

Structural Criminal Investigations in Sweden - Reinventing Investigations of International Crimes

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1 Introduction

International crimes are characterised both by the gravity of the offence and by their complexity. Their nature can make them particularly hard to investigate using the traditional working methods available to prosecutors. A method presented here, *structural criminal investigation*, serves to overcome some of the obstacles. The point of departure for Swedish prosecutors is compulsory prosecution, resulting in an obligation to initiate an investigation if there is *reason to assume* that a crime qualifying for public prosecution has been committed pursuant to the Swedish Code of Judicial Procedure (*Rättegångsbalken*, RB) chapter 23, section 1, para. 1. Initiating an investigation is however not compulsory if it is *evident that the crime cannot be investigated*, RB chapter 23, section 1 para. 2. The requirement in the first stage, a reason to assume a crime has been committed, is not the main obstacle. That international crimes occur in modern conflicts is not information that is hard to come by, especially not of the character required for meeting the relatively low threshold of the legal standard “reason to assume”. For instance, international organisations and NGOs systematically document and report on such events.¹ Instead, the difficulties lie primarily in the second stage, assessing the practical possibilities of conducting the investigation with a reasonable prospect of success.

In Swedish criminal law, the Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes (2014:406) regulates the core international crimes. The definitions of the crimes closely align with the model set by the Rome Statute for the International Criminal Court (ICC), but also go beyond the statute to reflect international custom.² The government is currently considering adding the crime of aggression to the catalogue.³ International crimes are characterised by elements of large-scale and complex, systematic action; they may also be termed system criminality.⁴ The most obvious example of this is their common special requirements, the contextual elements. Those elements represent a superstructure consisting of the general background that

¹ See e.g. International, Impartial and Independent Mechanisms to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (IIIM), established by UN General Assembly decision 21 December 2016, GA Res A/RES/71/248. One of many NGOs documenting war crimes is the European Center for Constitutional and Human Rights, ECCHR, www.ecchr.eu.

² Prop (Swedish Government Bill) 2013/14:146, ‘Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser’ p. 69f. For a discussion on the concept see Cryer, Robert et al., *An Introduction to Criminal Law and Procedure*, Cambridge, Cambridge University Press 2014, 3rd edn., p. 4.

³ SOU 2018:87, (*Statens offentliga utredningar-Official Government Inquiry*) ‘Aggressionsbrottet i svensk rätt och svensk straffrättslig domsrätt’, p. 122.

⁴ Nollkaemper, André & van der Wilt, Harmen (eds.), *Systematic Criminality in International Law*, Cambridge, Cambridge University Press, 2009, p. 12.

qualifies a particular action as an international crime.⁵ For war crimes, section 4 of the 2014 Act reflects international law in requiring a nexus to armed conflict or territorial occupation.⁶ If there is such a connection, acts that constitute regular crimes such as murder and assault and battery are reconceptualised as international crimes and the circle of perpetrators widens. In other words, there is a micro- and a macro-perspective to the action, and a need to establish links between these levels. A practical reflection of this is the investigative division into *crime base evidence*, that is, evidence regarding the crime as such, and *linkage evidence*, evidence regarding the connection between perpetrators at the various levels.⁷ For crimes against humanity, pursuant to section 2 of the 2014 Act, *crime base evidence* can serve to establish the existence of a systematic attack, and the murder of a person belonging to the relevant group. Linkage evidence serves to link these two circumstances by assigning responsibility for acts in the crime base to people higher up in the hierarchy who may not have physically taken part in the killing. Irrespective of place in the hierarchy, perpetration presupposes participation in a collective act of a certain type; an act within the framework of a structure.

2 Criminal Investigation in Swedish Law: Challenges for International Crimes

For national authorities taking on the task of investigating and prosecuting core international crimes, many practical and legal challenges relate to issues of extraterritoriality and jurisdiction. As noted above, Swedish prosecutors must assert that the legal standard *reason to assume* a crime has been committed is satisfied, when initiating the investigation. There must also be reason to assume the presence of circumstances required to establish the competence of the courts for future adjudication of the case according to the Swedish legal framework on jurisdiction. Apart from general associative factors such as citizenship and domicile, the courts are competent based on universal jurisdiction, which applies for international crimes under the Penal Code (*Brottsbalken, BrB*) chapter 2, section 3.6. The principle of universal jurisdiction allows states to assume extraterritorial jurisdiction over international crimes where there is otherwise no national association, based on the premise that states share a common interest in the adjudication of certain crimes.⁸ On the other hand, states regularly limit the exercise of universal jurisdiction based on other considerations. Foreign and security policy may motivate restrictions, as well as aspects relating to funding or practical coordination with countries exercising concurrent jurisdiction. The

⁵ Werle, Gerhard, & Jessberger, Florian, *Principles of International Criminal Law*, Oxford, Oxford University Press 2014, 3rd edn., p.35. See also Prop 2013/14:146, 'Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser' p. 74.

