Jurisdiction and Immunities in Sweden When Investigating and Prosecuting International Crimes

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1 Jurisdiction Concerning Crimes Committed Outside Swedish Territory

1.1 Introduction

The general rules on Swedish jurisdiction are given in the Swedish Criminal Code, Chapter 2. These rules should be viewed mainly as rules of competence when Swedish courts adjudicate in criminal cases with an international connection,[1] and are applicable unless otherwise provided.[2] The following text will focus on the Chapter 2 rules, particularly how they should be applied when a crime has been committed outside Swedish territory.[3]

Although focus is on jurisdiction of crimes committed outside Sweden, the prosecutor or the court initially needs to investigate and conclude where the alleged crime was committed. This is determined in the Code's Chapter 2 Section 4, which states that

> An offence is considered to have been committed where the criminal action was carried out, as well as where the offence was completed or, in the case of an attempted offence, where the intended offence would have been completed.

According to the *travaux préparatoires* to the Swedish Criminal Code, the localization of the crime should be interpreted extensively.[4] This view is also supported in the case law. It is, for example, possible to conclude that the crime as such was committed in Sweden even if it was only partly committed here.[5]

The place of the crime is crucial for the application of the Swedish Criminal Code, Chapter 2. If the crime occurred in Sweden, jurisdiction can be based on

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1 This description of the Swedish Criminal Code, Chapter 2 is, for example, used by Asp, Petter, *Internationell straffrätt*, Second edition, Iustus: Uppsala, 2014, p. 25.

2 A number of statutes contain special jurisdictional provisions, see e.g. Environmental Code, Chapter 29 Section 13; Act on Aviation (2010:500), Chapter 13 Section 11; Act on Prohibition of Female Genital Mutilation (1982:316), Section 3; Act on Space Activity (1982:963), Section 5; Act on Criminal Responsibility for Public Provocation, Recruitment and Training concerning Terrorist Offences and other Particularly Serious Crime (2010:299), Section 9. Since these provisions are *lex specialis* in relation to the Swedish Criminal Code, Chapter 2, they are applicable instead of the general rules in the Code.

3 Swedish territory means both the land and the territorial waters, defined as 22,224 metres drawn from the land or internal waters baselines, see the Act on Swedish sea boundaries (1966:374).

4 See e.g. SOU 1938:44, p. 345; SOU 1944:69, p. 7; NJA II 1943 p. 243; NJA II 1948 p. 162, which states that the localization of the crime can be where the immediate effect occurred and where the crime was actually completed.

5 See e.g. Supreme Court case NJA 1993 s. 292. See also the appeal court's case RH 2000:84, where a murder had been committed outside Swedish territory, in Iraq. The Court of Appeal held that the murder could be located to Sweden since the act of conspiracy to commit murder had occurred in Sweden. For an analysis of RH 2000:84, see e.g. Asp, Petter, *Från tanke till gärning. Del II. Förberedelse och stämpling till brott*, Uppsala: Iustus, 2007, pp. 231–236.

the territorial principle (Swedish Criminal Code, Chapter 2 Section 1).[6] Thus, there is no obstacle to bringing legal proceedings in Sweden (Chapter 2 Section 5 a) and there is a presumption that a request to prosecute is not needed (Section 5 para. 1 *e contrario*). Therefore little thought is needed on the matter of jurisdiction. However, if the crime is located outside Swedish territory, more complicated questions need to be addressed.

1.2 Jurisdiction from an International Law Perspective

From an international law perspective, jurisdiction concerns mainly the possibilities for a State to exercise power over individuals and property.[7] Within its own territory, a State is largely free to exercise its power,[8] since all States are sovereign:[9] a State is reasonably free to adopt and enunciate its own legislation and execute legal measures within its own territory. The vital question here is how far a State can extend its jurisdiction by exercising it in relation to crimes occurring outside its territory. A State doing so exercises extraterritorial jurisdiction, meaning that it intervenes with an internal matter of another (sovereign) State. Here a conflict arises between the principle of non-intervention and the internationally recognized principles for when a State can exercise extraterritorial jurisdiction. This conflict arose for example in the Lotus case,[10] where the Permanent Court of International Justice, *inter alia*, confirmed the principle of non-intervention.[11] However, the Court held that unless an exercise of extraterritorial jurisdiction is inconsistent with international law, a

