural position in Sweden. As in many countries in the continental legal family, victims of crime have the possibility under certain conditions to bring a private prosecution, an action for damages in connection with the criminal proceedings,

administrators have the new address. *Kvarskrivning* can be put in place for a maximum of three years at a time.

¹⁸ People who are victims of particularly serious crime and whose life, health or freedom is threatened may be given fictitious personal data, such as a new name and social security number. Previous identity is removed from the population register, including the social security number and the person must move to a new secret place of residence. Fictitious personal data are used only in exceptional cases after other less extensive measures have been tried.

¹⁹ Socialtjänstlagen.

²⁰ See further in Socialstyrelsen, 'Fristad från våld – en vägledning om skyddat boende'.

²¹ Sec. 13 a-c Förundersökningskungörelsen.

²² Sec. 26 förordning (1996:271) om mål och ärenden i allmän domstol. See also Ch. 30 Sec. 7 CJP.

²³ 'The right to insight is not manifest in Swedish law. It is expressed indirectly in several regulations, for example in the CJP and the law on publicity and confidentiality' (my translation). Ds 2014:14, p. 75.

²⁴ Skadeståndslag (1972:207).

²⁵ Lag (1988:609) om målsägandebiträde.

and to assist prosecutions.²⁶ However, the role of victims shifts during the criminal procedure.

The investigation examines who may reasonably be suspected of the crime and whether there are sufficient grounds to prosecute that person. The case must be prepared in such a way as to make it clear what evidence needs to be presented during trial. The focus during the investigation is to investigate the crime to the end that the person who committed the crime should also be punished for it. That is not to say that victims do not play a role at this stage. The victim is regularly questioned and it is appropriate that the injured party's legal counsel is appointed as early as possible, i.e. during the investigation. The claim for damages must also be prepared so that it can be filed at the same time as criminal charges are brought. The right to information, already mentioned, applies not least during the investigation. The decision to open an investigation is not generally dependent on the consent of the victims. For a few offenses, there is a requirement that the crime is reported by the victim for it to be investigated, but this does not apply to the offences that are relevant here.

The investigation examines various investigative measures, some of which may involve victims being affected in various ways. Coercive measures can be used if victims of crime do not volunteer to be examined, for example.²⁷ Search of premises is another measure that victims may be subjected to during the investigation.²⁸

The victim must be informed of the decision to close the investigation and may request that the decision be reviewed.²⁹ The decision to prosecute is based on an assessment of the sufficiency of the evidence. Alternatives to prosecution are a waiver of prosecution (*åtalsunderlåtelse*), a warning (*straffvarning*), or a summary imposition of a fine (*strafföreläggande*). The first two options mean that the suspect receives no penalty but the interests of the victim have to be taken into account.³⁰ The summary imposition of a fine entails a simplified process involving damages and may therefore be in the interests of victims of crime.³¹ These options may be considered of little relevance because of the seriousness of the crimes in question here.

²⁶ Heikkilä, Mikaela, *International Criminal Tribunals and Victims of Crime: A Study of the Status of Victims before International Criminal Tribunals and of Factors Affecting this Status*, Åbo: Åbo Akademi, 2004, p. 50 ff.

²⁷ See Ch. 23 Sec. 7-9 CJP on the conditions for retrieval and detention for questioning (*medtagande till, hämtning till and kvarstannande för förhör*).

²⁸ Ch. 28 Sec. 1 and Ch. 27 Sec. 15 CJP.

²⁹ Sec. 13 b and 14 Decree on Preliminary Investigation; The possibility of review has emerged in practice and is not regulated by law; Riksåklagarens riktlinjer (2013:1) *Överprövning och annan prövningsverksamhet*.

³⁰ Ch. 20 Sec. 7 CJP (waiver of prosecution); Riksåklagarens riktlinjer (RÅR 2008:2) *Förundersökningsbegränsning och åtalsunderlåtelse*; See also Sec. 17 paras. 3-4 lagen med särskilda bestämmelser om unga lagöverträdare, Riksåklagarens riktlinjer (RÅR 2006:3) för handläggning av ungdomsären den (warning).

³¹ One drawback, however, is that the victim is deprived of the possibility of telling his or her story in a court hearing, which is perceived by many victims as an important part of their redress.

After a decision not to prosecute, victims of crime can themselves choose to prosecute.³²

This has previously been justified by the claim that it allowed a check on the prosecutor and was thus in line with the interest in controlling crime, i.e. the impact of criminal law.³³ Nowadays, it can also be seen as a way of showing consideration for victims' interests.³⁴

If a prosecution is brought, the prosecutor is usually obliged to present the victim's claim for damages.³⁵ Victims of crime can assist the prosecution, allowing them to adjust the description of the offence in the indictment and present their own evidence regarding the guilt of the accused.³⁶

Usually a main hearing takes place in criminal cases.³⁷ The exceptions to this are minor offences, where the penalty is expected to be limited to a fine. However, there is a precondition that neither party has requested a main hearing.³⁸ Injured parties are not always summoned to the main criminal hearing. The injured party has to be summoned if he or she assists in the indictment, is bringing claims for damages or is going to be examined. Injured parties do not have to attend the main hearing if they are not going to be heard and if any claim for damages is to be brought by the prosecutor or a legal counsel.

Injured parties examined during the main hearing do this without taking the oath and thus are not at risk of being sanctioned for perjury.³⁹ It is possible for the injured party to be examined in the absence of the accused, if, for example, there is reason to believe that the victim, for fear or some other reason, will not freely tell the truth because of the presence of the accused or certain individuals in the audience.⁴⁰ Examination can also be conducted via a video link.⁴¹ Examinations in Swedish criminal trials begin with open questions from the prosecutor asking the injured party to give an account of the incident. Subsequently, additional questions are put by prosecutors, defenders and finally

³² Ch. 20 Sec. 8 para. 1 CJP. This is sometimes referred to as a right to subsidiary prosecution.

³³ SOU 1938:44 p. 44, 260; Landström, Lena, *Åklagaren som grindvakt: En rättsvetenskaplig studie av åklagarens befogenheter vid utredning och åtal av brott*, Umeå: Umeå University, Department of Law, 2011, p. 141 f.; Ekelöf, Per Olof, Edelstam, Henrik & Pauli, Mikael, *Rättegång*, andra häftet, 9th ed., Stockholm: Norstedts Juridik, 2015, p. 64 ff.

³⁴ Landström, Lena, 'Brottsoffret och rättsprocessen' in Granström, Görel & Mannelqvist, Ruth (eds.), *Brottsoffer – rättsliga perspektiv*, pp. 25-45, Lund: Studentlitteratur, 2016, p. 36.

³⁵ Ch. 22 Sec. 2 and Ch. 45 Sec. 4 CJP.

³⁶ Ch. 20 Sec. 8 para. 2 CJP.

³⁷ In Swedish criminal procedure, the main rule is that a main hearing is held. The main hearing is the event when the matter is determined, and includes opening statements, presentation of evidence and closing arguments. The trial (*rättegången*) is a broader term which also includes preparations before the hearing as well as measures taken after it, e.g. writing of the judgment.

³⁸ Ch. 45 Sec. 10 a para. 1 p. 3 CJP.

³⁹ Ch. 36 Sec. 1, Ch. 36 Sec. 11 *e contrario* and Ch. 37 Secs. 1 and 3 CJP.

⁴⁰ Ch. 36 Sec. 18 CJP.