⁶ See Prop 2013/14:146, p. 122.

⁷ Klamberg, Mark, *Evidence in International Criminal Trials*, Leiden: Martinus Nijhoff Publishers, 2013 p. 117f and Nystedt, Maria, Axboe Nielsen (eds.), Christian, Kleffner, Jann K, *A Handbook on Assisting International Criminal Law Investigations*, FBA, 2011, p. 42.

⁸ On the universality principle, see e.g. Orakhelashvili, Alexander, *Akehurst's Modern Introduction to International Law*, Routledge 2018, 8th edn, p. 221f.

legislative solution in Sweden is to implement the limitation mechanism through governmental authorisation of prosecution pursuant to BrB chapter 2, section 5 para 2. The government or the public authority designated by the government must authorise prosecution of a crime committed abroad, save for a few exceptions with obvious connection to the Swedish sphere of interest. The government may implement the restrictions based on the criteria mentioned above and the character of connection to Swedish national interests. The scope of universal jurisdiction actually exercised by a given country may vary from time to time. Countries such as Spain and Belgium, previously known to allow proactive use of universal jurisdiction, have adopted an increasingly cautious and reactive attitude.⁹ The goal then is not to assert international criminal justice universally but more modestly, to avoid becoming a safe haven for criminals. Wolfgang Kaleck and Patrick Kroker have referred to this as a “*no-safe-haven approach*” instead of a “*global enforcer approach*”.¹⁰

The legal assertion of jurisdiction is only the first step. Practically, finding and documenting evidence can be challenging if the crime scene is located on the territory of another state, which investigators may not be able to visit. Extraterritorial investigative measures require executive jurisdiction, which in turn depends on a framework of mutual legal assistance and cooperation with national authorities in the territory in question. An investigation concerning international crimes is likely to involve states in conflict or post-conflict, often lacking functioning legal institutions. The prospects for success are limited, particularly if measures are directed towards investigation of the political and military leadership of that state.

Another practical aspect that applies particularly in the reactive strategy is the issue of how reports come to the attention of the judicial authorities in the first place. States already committed to investigation may share results and intelligence. Exiled victims and witnesses may report the crimes to the police in the state of asylum, although lack of knowledge of the procedure and lack of trust in authorities may hamper the prospects of collecting such statements.¹¹

Extraterritoriality represents one of the typical situations where it may be evident that a crime cannot be investigated, as referred to in chapter RB 23, section 1, para. 2.¹² The need to build a case around the contextual elements of international crimes make such difficulties even more pronounced. In line with the reactive strategy, prosecutors would initiate investigation only when an individual perpetrator has been identified and is present on the territory. In that case, the regulations on pre-trial detention set a narrow timeframe, making it difficult to reach a reasonable level of certainty based on the collected evidence. It might seem impossible to meet the evidentiary thresholds within the given

⁹ Kaleck, Wolfgang & Kroker, Patrick, *Syrian Torture Investigations in Germany and Beyond*, Journal of International Criminal Justice 2018, vol. 16, p. 171f.

¹⁰ Kaleck, 2018, p. 172.

¹¹ Interview 26 April 2019 in Stockholm with Reena Devgun and Henrik Attorps, prosecutor at the National Unit for International and Organised Criminality. See also Dagens Nyheter of 23 March 2019, “War Crimes Prosecutor: We wish to contact Yazidi witnesses in Sweden”, <https://www.dn.se/nyheter/sverige/krigs-brotts-aklagare-vi-vill-na-yazidiska-vittnen-i-sverige/>, most recently downloaded 2019-09-25.

¹² Prop 1994/95:23 ‘Ett effektivare brottmålsförfarande’ p.95f.

time. With traditional methods of investigation, therefore, international crimes would more often than not turn out to be *impossible to investigate*.