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6 Since our focus is Swedish jurisdiction of crimes committed outside Sweden, we will not review Swedish jurisdiction of crimes committed on Swedish territory as regulated mainly in the Swedish Criminal Code, Chapter 2 Section 1. See further e.g. NJA II 1962 s. 55–57; Bäcklund, Agneta, et al., Brottsbalken (17 April 2019, Zeteo), commentary to the Swedish Criminal Code, Chapter 2 Section 1. On the territorial principle, see *inter alia* Helenius, Dan, *Straffrättslig jurisdiktion*, Helsinki: Soumalainen Lakimiesyhdistys, 2014, pp. 295–298; Wong, Christoffer, *Criminal Act, Criminal Jurisdiction and Criminal Justice*, Cracow: Polpress, 2004, pp. 63–86; Träskman, Per Ole, *Straffrättsliga åtgärder med främmande inslag I. En granskning av den finska straffrättens tillämpningsområde*, Helsinki: Juridiska föreningen i Finland, 1977, pp. 132–135.

7 For a more thorough review of various aspects concerning jurisdiction from an international law perspective, see further *inter alia* Crawford, James, *Brownlie's Principles of Public International Law*, Ninth edition, Oxford: Oxford University Press, 2019, pp. 431–492, 191–238; Orakhelashvili, Alexander, *Akehurst's Modern Introduction to International Law*, Eighth edition Milton Park: Routledge, 2019, pp. 213–229; Helenius, 2014, pp. 203–286; Bring, Ove, Klamberg, Mark Mahmoudi, Said & Wrange, Pål, *Sverige och folkrätten*, Sixth edition, Stockholm: Norstedts Juridik AB, 2020, pp. 106-114.

8 See e.g. Orakhelashvili, 2019, p. 213; Crawford, 2019, pp. 431–433.

9 See e.g. Charter of the United Nations, Article 2.1.

10 Case of the SS Lotus. (France v. Turkey). PCIJ, Rep. Ser. A, No. 10 (1927). Available at: https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_A/A_10/30_Lotus_Arret.pdf (Accessed 26 June 2020).

11 Case of the SS Lotus. (France v. Turkey). PCIJ, Rep. Ser. A, No. 10 (1927). Available at: https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_A/A_10/30_Lotus_Arret.pdf (Accessed 26 June 2020), pp. 18–19.

State has a rather wide margin of appreciation for exercising extraterritorial jurisdiction *within* its boundaries.[12]

Some scholars have noted that it is not possible to draw any far-reaching conclusions from the Lotus case.[13] Yet, from the Lotus case it follows that it is possible for a State – in its legislation and in its judiciary, but not in matters of enforcement – to exercise extraterritorial jurisdiction. Thus, the conditions that determine whether and how a State exercises jurisdiction, particularly extraterritorial jurisdiction, are a matter for each State's national legislation.[14] When a State regulates under what circumstances, whether and how it can exercise jurisdiction, it needs to ensure that the national legislation is consistent with minimum international rules, for example in the treatment of foreigners, human rights and the right to due process.[15] Further, international law also limits to some extent a State's possibilities to exercise or enforce rules of jurisdiction within its own territory. A State must, for example, respect the fact that international law gives some persons immunity and thus it cannot bring such a person before a national court.[16]

1.3 Swedish Jurisdiction When the Crime Occurred Outside Swedish Territory

1.3.1 Introductory remarks

If the alleged crime occurred outside Swedish territory it is, at least from a criminal law perspective, accurate to say that Sweden may claim to exercise extraterritorial jurisdiction. In practice, Swedish authorities thus extend their jurisdiction, claiming for one reason or another that it is legitimate to bring the defendant before a Swedish court. Several internationally recognized principles of jurisdiction can legitimize the exercise of extraterritorial jurisdiction. These also to a great extent underlie the rules on Swedish jurisdiction in the Swedish Criminal Code, Chapter 2.

Since this article focuses on Swedish jurisdiction for crimes committed outside Sweden, only a few principles of jurisdiction are relevant: 1) the active personality principle,[17] 2) representational jurisdiction and, 3) the principle of universal jurisdiction. Since the rules on jurisdiction are based on these principles, it is difficult to separate them from each other. Consequently, in the

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12 Case of the SS Lotus. (France v. Turkey). PCIJ, Rep. Ser. A, No. 10 (1927). Available at: https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_A/A_10/30_Lotus_Arret.pdf (Accessed 26 June 2020), p. 19.