⁴¹ Ch. 5 Sec. 10 CJP.

prosecutors again. The injured party's legal counsel can also ask questions and the court asks supplementary questions if uncertainties remain.⁴²

The court sends the judgment to injured parties who assisted the prosecution or brought action for damages.⁴³ The injured party has the opportunity to appeal against the judgment and be assisted in this by their legal counsel.⁴⁴

3 Victims of Crime in International Law

The legal position of victims of crime in Sweden has not developed in isolation; it is paralleled internationally. In the early 1980s, victimologists and the victims' movement took initiatives to involve the United Nations in questions relating to victims of crime. These lobbyists campaigned to persuade national politicians to implement reforms in the criminal justice systems with the victim in mind. In a relatively short time, the lobbyists managed to gather support for their ideas and the General Assembly decided unanimously in 1985 to adopt the Victims Declaration.⁴⁵ In the same year, the Council of Europe adopted Recommendation 85(11) on the position of the victim in the framework of criminal law and procedure.⁴⁶ The Recommendation in many ways resembles the Victims Declaration. Several factors put victims on the international agenda at this time. At national level, mention is usually made of the increase in individualism in the second half of the 20th century, which has led to a growing demand for personal rights. The women's movement is another often cited factor, as is a series of spectacular events (terrorist attacks) that put crime and their victims on the agenda. This convinced governments to introduce reforms for victims of crime.⁴⁷

3.1 Human Rights and the Protection of Victims in International Law

Although actual instruments concerning victims were adopted in the 1980s, it is necessary to go further back in time to understand how and why victims of crime are protected in international law. The protection of victims of crime is linked to the protection of human rights in general, an area that rose to prominence at the end of the Second World War. The international community was keen to take steps to prevent any repetition of the mass atrocities that occurred during the war. An early measure was the creation of the Nuremberg Tribunal, where leading Nazis were brought to justice. The Tribunal established individual

⁴² Ch. 37 Sec. 1 *cf.* Ch. 36 Sec. 17 CJP.

⁴³ Ch. 30 Sec. 7 CJP.

⁴⁴ Ch. 49 Sec. 1 and Ch. 20 Sec. 8 para. 2 CJP.

⁴⁵ UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted 29 November 1985, UN Doc. A/RES/40/34.

⁴⁶ Council of Europe, Recommendation (85)11 on the position of the victim in the framework of Criminal Law and Procedure, adopted 28 June 1985.

⁴⁷ de Brouwer, Anne-Marie & Groenhuijsen, Mark, 'The Role of Victims in International Criminal Proceedings' in Vasiliev, Sergej & Sluiter, Göran (eds.), *International Criminal Procedure: Towards a Coherent Body of Law*, 149-204, London: Cameron May, 2009.

responsibility for war crimes, crimes against peace and crimes against humanity. At the same time, the international community also introduced individual *rights*, meant to prevent abuse of individual human rights (HR) by states.

The first international agreement in this area was the adoption in 1948 of the UN Universal Declaration of Human Rights.⁴⁸ In the same year, states agreed to adopt the Genocide Convention.⁴⁹ Since then, several general multilateral human rights conventions have been adopted, both international and regional, together with instruments aimed at providing protection from certain types of abuse or protection for certain particularly vulnerable groups.⁵⁰ In addition to the law of treaties, individuals and groups are also protected by customary law and general principles of law.⁵¹

Human rights are relevant to victims of crime in many ways. Human rights are aimed at preventing abuses from happening in the first place.⁵² Not all human rights violations are necessarily criminal acts but many criminal offences also constitute human rights violations. These offences may breach general instruments such as the protection of the right to life and the right not to be subjected to torture or cruel and inhumane treatment under the International Covenant on Civil and Political Rights (ICCPR).⁵³ They may also constitute breaches of more specific conventions, such as instruments prohibiting genocide and enforced disappearances.⁵⁴ These instruments impose an obligation on states to criminalise the crimes and to investigate the crimes that occur.

⁴⁸ Universal Declaration of Human Rights, GA Res. 217 A (III), 10 December 1948, U.N. Doc. A/RES/3/217 A.

⁴⁹ Convention on the Prevention and the Punishment of the Crime of Genocide, adopted 9 December 1948, GA Res. 260 (III), Part I (A/810) (Genocide Convention).

⁵⁰ The two general conventions: International Covenant on Civil and Political Rights (ICCPR), adopted 16 December 1966, GA Res. 2200A (XXI), 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted 16 December 1966, GA Res. 2200A (XXI), UN Doc. A/6316 (1966), 993 UNTS 3; Examples of regional general conventions: European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 4 November 1950, ETS 5, 213 UNTS 221 (ECHR); American Convention on Human Rights, adopted 22 November 1969 OAS Treaty Series No. 36; Examples of conventions targeting specific offences: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, GA Res. 39/46, UN Doc. A/39/51 (1984), 1465 UNTS 85 (Torture Convention); International Convention for the Protection of All Persons from Enforced Disappearance, adopted 20 December 2006, GA Res 61/177, UN Doc. A/61/488 (convention against enforced disappearance); Examples of conventions addressing particular vulnerable groups: Convention on the Rights of the Child, adopted 20 November 1989, GA Res 44/25 and Convention on the Rights of Persons with Disabilities, adopted 13 December 2006, GA Res 61/106.

⁵¹ Brownlie, Ian, *Principles of Public International Law*, 7th ed., Oxford: Oxford University Press, 2008, pp. 562-5.

⁵² See statement from UN:s Human Rights Council in the resolution *The Role of Prevention in the Promotion and Protection of Human Rights*, A/HRC/RES/24/16. See also reference to prevention in the Torture Convention Article 2 and the Genocide Convention Article 1.

⁵³ Articles 6 and 7 of the ICCPR.

⁵⁴ Article 1 of the Genocide Convention and Article 1 of the Convention against Enforced Disappearance, respectively.

Most HR instruments include a right to an effective remedy. It is not enough to establish that an infringement of a right has taken place, the individual should also be able to have the infringement tried in a legal (sometimes administrative) body and receive some kind of reparation for his or her injury.⁵⁵

Another right connected to the criminal procedure is the right to a fair trial. This right is primarily aimed at the rights of the accused during a criminal trial, but victims of crime are also given some protection.⁵⁶

This general human right to a legal procedure has been interpreted by various bodies (both international and regional) to mean that victims of crime are assured that a range of criminal procedural rights are met, e.g. the possibility of appeal against decisions not to prosecute and the possibility of bringing damages. There is also a growing number of instruments which state more directly that victims of crime have a variety of rights. Some of these are non-binding, such as the above-mentioned Victims Declaration and Council of Europe Recommendation No. 85(11), while others are binding.⁵⁷

The international, binding instruments that include rights for or the taking into account of victims of international crimes are the general HR instruments,⁵⁸ regional general HR instruments (such as the European Convention on Human Rights (ECHR) and the American Convention on Human Rights), the Torture Convention, the Convention against Enforced Disappearances, and possibly the Convention on Transnational Organized Crime with the accompanying Palermo protocol (which addresses victims of trafficking in human beings).⁵⁹ Among the non-binding instruments, two deserve mention; the Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law (Basic Principles).⁶⁰

For Sweden, EU law is obviously relevant. The Union has adopted acts concerning victims of crime on a number of occasions,⁶¹ the latest being the

⁵⁵ See e.g. Article 2(3) ICCPR, Article 13 ECHR, Article 25 American Convention on Human Rights.

⁵⁶ Holm, Fanny, *Justice for Victims of Atrocity Crimes: Prosecution and Reparations under International Law*, Umeå: Umeå University, Department of Law, 2017, Section 3.3.

⁵⁷ For example European Convention on the Compensation of Victims of Violent Crimes, adopted 24 November 1983, ETS No 116, Torture Convention (establishing for example the right to reparations for victims of torture).

⁵⁸ ICCPR and ICESCR.

⁵⁹ Convention against Transnational Organized Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, adopted 15 November 2000, GA Res. 55/25.

⁶⁰ Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, ECOSOC Resolution 2005/20, 22 July 2005; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 16 December 2005, U.N. Doc. A/RES/60/147.

⁶¹ For example the Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims; Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

Victims' Rights Directive,⁶² to be incorporated into national law in November 2015.