3 The Structural Criminal Investigation in International Perspective

The method of conducting structural investigations originates from Germany, where prosecutors started using it in 2011.¹³ France, Sweden and other European states have since followed suit.¹⁴ The idea is to start a conventional investigation, based on a *structural* agent instead of an individual incident or perpetrator. The actions consistently carried out by perpetrators active within *structures*, or organisations, party to a conflict or other situation of a contextual element, fulfil the formal requirements of initiation of investigation even where incidents are not yet individualised. There is *reason to assume* a crime has been committed if there is evidence of such activity within the structure. The investigation seeks to gather evidence on the contextual element and the structures operating within that context.¹⁵ Such structures may be representatives of a state but also non-governmental groups. German prosecutors have carried out investigations focusing on both the Syrian regime and ISIS/Daesh regarding international crimes in Syria.¹⁶ One of the more obvious advantages of this method is the time aspect. Experience from investigating international crimes in Rwanda and the former Yugoslavia shows the importance of securing witness statements sooner rather than later.¹⁷ Through structural investigation, investigators secure evidence at an early stage, which benefits both the quality and the scope. The structural investigation method is not the result of new legislative measures. It simply represents a reinterpretation of the existing framework in light of the specific conditions of international crimes.¹⁸ This is similar to the classification in the provisions of the Rome Statute covering the jurisdiction of the ICC. Jurisdiction is categorised by a separation between investigation in relation to a situation and investigation in relation to cases against individual suspects.¹⁹ A *situation* may be referred to the ICC under Article 13 of the Rome Statute and is then loosely defined in time and space, e.g. “the situation in Darfur, Sudan since July 2002”.²⁰ A *case* as understood in e.g. Article 17 of the Statute is, instead, limited to one or more persons and their actions in a specific situation.²¹

¹³ Kaleck, 2018, p. 179.

¹⁴ Kaleck, 2018, p. 176; for Sweden see also below.

¹⁵ Kaleck, 2018, p. 179.

¹⁶ Kaleck, 2018, p. 180.

¹⁷ Interview 26 April 2019.

¹⁸ Kaleck, 2018, p. 179.

¹⁹ Klamberg, 2013, p. 106.

²⁰ See Security Council resolution 1593/1593, 2005.

²¹ Klamberg, 2013, p. 106.

The structural investigation first draws on open sources, witness- and other evidence available to the prosecutors in the state that initiated the investigation.²² The extent and complexity of the international crimes warrant a patient pace, where prosecutors build a major case with many small building blocks. Relevant information can concern anything from individual violent incidents to geographical circumstances or the organisation of the security services in the conflict area. The structural investigation serves to pool information for potential spin-out cases once individual perpetrators and incidents can be discerned.

The prosecutors are free to use the legal tools normally at their disposal, as the investigation proceeds and more proactive measures are called for. One option is establishing a Joint Investigation Team (JIT), a legal tool for investigation of cross-border crime.²³ The competent authorities may set up a JIT for a specific purpose and a limited period to carry out criminal investigations in one or more of the member states setting up the team.²⁴ The existence of structural investigations in two or more member states means that the JIT could hit the ground running, as the members may in effect already be investigating the same structures separately. Even where there is no JIT, authorities may share information through formal requests for legal assistance and informal exchange of information. A significant platform for cooperation is the European Network of Contact Points in respect of persons responsible for genocide, crimes against humanity and war crimes (the Genocide Network). The Genocide Network was established in 2002 in order to designate centralised and specialised contact points on genocide and crimes against humanity in each member state, and facilitate collection and exchange of information.²⁵ Knowledge and operative know-how of the structural investigation method is shared among practitioners using this platform.²⁶ Eurojust, the cooperative organ set up in 2002 to facilitate coordination among national authorities combatting trans-border criminality in the EU, currently hosts the Network secretariat. Eurojust also liaises as an observer with the Network. Pursuant to the new Eurojust Regulation of 2019, the competence of Eurojust encompasses the core international crimes of genocide, crimes against humanity and war crimes.²⁷ The experts within the Network are sometimes likely to represent the specialised

²² Interview 26 April 2019.

²³ For an informative summary of joint investigation teams, see Rebecchi, Maria Cecilia, *Joint Investigation Teams, A Reachable Solution to Catch Unreachable Criminals*, Queen Mary Law Journal, vol. 7, Special Conference Issue, 2016, pp. 95-108.

²⁴ Art 1 of the Council Framework Decision of 13 June 2002 on joint investigation teams (2002/465/JHA).