13 See e.g. Asp, 2014, p. 29. Cf Helenius, 2014, p. 213.

14 See e.g. Bring, Klamberg, Mahmoudi & Wrange, 2020, p. 106; Orakhelashvili, 2019, pp. 216, 218–219.

15 See e.g. Bring, Klamberg, Mahmoudi & Wrange, 2020, p. 107.

16 See Section 2 on immunities.

17 In international law, the term "the active nationality principle" is sometimes used rather than "the active personality principle". However, the terms are synonymous, see e.g. Currie, Robert & Rikhof, Joseph, *International and Transnational Criminal Law*, Second edition, Toronto: Irwin Law, 2013, p. 68.

following sections, they will be reviewed in parallel. We believe that this disposition underpins the connection between the principles and the rules.

1.3.2 The complex relationship between the Code's Chapter 2 Section 2 and Section 3 in general

Swedish law offers two main rules on jurisdiction over alleged crimes committed outside Swedish territory: the Swedish Criminal Code, Chapter 2 Section 2 and Chapter 2 Section 3. Which provision should be applied in an individual case?

The starting point is that Swedish courts should apply the Code's, Chapter 2 Section 3 in precedence over Section 2.[18] The reason for this is twofold. Firstly, since Section 3 covers rather specific situations,[19] it is considered *lex specialis* in relation to the general rule in Section 2. Secondly, if Section 3 is applied, the result would (partly) be the same as if Section 1 had been applied. Thus, when Section 3 is applied the result (just as when Section 1 is applied) is mainly that double criminality is not needed. Thus, the Swedish court can handle the case simply according to the relevant Swedish law, without taking into account the regulation of criminal law in other States.[20]

The above-mentioned relationship between these two rules on jurisdiction deserves a more thorough explanation. If the Code's Chapter 2 Section 2 is used to claim jurisdiction, other conditions need to be fulfilled in order for Sweden to actually exercise extraterritorial jurisdiction. First, double criminality is necessary, i.e. the alleged crime must be criminalized both in Sweden and at the place of the crime.[21] If the double criminality requirement is met, the court must consider the range of punishment for the crime in question in the jurisdiction of the State where the crime occurred. According to Section 2 para. 3, the Swedish court cannot impose a sanction that is considered more severe than the most

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[18] See e.g. Asp, 2014, p. 62.; Asp, Petter et al., *Brottsbalken. En kommentar. Kapitel 1–12*, Stockholm: Karnov Group, 2018, p. 66.

[19] The Swedish Criminal Code, Chapter 2 Section 3 applies, somewhat simplified, when the offence was committed: 1) on board a Swedish ship or aircraft, 2) by a member of the Swedish Armed Forces in an area in which a detachment thereof was present, 3) by a person who, when posted abroad, is employed in the Swedish Armed Forces and is serving in an international military operation, or who is a member of the Swedish Police Peace Support Operations Unit, 3a) committed in the course of their duty abroad by a police officer, a customs officer or an officer of the Swedish Coast Guard who is carrying out duties under an international agreement to which Sweden has acceded, 4) against Sweden, a Swedish municipality or other local body, or a Swedish public institution, 5) in an area that does not belong to any State and was committed against a Swedish citizen, a Swedish association or private establishment, or against an alien habitually resident in Sweden. The provision is also applicable in two other situations, see further below Section 1.5.

[20] The reasoning presented above is based mainly on what Asp previously expressed, albeit here in slightly other terms, see further Asp, 2014, pp. 61–65.

[21] However, there are some exceptions from the requirement of double criminality. The Swedish Criminal Code, Chapter 2 Section 2 para. 4 lists several offences that do not require double criminality, mainly various forms of sexual offence against children under the age of 18, including the offence of gross child pornography.

severe penalty provided for the crime under the law of the State in which it was committed.[22]

However, if Section 3 is applied, the Swedish court is not required to consider either double criminality or the range of punishment in the State where the crime occurred.