International criminal law as a legal area is relatively new and is based, above all, on the instruments establishing the international and semi-international criminal tribunals and their practice. The development towards a stronger position for victims of crime is particularly prominent in the field of international criminal law. The first international legal process for international crimes was the Nuremberg trials. At the Nuremberg and Tokyo Tribunals, victims of crime only had the status of witnesses, which was linked to the strong common law character of those courts.⁶³

More attention was paid to the victims at the temporary tribunals created in the 1990s in response to mass atrocities in Rwanda and the former Yugoslavia. Crime units were introduced and provided some support, for example to victims who testified, but at the same time they were referred to national courts for any claims to damages.⁶⁴ They had no right to participate in the proceedings, to provide information or to present their views. It was still the Anglo-Saxon view of the role of victims that permeated the procedure rather than the principles of the Victims Declaration introduced a decade earlier. Only on a few occasions did victims turn to their national courts to claim damages.⁶⁵

The semi-international court created to try those most responsible for the Khmer Rouge abuses in Cambodia was a step forward.⁶⁶ The Extraordinary Chambers in the Courts of Cambodia (ECCC) have to apply both international and national law. National Cambodian law is influenced by French law, which recognises the position of victims of crime – as a *partie civile* – meaning that this is also the situation in Cambodia and at the ECCC. Victims can participate in the trial and claim reparation, even if this is limited to collective and symbolic reparation.⁶⁷ The tribunals created after the end of the Second World War, as

⁶² Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

⁶³ Moffett, Luke, *The Role of Victims in the International Criminal Tribunals of the Second World War*, *International Criminal Law Review* 2012, vol. 12, no. 2, 245.

⁶⁴ Holm, 2017, p. 36 f.

⁶⁵ Holm, 2017, p. 37.

⁶⁶ Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, entered into force on 29 April 2005, 13 May 2003, UN Doc. A/RES57/228B (Annexe); Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006). According to Article 1 of the Law, The Chambers are to try senior leaders of Democratic Kampuchea and those most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognised by Cambodia. The Chambers have the power to try the crime of genocide under the 1948 Genocide Convention, crimes against humanity as defined in the ICC Statute, grave breaches of the Geneva Conventions, and homicide, torture and religious persecution under Cambodian law.

⁶⁷ The regulation on reparations can be found in the Chambers' Internal Rules, Rule 23quinquies(1). Examples of collective and symbolic reparations that the Court has

well as those for Rwanda and the former Yugoslavia, were all strongly characterised by the Anglo-Saxon legal tradition. Unlike these, the Franco-Cambodian model gave a more prominent role to victims at the ECCC.

At about the same time, states gathered in Rome where they agreed to adopt the Rome Statute of the International Criminal Court (ICC).⁶⁸ The Statute recognises more far-reaching rights for victims at the ICC than in any previous international court or tribunal, namely the rights to participation, protection and reparation.⁶⁹ It should be mentioned that the Rome Statute and other statutes of international courts and tribunals regulate the judicial activities only of the specific court. They do not necessarily impose obligations on States Parties, for example, to themselves prosecute the crimes and to meet the rights of the victims.

This overview shows that there are a number of international instruments relevant for victims of crime. Some of them grant universal human rights, which victims also enjoy, others target victims as a group, or specific offences, or certain categories of victims. The catalogues of rights contained in these instruments vary, but there are rights that recur in many of them. These are the right to report crimes and to have them investigated, the right to obtain and provide information, the right to legal representation and legal counsel, the right to privacy and security and the right to reparation from the offender or state.⁷⁰

This is not an exhaustive list and not all sources include the rights in the same way. The management of the right to judicial proceedings in different instruments illustrates this. This is expressed in the Basic Principles as a more general right to justice, involving the investigation and prosecution of the offences.⁷¹ It is certainly in the interests of victims of crime that investigations and prosecutions take place. Some sources go so far as to grant it as a right of the victim that the guilty should be punished.⁷² Other sources deny the existence of such a right. The conclusion must be drawn that there is no general obligation under international law to accept that victims of crime have the right to demand that a prosecution be brought.⁷³ Victims of crime are considered to have the right

determined are the publication of public apologies from the perpetrator, psychological support, documentation of victims' stories and history teaching.

⁶⁸ Rome Statute of the International Criminal Court, adopted 17 July 1998, UN Doc. A/CONF.183/9 (and UNTS No. 38544).

⁶⁹ Articles 68 and 75 of the Rome Statute.

⁷⁰ See e.g. the Torture Convention, Article 13 (the right to report crime and to have them investigated), the Victims' Rights Directive, Articles 3-9 (the right to give and receive information), ICC Rules of Procedure and Evidence Rule 90 (legal representation), the Convention against Enforced Disappearance, Article 12 (protection), the Victims Declaration, Principles 8-13 (the right to reparations).

⁷¹ Principles 11-14.

⁷² Inter-Am.Ct.H.R., *Velásquez Rodríguez v. Honduras*, Judgment 29 July 1988, (Ser. C) No. 4, para. 35.

⁷³ Holm, 2017, p. 89. The ECtHR has denied an independent right under the Convention to claim prosecution of perpetrators, but the right to a fair trial has been interpreted as providing a right for victims to information and to, under certain conditions, claim damages within the framework of criminal proceedings. See Holm, 2017, p. 71 f.

to an investigation. This follows from articles other than those relating to the duty to prosecute found in certain treaties.⁷⁴

3.2 Compliance

A dramatic development of the protection of human rights in international law has taken place. If this protection were to depend solely on the number of conventions that exist, the human rights situation in the world would be very good. But a major challenge is to ensure compliance with the rights. Human rights are often vaguely worded. Their national application requires action by the states. Ratifying is not enough; more active measures are also normally required. The margin of appreciation that accompanies most conventions is extensive, and often it means that not so much happens nationally. To improve compliance, many conventions are linked to a treaty-monitoring body to which individuals can turn with complaints.⁷⁵

Whether or not an instrument is binding is of the essence. There are victimologists who highlight the benefits of the non-binding instruments and point out that they have had an impact. For example, the Victims Declaration – which has also been called the 'Magna Carta of victims' – is said to have become a model for regional institutions and that states have chosen to introduce reforms on the basis of this declaration.⁷⁶ One clear disadvantage is the lack of institutions and mechanisms supervising compliance with non-binding instruments. Another disadvantage is that states may be even more reluctant to incorporate the provisions under such instruments into national law. A draft for a Crime Victim Convention exists, but the UN has not yet given priority to translating it into a binding instrument.

Below is an analysis of the extent to which it appears Sweden lives up to its international legal obligations regarding victims of crime. The criticism of Sweden made by international bodies responsible for supervision is also analysed as well as the response Sweden has given to the criticism.

In this context, it should be mentioned that there is a further obligation in addition to treaty law and general principles of law; there is also customary international law. However, customary law provides little support as far as the criminal procedural rights of victims are concerned. The right to a remedy and access to court are examples of rights under customary law, and include, in particular, the judicial examination of the damages. Customary law may also include the right to have serious human rights violations investigated by law enforcement agencies. Serious infringements of human rights are often criminal acts in addition to being violations of human rights. On the whole, however,

⁷⁴ See review in Holm, 2017, Section 3.3.

⁷⁵ These bodies include the European Court of Human Rights, which examines compliance with the ECHR, the Inter-American Court and Commission, which examine compliance with the Inter-American Convention on Human Rights, and the UN committees monitoring states' compliance with UN conventions, such as the Human Rights Committee in relation to the ICCPR, and the Committee against Torture in relation to the Torture Convention.

⁷⁶ Groenhuijsen, Mark, *The Development of International Policy in Relation to Victims of Crime*, International Review of Victimology 2014, Vol 20, no. 1, 31, p. 32 ff.

customary international law does not take a position on criminal procedural issues, but such issues are considered to be within the sovereignty of the state.