²⁵ Council Decision of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes (2002/494/JHA).

²⁶ Kaleck 2018, p. 171 f; Interview 26 April 2019. See information on the Genocide Network on the Eurojust home page, www.eurojust.europa.eu.

²⁷ Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA, Art 3(1) and Annex I.

investigative units set up in a number of states.²⁸ Investigating international crimes is a long-term commitment that requires experience and specific expertise, making specialised units a key element for building and maintaining structural investigations.²⁹

4 Application of the Method of Structural Investigation in Sweden

Swedish prosecutors at the National Swedish Unit against International and Organised Crime (*Riksenheten mot Internationell och Organiserad brottslighet*, RIO) have been conducting structural criminal investigations since 2015.³⁰ In April 2019, two structural investigations linked to Syria and Iraq were ongoing, one of which concerned ISIS/Daesh.³¹ The potential charges were war crimes since March 2012 and crimes against humanity and genocide since July and August 1914, respectively. The initiation of the investigation was the result of the presence of Syrian and Iraqi refugees exiled in Sweden, leading to the assessment that there was sufficient available evidence to allow the investigation to proceed, and a sufficiently strong Swedish national interest.

The investigation strategy sets out being less proactive than in regular investigations of known perpetrators. As a starting point, prosecutors refrain from normal coercive measures, for instance obligatory questioning pursuant to RB chapter 23, section 7. Victims and witnesses can voluntarily choose to give information by contacting Swedish authorities. A particular feature of structural investigations is that, apart from victims and witnesses, persons with any kind of detailed knowledge of the state in question may be of interest to investigators. A detailed description of a certain building or the surroundings of a village, or of the organisation of state intelligence services, may provide pieces of the puzzle otherwise hard to come by. As the investigation proceeds, the strategy may become more proactive. When a perpetrator is identified during a structural investigation, that information may be used to initiate a spin-out investigation on that particular perpetrator.³² Structural investigations have resulted in several ongoing individual investigations in Sweden (September 2019).³³ Swedish structural investigations also generate information that supports investigations in other states through legal assistance and cooperation.

5 Analysis

The structural investigation is a practical application and reinterpretation of the existing rules and regulations as a response to new challenges. The development

²⁸ Human Rights Watch, *The Long Arm of Justice, Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands*, HRW 2014 ISBN: 978-1-62313-1913, p. 5 f.

²⁹ Interview 26 April 2019.

³⁰ Interview 26 April 2019.

³¹ Interview 26 April 2019.

³² Interview 26 April 2019.

³³ Supplementary interview with Reena Devgun, 17 September 2019.

of the method, for Swedish purposes, has been undertaken by individuals and working groups of RIO, as a way addressing the challenges of investigating international crimes. The implementation of asylum protection creates the nexus to national interests and allows prosecutors to proceed with the investigations due to the amount of available evidence. Compared to traditional investigation methods, the structural criminal investigation allows for securing the evidence earlier on in the process, raising the level of legal certainty in the interest of the rule of law. It allows prosecutors to act within the relevant timeframes, while still meeting the required evidentiary thresholds. Structural investigation is essentially a means of pooling resources, both nationally and internationally. Established platforms for cooperation such as Eurojust and the Genocide Network facilitate the flow of information. It is worth noting that the development is not the result of specific legislative measures or harmonisation of laws. Even though international crimes stem from public international law, this mostly affects the content of the *special part of criminal law*, where norms may align according to international custom. The general part of criminal law and the criminal procedural law is a different matter.³⁴ States will apply their domestic norms and regulations in investigating and adjudicating the crimes, and rules will vary between countries, as will the manner of making use of universal jurisdiction.³⁵ Thus, rather than being the result of formal legislation or treaty regulation, the structural method has grown out the experience and expertise of specialised practitioners. The advantages are economic as well as strategic. Structural investigations are the practical vehicle that enable states to turn the grand theory of international criminal law- the expressive, preventive, retributive or restorative purposes, the ending of impunity and balancing the reciprocity of inter-state relations, into everyday practice. There is *reason to assume* that the reinvention of investigations according to the structural method will greatly improve the possibilities of successful national investigation of international crimes.

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³⁴ See prop 2013/14:146, 'Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser' p. 71.

³⁵ For a comparative analysis of the Netherlands, Germany and France, see Humans Rights Watch, *The Long Arm of Justice*, 2014.

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