Therefore, it is usually explained that the Swedish Criminal Code, Chapter 2 Section 2 provides *conditional jurisdiction*, while Section 3 provides *unconditional jurisdiction*.[23] Generally, a rule that provides unconditional jurisdiction should be applied in precedence over one that provides conditional jurisdiction. Thus, if the Code's conditions for unconditional jurisdiction in Chapter 2 Section 3 are met, it – rather than Section 2 – should be used as the basis for exercising extraterritorial jurisdiction.[24]

In the following sections, we review briefly the Swedish Criminal Code's Chapter 2 Section 2 and Section 3. We focus solely on conditions that are relevant for assessing what rules could be applied when Sweden claims jurisdiction for a crime committed outside Swedish territory.[25]

1.4 Swedish Jurisdiction according to the Swedish Criminal Code, Chapter 2 Section 2

1.4.1 The wide active personality principle

According to the Swedish Criminal Code, Chapter 2 Section 2 para. 1, Sweden can always claim jurisdiction over a crime that occurred abroad if it was committed by 1) a Swedish citizen or an alien habitually resident in Sweden, 2) an alien not habitually resident in Sweden who, after the offence, has become a Swedish citizen or become habitually resident in this country or is a citizen of another Nordic country who is in Sweden, or 3) any other alien who is in this country and the offence can, under Swedish law, result in imprisonment for more than six months. Since this rule on jurisdiction requires a nexus between the

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22 This requirement is sometimes referred to as *lex mitior*.

23 See *inter alia* Falk, Per, *Straffrätt och territorium*, Stockholm: Norstedts, 1976, p. 44; Asp, 2014, pp. 44–45; Cameron, 2011, p. 57, 62, 72.

24 See Asp, 2014, pp. 61–65, who discusses the relationship between different rules in the Swedish Criminal Code, Chapter 2, and who concludes that the Swedish Criminal Code, Chapter 2 Section 3 should be applied in precedence over the Swedish Criminal Code, Chapter 2 Section 2. The reason for this, Asp argues, is that the Swedish Criminal Code, Chapter 2 Section 2 states conditional jurisdiction. See also Asp et al., 2018, p. 66.

25 For a more thorough review, including every legal condition for Sweden to exercise jurisdiction, see *inter alia* Bäcklund, Agneta, m.fl., Brottsbalken (17 April 2019, Zeteo), commentary to the Swedish Criminal Code, Chapter 2; Asp, 2014, pp. 25–65; Asp, Petter & Samuelsson, Jörgen, "De svenska jurisdiktionsreglerna" in Asp, Petter & Jareborg, Nils, (eds.), *Svensk internationell straffprocess*, Uppsala: Iustus, 1995, pp. 21–112; Cameron, 2011, pp. 62–99; Cornils, Karin, "Sweden" in Elholm, Thomas & Feldtmann, Birgit, (eds.), *Criminal Jurisdiction. A Nordic Perspective*, Copenhagen: Djøf Publishing, 2014, pp. 125–148. For a review in older Swedish criminal law literature, see e.g. Falk, 1976.

person who allegedly committed the crime and Sweden – either by citizenship or residence – the rule is legitimized by the active personality principle.[26]

A comparative international perspective shows that the Swedish version of the active personality principle is rather wide. The scope of the Code's Chapter 2 Section 2 para. 1 is wide since it includes a person who *after* the crime was committed, has become a Swedish citizen.[27] As well as in the Nordic countries, a wide scope of the active personality principle exists in German law[28] and in French law.[29] Other States, predominantly countries that belong to the common law tradition, seem to apply a narrower version. Some, for example, limit its scope applying it solely in cases concerning fairly severe offences.[30] Others seem to apply this principle intermediately to a wide and a narrow version.[31]

One explanation of the wide scope of the Swedish active personality principle is offered by Petter Asp.[32] He argues that the reason why the Code's, Chapter 2 Section 2 includes persons who *after* the crime become Swedish citizens or take up residence in Sweden, is the difference between applying the "pure" criminal law provisions and the procedural-law issue of exercising jurisdiction in an individual case where the alleged crime was committed abroad.[33] Thus, Asp simply means that *if* a distinction is made between whether a crime has been

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[26] SOU 2002:98, p. 79. For an in-depth analysis of the active personality principle, see *inter alia* Helenius, 2014, pp. 317–324; Wong, 2004, pp. 87–94; Träskman, 1977, pp. 136–138.