4 Swedish Legislation concerning the Position of Victims of Crime in Light of International Legal Obligations

No comprehensive analysis of the compliance of Swedish law with the obligations that exist in relation to victims of crime can be made in this context, but some cautious conclusions on the matter can be drawn. These are based primarily on studies already made, the criticism from international treaty-monitoring bodies and legislative preparatory work containing analysis of the correspondence between Swedish law with international instruments regarding victims of crime.

4.1 Measures Taken by the Legislator as a Response to International Legal Obligations concerning Victims of International Crimes

A basic prerequisite for prosecuting international crimes is that they are criminalised in Swedish law. Since most rights and obligations affecting victims are linked to injured parties in the criminal procedure, it is also important from a victim's perspective that the crimes are criminalised. Sweden legislated on the crime of genocide a decade after the ratification of the Genocide Convention in 1952, while war crimes (*folkrättsbrott*) were already introduced into the Criminal Code by the criminal law reform in 1948. Some amendments were made in the light of ratification of the four Geneva Conventions and their Additional Protocols.⁷⁷ For many years, there was no special legislation criminalising crimes against humanity as such, and in some parts the legislation did not even otherwise cover the crime.⁷⁸ This was criticised by the UN Human Rights Council. The Council is responsible for the overall review of the human rights situation in the Member States.⁷⁹ This review is carried out, *inter alia*, through so-called Universal Periodic Reviews (UPR). The first review of Sweden took place in 2010 and the second in 2015. In the 2010 review report, the Council called for new Swedish legislation based on the Rome Statute.⁸⁰ The Rome Statute was ratified by Sweden in 2001, but it took until 2014 for the Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes (2014:406) to come into force.⁸¹ The 2015 Council Report noted that

⁷⁷ Regeringens proposition 1953:142 ändring i 1 och 27 kap. strafflagen m.m.

⁷⁸ This was cited as a reason for reform, see SOU 2002:98 p. 238, Prop. 2013/14:146 p. 68.

⁷⁹ The UN:s Human Rights Council was established in 2006 after a decision of the UN:s General Assembly, and replaced the former Commission for Human Rights.

⁸⁰ Human Rights Council, Report of the Working Group on the Universal Periodic Review, 16 June 2010, UN Doc GA/HRC/15/11, p. 13.

⁸¹ Lag (2014:406) om straff för folkmord, brott mot mänskligheten och krigsförbrytelser.

Sweden had introduced new legislation and had prosecuted a person from Rwanda for genocide.⁸²

The UN review system also includes the Human Rights Committee (HRC), which monitors compliance with the International Covenant on Civil and Political Rights. The Human Rights Committee's report for Sweden in 2016 does not criticise the position of victims of crime in general, but does criticise the work to combat violence against women and children and the treatment of migrants. The report welcomes the introduction of the new law on genocide, crimes against humanity and war crimes.⁸³ The HRC also allows individual complaints concerning breaches of the Convention by Sweden but no decisions have concerned victims' rights.⁸⁴

The Act of 2014 was thus received as a step forward by these UN agencies. From the perspective of accountability, the law is a step forward, but it is questionable whether the victim's perspective has been sufficiently taken into account. The Rome Statute admittedly does not impose an obligation on Sweden to prosecute the crimes or to grant rights to the victims, but given how the legislator has discussed the criminalisation of the crimes based on our ratification of the Statute, one could have wished for a corresponding discussion regarding victims' rights in the Statute.⁸⁵ The preparatory work for the Swedish law says remarkably little about what Sweden must, can and should do in the context of criminal procedure to meet its international obligations to the victims.⁸⁶ This is despite the fact that it can be assumed that the legislator was generally aware of the victim's perspective when the law was prepared. Sweden implemented the Victims' Rights Directive during the same period that it prepared the Act of 2014 and the Rome Statute expresses a clear victim perspective in both the preamble and the substantive rules.⁸⁷

At the regional level, the country reports published by the Commissioner for the Council of Europe can be mentioned. In relation to Sweden, these have not

⁸² Human Rights Council, Report of the Working Group on the Universal Periodic Review, 13 April 2015, UN Doc GA/HRC29/13, paras 38 and 44.

⁸³ Concluding observations on the seventh periodic report of Sweden, 28 April 2016, U.N Doc. CCPR/C/SWE/CO/7.

⁸⁴ Review of the database in November 2019.

⁸⁵ For example is it stated in Prop. 13/14:146 Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser, p. 75, that serious violations of international law must be prevented and prosecuted as far as possible. It is therefore important, as has been noted, that Swedish legislation allows prosecution in any case to the same extent as at the International Criminal Court. It is also, among other things, with this aim that a reform should be implemented. Own translation of; 'Allvarliga brott mot folkrätten måste så långt som möjligt förhindras och beivras. Det är därför, som konstaterats, angeläget att svensk lagstiftning möjliggör lagföring i vart fall i samma utsträckning som vid Internationella brottmålsdomstolen. Det är också bl.a. med detta syfte som en reform bör genomföras.'

⁸⁶ Such as the victims' right to reparation.

⁸⁷ The Preamble to the Rome Statute states that states parties to the statute are '[m]indful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity'. See also Rome Statute Article 68 (protection and participation) and 75 (reparations).

considered the offences in question.⁸⁸ As already mentioned, the European Court of Human Rights has touched on questions about how the ECHR should be interpreted in relation to victims of crime, but none of these cases have involved Sweden.⁸⁹ In Sweden, the requirement under the ECHR for available remedies to claims of state responsibility for violations of the Convention, have not been linked to victims of crime.⁹⁰

In general, international law sources – including international instruments such as the Victims Declaration and various European victims' rights instruments and the case-law of the European Court of Human Rights – have been mentioned and taken into account in Swedish preparatory work that preceded the legislation relevant to victims of crime.⁹¹ The Crime Victim Compensation and Support Authority, which is the national authority responsible for, *inter alia*, promoting victims' rights and drawing attention to victims' needs and interests, refers to international instruments in various information channels. Reports from law enforcement agencies refer to international standards regarding victims and victims' rights, to such an extent that there is talk of a trend to emphasise victims' rights.⁹² However, neither the binding nor non-binding instruments in the field of victims of crime have led to many measures being taken in Sweden, possibly with the exception of EU instruments.⁹³

Government initiatives towards victims of crime are more often concerned with the whole battery of measures to meet victims' needs and improve the situation of victims and less often about enforceable rights and international commitments.⁹⁴ It should be noted that in the legislative preparatory work in response to the Victims' Rights Directive it was found that two minor legislative changes were sufficient for the directive to be considered as implemented. The changes related to the rules on interpreters and information during the criminal

⁸⁸ Council of Europe, The Commissioner intervenes before the European Court of Human Rights in a case concerning family reunification in Sweden, 3 June 2019, available at <<https://www.coe.int/en/web/commissioner/country-monitoring/sweden>>, last visited 24 Sep 2019.

⁸⁹ Review of judgments concerning Sweden through the Hudoc database in September 2019.

⁹⁰ Wergens, Anna, *Human Rights for Victims of Non-State Crime: Taking Victims Seriously*, Oisterwijk: Wolf Legal Publishers, 2014, footnote 1183.

⁹¹ See e.g. Ds 1993:29 *Brottsoffren i blickpunkten – åtgärder för att stärka brottsoffrens ställning*; SOU 1995:60 *Kvinnofrid*; SOU 1998:40 *Brottsoffer – Vad har gjorts? Vad bör göras?*; SOU 2004:61 *En översyn av Brottsoffermyndigheten*; SOU 2004: 121 p. 60; prop. 2005/06:155, pp. 36-39; SOU 2007:6 *Målsägandebiträdet ett aktivt stöd i rättsprocessen*, pp. 81-101.

⁹² Wergens, 2014, p. 291. See e.g. *Brottsoffer: redovisning av tre regeringsuppdrag*, Domstolsverket Jönköping: Domstolsverket, 2003, Dv – rapport 2003:2, p. 4; Rikspolisstyrelsen, *Brottsofferarbete inom polisen, En nationell handlingsplan*, 2003, p. 6-8; Crime Victim Compensation and Support Authority, *Utbetalning av brottsskadeersättning till offer för människohandel: Redovisning av ett regeringsuppdrag*, Umeå, 2010; *Handbok om socialnämndens ansvar för våldsutsatta kvinnor och barn som bevittnat våld*, Socialstyrelsen, 2011, p. 14, 158; SOU 2013:17 *Brottmålsprocessen*, p. 265 f.

⁹³ Wergens, 2014, p. 294, 296.

⁹⁴ Wergens, 2014, p. 295.

procedure.⁹⁵ A similar assessment was made in response to the regulations regarding victims in the EU Directive on Combating Terrorism.⁹⁶

4.2 Does Swedish Legislation Correspond to International Legal Obligations regarding Specific Rights?

What can be said in terms of Swedish legislative compliance with specific rights expressed in sources of international law? Only a general and preliminary assessment of this can be made here, in relation to some of the rights. As regards victims' right to an investigation, the opportunities available at legislative level, *inter alia*, to report offences to which they have been subjected, and obligations for law enforcement agencies to open investigations when suspicion has reached a certain level, are considered sufficient. In relation to the right to legal representation or legal counsel, the rules conferring a right to an injured party's legal counsel have been considered sufficient to ensure that this obligation is fulfilled.⁹⁷

The rights to privacy and security have been considered to be met by the legislation on different types of protection (see section on Swedish law above), with the exception of individual safety assessments, where deficiencies have been identified.⁹⁸ There is reason to review how this protection is implemented when the victims are not in the country during the criminal procedure. A study of investigations in other comparable states has revealed that protection has been more limited, partly because law enforcement personnel have not perceived it as their duty to assist victims abroad.⁹⁹

Another right that recurs in the sources of international law concerning victims of crime is the right to receive and provide information. Many of the victim-related rules of the Decree on Preliminary Investigation are about this. The Victims' Rights Directive prompted some amendments to these rules (see above), but they were considered to be essentially in line with the Directive.¹⁰⁰ One aspect of this right is information regarding the possibilities of reporting crimes. It is unclear whether victims of international crimes receive such information in practice, which could be contrary, for example, to Article 4 of the Victims' Rights Directive.

The right to reparations from the offender or state is quite vague and there are no international legal requirements for certain types of damages or levels of monetary damages, but the Basic Principles has provided some guidance, for example, to ICC. Swedish law lacks some of the forms of reparations listed in

⁹⁵ Ds 2014:14, *Genomförande av brottsofferdirektivet*.

⁹⁶ Ds 2018:22, *Genomförande av terrorismdirektivets brottsofferbestämmelser*.

⁹⁷ Ds 2014:14, p. 142 and 171. For example, the Directive's requirement for victims of crime to be accompanied by their legal representative (Article 20(c)) was considered fulfilled by the right under Chapter 23 Sec.10 para. 5 CJP to have an injured party's legal counsel to attend hearings with injured parties.

⁹⁸ Ds 2014:14, p. 202 ff.

⁹⁹ O'Leary, Tara, Redress, *Driving Forward Justice: Victims of Serious International Crimes in the EU*, October 2014, p. 26.

¹⁰⁰ Ds 2014:14, Ch. 5.

the Basic Principles and established in practice in, for example, the ICC and ECCC.¹⁰¹ It is debatable whether this should be seen as a shortcoming. Firstly, the instrument in question is a resolution and as such is not binding. Secondly, it addresses forms of reparations that appear impossible to satisfy in a country like Sweden. One such form of reparation is 'guarantees of non-repetition'.¹⁰² Measures to guarantee non-repetition appear difficult if not impossible for Sweden to carry out, because the trials relate to crimes committed in another state, but above all because it is difficult for the individual offender to satisfy such a type of reparation. It might have been relevant to discuss such a form of reparation in connection with the inclusion in the Damages Act of a right to damages from the State in response to violations of the ECHR, but victims of crime were not the focus in the introduction of this rule. Perhaps that explains why such creative discussions did not take place.¹⁰³

The question of reparations includes provisions concerned with ability of victims to obtain reparations in the event of the accused being indigent. In Sweden there is a system where victims can receive compensation from the state, so-called criminal injuries compensation (*brottsskadeersättning*), in cases where it is not paid, for example, through damages or insurance.¹⁰⁴ However, the way this form of compensation is structured means that most of the victims of international crimes are not covered. Systems for dealing with reparations for victims of mass abuse have developed in recent decades and there are now a number of mechanisms aimed at providing reparations for these victims. In addition to traditional remedies, such as damages from perpetrators and sometimes the state, some states have introduced specific funds or procedures available to these victims' groups.¹⁰⁵ The Swedish Government has taken no initiatives to introduce such specific mechanisms for reparations.

4.3 Conclusion

The rights conferred on victims of crime by international law can be said to be generally and vaguely phrased and hand over much of the forms of implementation to the states' own assessment. With regard to most of the rules relating to the position of victims of crime, it is up to the States themselves to flesh out the obligations. In Sweden, much of the victim support is formulated

¹⁰¹ Basic Principles (Guidelines 18-23) list *restitution, compensation, rehabilitation, satisfaction and guarantees of nonrepetition*. In ECCC's judgment in Case 002 reparations were determined in the form of different projects, including an app-education about the Khmer Rouge, publishing a book with testimonies about the abuses and psychological care, ECCC, Case 002/02 Judgment, 16 November 2018.

¹⁰² Basic Principles Guideline 23.

¹⁰³ Ch. 3 Sec. 4 Damages Act (*skadeståndslagen*) (changes made through SFS 2018:23, Prop. 2017/18:7).

¹⁰⁴ Criminal Injuries Compensation Act (2014:322) (*brottsskadlagen*).

¹⁰⁵ For example Germany (after the Second World War), Rwanda, South Africa and Colombia; see de Greiff, Pablo (ed.), *The Handbook of Reparations*, Oxford: Oxford University Press, 2006.

as obligations, without a corresponding right or remedy for the victims to complain when they find that the obligation is not being met.

On a few occasions, Swedish legislative preparatory work has concerned the fulfilment of EU legal obligations regarding victims of crime, and in addition, a few matters have concerned the implementation of obligations under international treaties, such as the legal measures taken to combat trafficking in human beings.¹⁰⁶ The international and regional instruments have not been deemed to require major changes in Swedish legislation on victims' rights. Much of the criticism from international bodies is directed at Sweden's treatment of particularly vulnerable groups, such as violence in close relationships, offences directed against children and hate crimes. Most of Sweden's measures in the field of victims of crime target these groups and these measures do not include the category of victims that are in focus here. Victims of international crimes have not been a subject for legislative attention even following the ratification of the Rome Statute, despite the prominence it gives to victims.

5 Swedish Cases concerning International Crimes from the Perspective of Victims

The question now is whether the general rules concerning victims of crime are applied with any special adjustments on the basis of the special nature of international crimes and Sweden's international legal obligations. This analysis also includes the question of whether victims' interests have been taken into account in a broad sense in the application of the law.

5.1 Selection of Preliminary Investigations

Prosecutorial decisions on the scope and focus of investigations are fundamental from the perspective of victims. These are decisions that are often made before anyone is considered an injured party with related rights. The extent to which a person's exposure to crime is recognised by the legal system should differ between crimes committed abroad and crimes committed in Sweden. In the event of crimes committed within the state, the police can be alerted to the incident immediately, perhaps when the person seeks medical care for their injuries. The processes we have had in Sweden were not prompted by reports from victims. The Swedish Migration Board has an obligation to report to the Swedish Police Department or prosecutors if there are suspicions of genocide, crimes against humanity or war crimes in a case that has come before it.¹⁰⁷ Such reports have

¹⁰⁶ See review of legislative measures taken as a response to Sweden's accession to the UN Convention on Transnational Organized Crime and the associated Palermo Protocol and to the Council of Europe Convention on Action against Trafficking in Human Beings in Åström, Karin, *Rättsliga åtgärder mot människohandel: att skydda offer eller möta hot*, Uppsala: Iustus, 2014, Ch. 5.