[27] See e.g. Cryer, Robert, Robinson, Darryl & Vasiliev, Sergey, *An Introduction to International Criminal Law and Procedure*, Fourth edition, Cambridge: Cambridge University Press, 2019, p. 55; Crawford, 2019, pp. 443–444; Shaw, Malcolm Nathan, *International Law*, Eighth edition, Cambridge: Cambridge University Press, 2017, pp. 469–497. See also Cameron, 2011, p. 69, who claims that the active personality principle in Swedish law is formulated in a wide manner. For a comparison between how different States have formulated the principle in its national legislation, see further Satzger, Helmut, *International and European Criminal Law*, Munich: Beck, 2012, pp. 21–25.

[28] Strafgesetzbuch, Section 7 para. 2.

[29] Code Pénal, Article 113-6.

[30] See e.g. Offences Against the Person Act 1861 (UK), Section 9 (murder, manslaughter), Section 57 (bigamy).

[31] See e.g. Crimes Act 1961 (New Zealand), Section 7A, stating that New Zealand, *inter alia*, can exercise extraterritorial jurisdiction for crimes committed abroad if the "person to be charged is ordinarily resident in New Zealand" or "has been found in New Zealand and has not been extradited". This provision further states that extraterritorial jurisdiction can only be exercised in respect of certain offences listed in the provision, for example trafficking in persons and participation in an organised criminal group.

[32] Justice of the Swedish Supreme Court since 2017. Previously, Asp was professor of criminal law at Stockholm University; earlier, professor of criminal law at Uppsala University.

[33] Asp, Petter, "Materiellt och processuellt – och frågan om kriminalisering av sexköp utomlands" in Samuelsson Kääntä, Jenny, Almkvist, Gustaf, Svensson, Erik & Skarhed, Anna (eds.), *Vänbok till Lena Holmqvist*, Uppsala: Iustus, 2019, pp. 89–91. Asp has previously expressed this opinion, see Asp & Samuelsson, 1995, p. 23–25. The relevant question is whether the national rules on jurisdiction should be viewed as purely a matter of procedural law, purely a matter of criminal law or something in between. Asp concludes that national rules on jurisdiction should be treated as procedural law. However, other scholars argue that these rules should be viewed as purely a matter of criminal law or something in between. For an overview of different scholars' opinions on this matter, see e.g. Helenius, 2014, pp. 141–162.

committed and whether the procedural rules on Swedish jurisdiction can be applied,[34] it follows that it also is possible to determine these issues to some extent separately. In other words, the matter of whether Sweden can exercise jurisdiction according to the rules in Chapter 2 cannot be determined according to whether a crime has been committed. The reason, according to Asp, is that different considerations obtain in these two matters. The converse – i.e. to let the application of the rules and conditions governing the exercise of jurisdiction at the time of the offence (that the defendant at that time was a Swedish citizen) completely determine whether a crime has been committed – would thus in Asp's words appear "artificial".[35]

This reasoning might at first glance appear rather theoretical. However, in practice it has an important effect. One example the case of *Tabaro*, where the defendant was indicted for alleged crimes committed during the Rwanda genocide. At the time of the alleged crime (April to May 1994) the defendant was a Rwandan citizen and resident there. Four years after the alleged crime, he became resident in Sweden, becoming a Swedish citizen in 2006. Since he gained Swedish citizenship long *after* the time of the offence, Swedish jurisdiction *could have* been based on the Swedish Criminal Code, Chapter 2 Section 2. However, if the rules of jurisdiction were to determine – at the time of the offence – whether a crime had been committed, it would be impossible to exercise Swedish jurisdiction. Thus, it would not even be considered a crime at the time of the offence. Note, however that the Swedish Government, when deciding on the request to prosecute in *Tabaro*, based Swedish jurisdiction on the Swedish Criminal Code, Chapter 2 Section 2 p. 6.[36]

Further, the Code's Chapter 2 Section 2 para. 1 equates citizenship of the Nordic countries with Swedish citizenship. This provision also applies to citizens from other countries currently in Sweden.

The reason for the wide scope of application of the active personality principle is the general rule that Sweden does not extradite its citizens to other States.[37] The inclusion of Nordic citizens in this provision is explained by the close Nordic co-operation in matters of criminal procedure: a Nordic citizen can generally be brought before a court in another Nordic State if he or she is resident there.[38]

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[34] Asp, Petter, Ulväng, Magnus & Jareborg, Nils, *Kriminalrättens grunder*, Second edition, Uppsala: Iustus, 2013, p. 63, 181-184; Strahl, Ivar, *Allmän straffrätt i vad angår brotten*, Stockholm: Norstedt, 1976, p. 6.