¹⁰⁷ Sec. 2 para. 1 p. 17 Förordning (2016:1245) om ändring i förordningen (2007:996) med instruktion för Migrationsverket.

been made on the basis of investigations concerning suspected perpetrators, but have not been prompted by investigations concerning victims.¹⁰⁸

Interviews conducted by the human rights organisation Human Rights Watch show that people who have fled Syria for Sweden, having been subjected to serious crimes during the armed conflict in the country, have not been informed of the rights they possess as victims of crime, *inter alia*, the possibility of participating in criminal proceedings and the possibility of reporting offences.¹⁰⁹ In 2017, the police published a brochure, 'Sweden – No sanctuary for war criminals', translated into English, French, Arabic, Dari and Farsi. The brochure calls on those subjected to international crimes and others aware of the commission of such crimes to contact the police. The brochure does not provide information addressed to victims about their rights.¹¹⁰

In their report, Human Rights Watch highlights possible explanations for the fact that reports are not made. According to the report, the Swedish authorities perhaps have difficulty getting Syrian witnesses to come forward and participate in legal proceedings because these people already distrust authorities. They may also be concerned that relatives in Syria will suffer retaliation if they participate in a Swedish trial.¹¹¹ There is also a perception among victims that talking about their experiences during the asylum process may be detrimental to their application.¹¹²

These fears should to some extent – for example in terms of fear of being mistreated by law enforcement agencies – fall under the rights to privacy and security that everyone, including victims of crime, enjoy under Swedish law. Information about these rights and how they can be claimed is a right of the individual but can potentially also contribute to the effectiveness of investigations.

This report also suggests a frustration among some victims from Syria, that the prosecutions in Sweden were not about the abuses of Syrian government forces, but concerned only offences perpetrated by other groups.¹¹³ It may be worth noting that since the report was published, a soldier in the government forces has been prosecuted and convicted.¹¹⁴

¹⁰⁸ Regarding victims from Syria, see report from Human Rights Watch, *These are the Crimes We are Fleeing: Justice for Syria in Swedish and German Courts*, 2017, p. 27.

¹⁰⁹ Human Rights Watch, 2017, p. 50.

¹¹⁰ *cf.* information material submitted by the Crime Victim Compensation and Support Authority (*Brottsoffermyndigheten*), e.g. the brochure 'Information to Crime Victims', available at <<https://www.brottsoffermyndigheten.se/material-och-publikationer?refid=2421#o-2421>>, last visited 12 February 2020.

¹¹¹ Human Rights Watch, 2017, pp. 46-47.

¹¹² *Ibid.*, pp. 48-49.

¹¹³ *Ibid.*, p. 36.

¹¹⁴ *Åklagaren ./. Abdullah*, Case B 11191-17, Judgment 25 September 2017.

5.2 Crime Victim Aspects of Trials

There have been injured parties in the majority of the eleven completed trials for war crimes and genocide. A large number of injured parties have participated in the Rwanda trials¹¹⁵ and in the former Yugoslavia trials.¹¹⁶ There was an injured party in only one of the trials concerning Iraq and Syria. That particular case was referred back to the District Court after the injured party had been identified.¹¹⁷

An injured party's legal counsel was assigned to all the injured parties involved and it can therefore be said that the international legal requirements for legal representation were met in the eleven trials, at least after the date of appointment of the counsel.

The injured parties have all been parties to the legal proceedings, in both the District Court and the Court of Appeal.

Almost all injured parties brought an action for damages.¹¹⁸ Of these claims, a large proportion were approved. In one case, the defendant was acquitted by the Court of Appeal and the action for damages was therefore also dismissed.¹¹⁹ In two of the cases, the action for damages was dismissed for one or more of the injured parties on the ground that the accused was not convicted of the unlawful act in that part.¹²⁰ In the first genocide trial, the actions for damages were dismissed despite conviction, on the grounds that the matter should be assessed according to Rwandan law while the claim was made under Swedish law.¹²¹ It is an assessment that can be criticised. The Court was not prevented from examining the damages under the law of another state *ex officio*, which would have been a much more victim-friendly approach. In the later cases relating to events in Rwanda, Rwandan law has been applied, not as an explicit choice of law on the part of the court, but in view of the fact that the choice of law was undisputed between the parties. In these cases, the injured parties presented an investigation into the content of Rwandan tort law.¹²²

In some cases, injured parties have instead based their claims on Swedish law. In these cases, the courts have based their assessments on Swedish law, without any explanation as to how the choice of law was made.¹²³ Presumably conflict

¹¹⁵ They numbered 21, 16 and 28 in the respective cases.

¹¹⁶ They numbered 11, 28 and 14 in the respective cases.

¹¹⁷ *Åklagaren ./. Droubi*, Svea hovrätt, Case B 4770-16, Judgment 5 August 2016.

¹¹⁸ All but one in *Åklagaren ./. Tabaro*, Stockholms tingsrätt, Case B 13688-16, Judgment 27 June 2018, partly affirmed in *Åklagaren ./. Tabaro*, Svea hovrätt, Case B 6814-18, Judgment 29 April 2019.

¹¹⁹ *Åklagaren ./. M.M.*, Svea hovrätt, Case B 1248-12, Judgment 19 December 2012.

¹²⁰ See *Tabaro*, 29 April 2019 and *Berinkindi*, Stockholms tingsrätt, Judgment 16 May 2016, p. 140, partly affirmed in *Åklagaren ./. Berinkindi*, Svea hovrätt, Case B 4951-16, Judgment 15 February 2017.

¹²¹ *Åklagaren ./. Mbanenande*, Stockholms tingsrätt, Case B 18271-11, Judgment 20 June 2013, affirmed in RH 2014:34.

¹²² *Tabaro*, 27 June 2018, p. 179, *Tabaro*, 29 April 2019; *Berinkindi*, 16 May 2016, p. 138, *Berinkindi*, 15 February 2017.

¹²³ See e.g. *Åklagaren ./. Droubi*, Södertörns tingsrätt, Case B 2639-16, Judgment 11 May 2016, *Droubi*, Svea hovrätt, Case B 4770-16, Judgment 5 August 2016. In *Makitan* the claim for damages and the assessment was made according to Swedish law with explicit reference to

of laws here too was undisputed between the parties. The judgments would have gained clarity if they actually mentioned this. Only in three cases were damages awarded under Swedish law and only in these have compensation been awarded for violation of personal integrity (*kränkning*).¹²⁴

In one of these cases, the damages were reduced on the basis of the defendant's ability to pay and were settled at low amounts, in relation to the severity of the crimes. The courts also chose not to separate the various grounds for damages (violation of personal integrity and pain and suffering).¹²⁵ In another case, SEK 125,000 was awarded in damages for violation of personal integrity.¹²⁶

The consequences of applying foreign law need to be considered. On August 22, 2018, two million Rwandan francs, the amount awarded in the *Berinkindi* case to injured parties for the loss of a close relative,¹²⁷ accounted for just over SEK 20,000. For the victims residing in Rwanda, this may be a reasonable level of compensation, but if the victims had resided in Sweden, it would have been more appropriate to apply Swedish law. However, the private international law applicable at the time of the offences allowed no exceptions to the rule of *lex loci delicti*.¹²⁸ With EU:s adoption in 2007 of the Rome II Regulation, the new main rule is instead *lex loci damni*.¹²⁹ The Regulation contains exceptions to the main rule, allowing Swedish courts, under certain conditions, to apply Swedish law in determining damages concerning offences committed abroad.¹³⁰ These exceptions could be relevant in international crime cases involving victims residing in Sweden.

According to the Criminal Injuries Compensation Act, victims are able to claim compensation from the Swedish state for criminal injuries in cases where the report has not led to the perpetrator being found, where perpetrators who have been ordered to pay damages do not have the means to cover them, or the victim is unable to receive full compensation from elsewhere (typically insurance). However, criminal injuries compensation for crimes committed abroad is only paid to persons who were resident in Sweden when the crime was committed,¹³¹ which excludes this type of compensation in all cases. The injured

this being the parties' will, *Åklagaren ./. Makitan*, Stockholms tingsrätt, Case B 382-10, Judgment 8 April 2011, p. 81.

¹²⁴ *Åklagaren ./. Arklöf*, Stockholms tingsrätt, Case B 4084-04, Judgment 18 December 2006; *Makitan*, 8 April 2011; *Droubi*, 11 May 2016, affirmed in *Droubi*, 5 August 2016.

¹²⁵ *Makitan*, 8 April 2011.

¹²⁶ *Droubi*, 11 May 2016, affirmed in *Droubi*, 5 August 2016.

¹²⁷ See e.g. *Berinkindi*, 15 February 2017, p. 60.

¹²⁸ *Lex loci delicti* means the law of the place where the tort was committed and the rule was established by the Supreme Court in NJA 1969 s. 163.

¹²⁹ The law of the place where the injury occurs.

¹³⁰ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Article 4.2, referring to the law of the country where both claimant and the person sustaining damage are habitually residing, and Article 4.3, referring to the law of the country most closely connected to the tort/delict.

¹³¹ Sec. 2 para. 2 Brottskadeförordningen (2014:322).

party's legal counsel already pointed out this shortcoming in connection with the *Arklöf* trial, and proposed setting up a special fund for the victims. At the time, this may not have been something that the legislator was familiar with, but such specific funds or forms of compensation have now been used in Sweden for several groups, such as children who have been abused in the social care sector and persons who have been forcibly sterilised.¹³²

It is worth mentioning the discussion in one of the judgments that the credibility of the victims' stories benefits from the fact that they have not been able to receive any criminal injuries compensation from the Swedish state.¹³³ Admittedly, the analysis led to credibility being strengthened in the case, but supporting credibility on this basis seems remarkably cynical. Similar credibility discussions do not usually occur in connection with victims heard in 'ordinary' trials.

Examinations of injured parties have been held in all cases, in accordance with Ch. 46, Sec. 6, para. 2 of the CJP.¹³⁴ These have been conducted orally before the court during the main hearing. In one case the court heard a reading of the minutes of examinations held during the investigation – the injured party was deceased at the time of the main hearing.¹³⁵ A large proportion of injured parties are residents of states other than Sweden and examinations have frequently been conducted with the application of the law on international legal assistance in criminal procedures.¹³⁶ The practical implementation of injured party examinations has included injured parties making their way, for example, to a court or the Swedish embassy in the country where they reside. The examination is conducted from there via video link. In several trials, the Swedish court took up evidence on the ground in Rwanda.¹³⁷ In another case, the minutes from an examination conducted in a court abroad were allowed to be read out at the main hearing in Sweden.¹³⁸

The choice of examination method (on site, via video link etc.) can be made based on a variety of aspects. In one judgment, the District Court stated that it applied the principle of best evidence and therefore conducted an on-site examination of the scene of the crime and examination of several persons in Rwanda.¹³⁹ In a press release from the Swedish Courts, the president of the court

¹³² Lag (2012:663) om ersättning på grund av övergrepp eller försummelse i samhällsvården av barn och unga i vissa fall; Lag (1999:332) om ersättning till steriliserade i vissa fall; Lag (2018:162) om statlig ersättning till personer som har fått ändrad könstillhörighet fastställd i vissa fall.

¹³³ *Åklagaren ./. M.M.*, Stockholms tingsrätt, Case B 5373-10, Judgment 20 January 2012, p. 39.

¹³⁴ A review of judgments revealed that in some cases but not in all is it clear how examinations have been conducted.

¹³⁵ *Makitan*, 8 April 2011, p. 27.

¹³⁶ Lag (2000:562) om internationell rättslig hjälp i brottmål.

¹³⁷ *Tabaro*, 27 June 2018, p. 179, *Tabaro*, 29 April 2019; *Berinkindi*, 16 May 2016, p.138, *Berinkindi*, 15 February 2017.

¹³⁸ *M.M.*, 20 January 2012.

¹³⁹ Own translation of '[t]ingsrätten har i målet använt sig av principen om det bästa bevismaterialet och hållit syn samt hört flera personer i Rwanda'; *Mbanenande*, 20 June 2013, pp. 39-40.

was quoted as saying that the District Court found it necessary for certain evidence to be taken up in Rwanda to meet the high legal certainty requirements that must be set.¹⁴⁰ From a victim's perspective, it may be an advantage for examinations to be conducted nearby, as the injured parties do not have to travel to Sweden for the trial, but it may be more difficult for the injured parties' legal counsel to provide the same support. It may also be hard for Swedish law enforcement agencies to provide the same protection as in Sweden, a problem that has attracted attention in trials in other comparable countries (see Section 4.2 above).

5.3 Is Legal Practice Informed by the Special Nature of the Crimes and International Legal Sources?

The trials concluded to date concerning international crimes differ from typical criminal cases in the Swedish criminal justice system. Many of these characteristics affect the victims involved. It has already been established that these specificities did not give rise to legislative adjustments. Nor have international law requirements concerning victims' rights led to many changes at the level of legislation. Similarly, the reasoning in judgments indicates that adjustments have taken place in the application of the law only to a relatively limited extent. This has been the case, for example, in assessing the requirement of proof of kinship and place and date of the death of relatives. In one of the genocide trials, the District Court stated that the requirement would be set low in light of difficulties in identifying those killed after the genocide; an assessment shared by the Court of Appeal.¹⁴¹ Another apparent adjustment is the fact that a few injured parties' legal counsel have been allowed to represent a group of injured parties. This approach may have advantages from an efficiency point of view when there are a large number of injured parties in one case. Adjustments have also been made regarding the taking of evidence – the District Court notes in a judgment that, on the basis of the principle of best evidence, it should take place on the ground in Rwanda. On the other hand, in none of the judgments is the decision to take up evidence in Rwanda expressly based on victims' concerns. Some rather obvious adjustments involve the language of the injured party, where an interpreter has been used if necessary.

The extent of professed adjustments to the special nature of the crimes in the judgments has therefore been quite limited. There is no expression at all in the judgments that sources of international law have been taken into account in the management of victims' issues. It is not impossible that sources of international law have been taken into account without this appearing in the reasoning – or that they have been taken into account in earlier stages of the legal procedure and that this is reflected in written documentation such as investigation reports

¹⁴⁰ Own translation of '[t]ingsrätten har bedömt att det är nödvändigt att viss bevisning tas upp i Rwanda för att tillgodose de höga rättssäkerhetskrav som måste ställas'; Stockholms tingsrätt, Pressmeddelande 5 November 2012, cited in InfoTorg Juridik, *Åtal i Rwandamålet*, 5 November 2012, <<http://infotorgjuridik.se/premium/mittijuridiken/article184588.ece>>, last visited 16 October 2019.

¹⁴¹ *Berinkindi*, 16 May 2016, p. 139, *Berinkindi*, 15 February 2017, pp. 53-54.

and the files of the courts. However, such matters fall outside the scope of the present study.

6 Analysis

Initially, it was mentioned that the new crimes appearing on both international and national agendas involve a focus on: how crimes should be handled from a victim's perspective; how legal systems should deal with issues such as participation and reparations when there are potentially thousands of victims in one case; what role the criminal justice system should play in relation to these crimes. The challenges that can be identified after the completion of eleven Swedish trials are linked to fundamental questions about the purpose of international criminal law. The first question that the article seeks to answer is whether Swedish law lives up to the obligations under international law regarding the legal status of victims of crime. It is noted that international and regional instruments seem not to have induced major changes in Swedish legislation on victims' rights. Rather, the preparatory work expresses an attitude of 'we know this'. In the assessment of the legislator Sweden lives up to these obligations. A full answer to the question of compliance with international norms cannot be given here, but there is no apparent discrepancy between Swedish legislation and international obligations to this group of victims, if one looks at assessments by international human rights bodies. That no such criticism has been made might also be due to the fact that the issues have simply not been the focus of attention. The conclusion can be drawn that victims' issues are not discussed in relation to international crimes in Sweden.