[35] Asp, 2019, p. 90; Asp & Samuelsson, 1995, p. 24.

[36] See the Swedish Government's decision of 10 August 2017, reference number JuBC2017/00565/BIRS (*Tabaro*).

[37] The Act on Extradition for Crimes (1957:668), Section 2. Other States which have expressed the active personality principle in wide terms in their national legislation have the same general rule. Germany is an example, see e.g. Grundgesetz article 16, p. 2.

[38] See further the Administrative Agreement between the Prosecutors General of Denmark, Finland, Iceland, Norway and Sweden, concluded in 1970.

1.4.2 An element of representational jurisdiction

The inclusion in the Swedish Criminal Code, Chapter 2 Section 2 para. 1 of the third category (non-Nordic citizens that happen to be present in Sweden) cannot be legitimized by the active personality principle. This should rather be viewed as being legitimized by the principle of representational jurisdiction.[39] The *rationale* behind this regulation is that non-Nordic citizens – domiciled or not – can be extradited even without the need for an extradition treaty. For humanitarian reasons, however, Sweden wishes to avoid extradition of non-Nordic citizens.[40]

Since the Swedish Criminal Code, Chapter 2 Section 2 para. 1 p. 3 includes this third category, it may seem that the provision is rather wide in scope. However, its application is limited by the requirement of double criminality (Swedish Criminal Code, Chapter 2 Section 2 para. 2).

1.5 Swedish Jurisdiction according to the Swedish Criminal Code, Chapter 2 Section 3

1.5.1 The universality principle in Swedish criminal law

Some crimes committed outside Swedish territory are so severe that Sweden always has jurisdiction over them. Therefore, the Swedish Criminal Code, Chapter 2 Section 3 p. 6 applies to such crimes over which international conventions oblige Sweden to exercise jurisdiction regardless of where the crime occurred.[41] Thus the provision is evidently based on the universality principle, i.e. that a crime committed outside Swedish territory can always be brought before a Swedish court regardless of who committed the crime and where.[42]

From an international law perspective, the universality principle is probably the most debated ground for (extraterritorial) jurisdiction, and the legal doctrine

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39 See also Cornils, 2014, pp. 143–144. See however Cameron, 2011, p. 70, who adds that this provision cannot be described as purely representational. The reason being that application of the provision in these cases does not depend on a request by another State to institute a prosecution or follow the refusal of an extradition request from another State.

40 Prop. 1957:170, pp. 10–15. See also Cameron, 2011, p. 70.

41 The provision states that crimes committed abroad are adjudicated under Swedish law: 'if the offence is hijacking, shipping or aircraft sabotage, airport sabotage, counterfeiting currency, attempting to commit such offences, unlawful handling of chemical weapons, unlawful handling of mines, making an untrue or careless statement before an international court, a terrorist offence under Section 2 of the Act on Criminal Responsibility for Terrorist Offences (2003:148), attempting, preparation or conspiracy to commit such an offence, an offence referred to in Section 5 of that Act, an offence under the Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes (2014:406), inciting crime consisting of an immediate and public call to commit genocide, or if the offence is directed at the administration of justice by the International Criminal Court'. Note that entry into force of the Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes (2014:406), resulted in the addition of offences criminalized in this legislation to the Swedish Criminal Code, Chapter 2 Section 3 p. 6, see prop. 2013/14:146, pp. 15, 216–218, 306.

42 SOU 2002:98, p. 82.

focusing thereon is vast.[43] In sum, the core of the universality principle is that some interests worth safeguarding (*Rechtsgut*) are so fundamental that, regardless of the victim and the place of the crime – all States have an obligation to protect them. Generally, the universality principle is a justified basis for extraterritorial jurisdiction in two situations. Firstly, it can legitimately be applied by another State if the State in which the crime was committed, lacks the ability to protect the attacked interest worth safeguarding (*Rechtsgut*). Secondly, the principle is legitimized in situations where the crime in question is aimed at a common interest of States or at humanity itself. It is thus possible to claim that the universality principle ensures that no State becomes a safe haven for the perpetrator of a crime of this character.[44]