The second question concerns whether legal practice is informed by the special nature of the crimes and international legal sources. It has been established that there is no significant adjustment on the basis of the special nature of the offences. Nor are international law sources of victims' rights taken into account. However, more adjustment is done in the application of the law than at the level of legislation.

One conclusion to draw is that a more comprehensive study is needed to assess compliance with international law obligations, and to know how adjustments take place. In particular, the article has identified problem areas needing further study.¹⁴² This also applies when victim issues are seen in the light of the analytical framework presented in the introduction. As regards the interaction between *actors and institutions*, the situation that in many cases the injured parties were resident abroad throughout the proceedings represents a challenge. It is unclear what responsibility the Swedish law enforcement agencies have in relation to the right to protection of injured parties living abroad, and what can be asked of the injured parties' legal counsel within the framework of their duties. It is unclear how questions concerning the examination of injured parties should be determined and on the basis of what factors. Victims of international crimes have a right to information and it is

¹⁴² This article provides early assessments within the project *Victims of Atrocity Crimes in Sweden – Are International Legal and Political Obligations Met?*, carried out by the author and Per Bergling 2018-2021 at Umeå University, with the support of the Swedish Crime Victim Fund.

unclear whether Sweden provides this. This also applies to the victims who reside in Sweden and who have so far not been subject to any investigations. The article has also drawn attention to the question of what consideration should be given to victims in the selection of investigations and prosecutions, such as how victims are recognised, informed and protected by law enforcement agencies at such early stages of procedures. Finally, consideration was given to problems relating to issues of compensation, such as uncertainties about how and on what grounds the choice of law is made.

As regards *processes and mechanisms* for the integration of international law and foreign legal sources into Swedish law, the article shows that the consistent attitude of the legislator to victim issues has been that 'we know this' and the need for adaptation of Swedish legislation is considered small.

Finally, as regards the *objectives* of international criminal law, it is clear that in the motivation for the new law on international crimes, the legislator attaches no importance to the interests of victims. The preparatory works focus on aligning Sweden's legislation with international law in this area and on preventing and prosecuting the crimes in question, i.e. *efficiency* and *prevention*.¹⁴³ The Swedish attitude may be explained by the general attitude towards victim issues as an area where international law does not give grounds for legal action. *Fair trial guarantees* are relevant to victims of crime, not least the guarantee of predictability in legal processes. Several instruments, such as the Rome Statute¹⁴⁴ and the EU's Victims' Rights Directive,¹⁴⁵ state that consideration of victims' interests must not come at the expense of the rights of the accused. It can be problematic to consider rights issues as a zero-sum game in this way.

It is easy to imagine that *peace and reconciliation* and *truth-seeking* have a bearing on victim issues. A criminal trial can certainly contribute to the documented history of a conflict and raise public awareness of mass abuses, which is often in the interests of victims. Not least, this may be relevant in relation to the Swedish trials concerning such offences that are not prosecuted in the country where they have been committed, which applies, for example, to Syria. At the same time, truth-seeking in the broader sense is not the main purpose of criminal proceedings, which focus on the accused's responsibility in relation to the indictment. *Expeditious proceedings* are about the effective implementation of the process itself and here can be mentioned measures such as the appointment of the same injured party's legal counsel for a larger group of injured parties. It is in itself in the interests of the injured parties that the proceedings are conducted effectively, but it must not be at the expense of respect for their right to information or to bring an individual action for damages.

State sovereignty is a value that is maintained in relation to victims of crime. Issues concerning victims are usually contained within criminal law (national) and in various instruments for the protection of human rights (international law). Criminal procedural law is traditionally an area characterised by few concrete international law obligations and a wide margin of appreciation. With regard to

¹⁴³ See e.g. Prop. 2013/14:146, p. 69 and 75.

¹⁴⁴ Article 68(3).

¹⁴⁵ Article 20.

norm harmony, the ratification of the Rome Statute has not led to changes concerning victims and thus has had no effect in this respect. It should be noted that many of the objectives identified in international criminal law are relevant from a victim's perspective, but also that other purposes may conflict with the interests of victims.

The problem areas highlighted here share common root causes to be found at the level of legislation, such as the lack of certain forms of reparations found in international instruments, and partly in the application of the law. Experiences from international and semi-international tribunals and courts could be used more widely, such as how to deal with the participation of large groups of victims in a trial, providing information to large groups of victims and forms of symbolic reparations. Such a discussion needs to take its starting point in what is reasonable for the Swedish system for administration of justice. One concrete proposal would be to disseminate judgments, like both the ICC and the ECCC, more widely, for example to Syrians in Sweden. The new information brochure on international crimes is a commendable initiative, but its lack of information on the rights of victims of crime is a shortcoming that should be remedied.

Literature

- Bring, Thomas & Diesen, Christian, *Förundersökning*, 5th ed., Stockholm: Norstedts juridik, 2019
- Brownlie, Ian, *Principles of Public International Law*, 7th ed., Oxford: Oxford University Press, 2008
- de Brouwer, Anne-Marie & Groenhuijsen, Mark, 'The Role of Victims in International Criminal Proceedings' in Vasiliev, Sergej & Sluiter, Göran (eds.), *International Criminal Procedure: Towards a Coherent Body of Law*, 149-204, London: Cameron May, 2009
- de Greiff, Pablo (ed.), *The Handbook of Reparations*, Oxford: Oxford University Press, 2006
- Ekelöf, Per Olof, Edelstam, Henrik & Pauli, Mikael, *Rättegång, andra häftet*, 9th ed., Stockholm: Norstedts Juridik, 2015
- Groenhuijsen, Mark, *The Development of International Policy in Relation to Victims of Crime*, International Review of Victimology 2014, Vol 20, no. 1, 31–48
- Heikkilä, Mikaela, *International Criminal Tribunals and Victims of Crime: A Study of the Status of Victims before International Criminal Tribunals and of Factors Affecting this Status*, Åbo: Åbo Akademi, 2004
- Heikkilä, Mikaela, *Coping with International Atrocities through Criminal Law: A Study into the Typical Features of International Criminality and the Reflection of These Traits in International Criminal Law*, Åbo: Åbo Akademi, 2013
- Holm, Fanny, *Justice for Victims of Atrocity Crimes: Prosecution and Reparations under International Law*, Umeå: Umeå University, Department of Law, 2017
- Holm, Fanny, *Objectives of International Criminal Law*, Scandinavian Studies in Law, 2020, vol. 66.

- Landström, Lena, *Åklagaren som grindvakt: En rättsvetenskaplig studie av åklagarens befogenheter vid utredning och åtal av brott*, Umeå: Umeå University, Department of Law, 2011
- Landström, Lena, 'Brottsoffret och rättsprocessen' in Granström, Görel & Mannelqvist, Ruth (eds.), *Brottsoffer – rättsliga perspektiv*, 25-45, Lund: Studentlitteratur, 2016
- Moffett, Luke, *The Role of Victims in the International Criminal Tribunals of the Second World War*, *International Criminal Law Review* 2012, vol. 12 no. 2, 245-270
- O'Leary, Tara, *Redress, Driving Forward Justice: Victims of Serious International Crimes in the EU*, October 2014
- Wergens, Anna, *Human Rights for Victims of Non-State Crime: Taking Victims Seriously*, Oisterwijk: Wolf Legal Publishers, 2014
- Åström, Karin, *Rättsliga åtgärder mot människohandel: att skydda offer eller möta hot*, Uppsala: Iustus, 2014