From an international law perspective it is not the universality principle as such that is controversial. Regarding international crimes, it is internationally recognized as a legitimate basis for extraterritorial jurisdiction.[45] In relation to genocide, crimes against humanity and war crime, it is undoubtedly considered a legitimate base for exercising extraterritorial jurisdiction. The principle is also without question considered legitimate in relation to piracy, torture and slavery. Except for the above mentioned crimes, it is however unclear against what crimes the principle could legitimately be used by a State to claim extraterritorial jurisdiction.[46] Thus, in an international law context the controversy lies in how far the universality principle can be used.[47]

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43 Yet some literature thoroughly analyzes the universality principle, see *inter alia* Reydams, LuSectioc, *Universal jurisdiction – international and municipal legal perspectives*, Oxford: Oxford University Press, 2004; Kmak, Magdalena, *The scope and application of the principle of universal jurisdiction*, Helsinki: Erik Castrén Institute of International law and Human Rights, 2011. A rather concise overview of the universality principle, with plenty of references, is offered *inter alia* by Helenius, 2014, pp. 337–350. See also *inter alia* Shaw, 2017, pp. 500–514; Cryer, et al., 2019, pp. 56–68; Crawford, 2019, pp. 451–455. For an overview of the legal doctrine around the turn of the century, see e.g. Butler, Hays A, *The Doctrine of Universal Jurisdiction: A Review of the Literature*, Criminal Law Forum 2000, vol. 11, no. 3, pp. 353–373.

44 Helenius, 2014, p. 338.

45 See e.g. *Prosecutor v. Tadić*, (Case No. IT-94-1), ICTY A. Ch., Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1 October 1995, para. 62: 'Furthermore, one cannot but rejoice at the thought that, universal jurisdiction being nowadays acknowledged in the case of international crimes, a person suspected of such offences may finally be brought before an international judicial body for a dispassionate consideration of his indictment by impartial, independent and disinterested judges coming, as it happens here, from all continents of the world.'

46 See *inter alia* Bassiouni, Cherif M, *Universal Jurisdiction for International Crimes: Historical Practice and Contemporary Practice*, Virginia Journal of International Law 2001–2002, vol. 42, no. 1, pp. 105–134.

47 See e.g. Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, ICJ Reports 2002, p. 3, Joint Separate Opinion of Judges Higgins, Kooijmans and Burgenthal, para. 45: 'That there is no established practice in which States exercise universal jurisdiction, properly so called, is undeniable. As we have seen, virtually all national legislation envisages links of some sort to the forum State; and no case law exists in which pure universal jurisdiction has formed the base of jurisdiction. This does not necessarily indicate, however, that such an exercise would be unlawful (…) In short, national legislation and case law – that is, State practice – is neutral as to exercise of universal jurisdiction.'

The universality principle as expressed mainly in the Swedish Criminal Code, Chapter 2 Section 3 p. 6 lists what offences are covered by the provision.[48] The list is based essentially upon international law. Further, the international treaties that provide the basis for the various offences listed in this provision also recognize that the universality principle constitutes a legitimate reason for a State to exercise extraterritorial jurisdiction in regard to these offences.

Although the offences covered by the Code's Chapter 2 Section 3 p. 6 are based upon international law, some argue that the provision offers a wide form of the universality principle. This is mainly because Section 3 p. 6 does not – as does for example Section 2 – limit the scope and application of the provision by requiring double criminality.[49]

At first glance Section 3 p. 6 appears to represent a wide form of the universality principle; however the scope and application of this provision are in practice limited by the fact that an indictment in Sweden (founded on this provision) requires positive authorisation to prosecute.[50] A request to prosecute in Sweden that concerns the offences listed in Section 3 p. 6, must be decided either by the Swedish Government or by the Swedish Prosecutor General.[51] This gives a significant restriction of the application of the universality principle as a basis for extraterritorial jurisdiction in Swedish law.

1.5.2 Ensuring that Sweden does not become a safe haven for perpetrators

As well as the offences listed in the Swedish Criminal Code, Chapter 2 Section 3 p. 6 (which are based on international law), the universality principle is also expressed in another provision in Swedish law. According to the Code's, Chapter 2 Section 3 p. 7, Swedish jurisdiction can always be claimed in cases where the crime has been committed abroad, if the least severe penalty prescribed for the offence in Swedish law is imprisonment for four years or more. There are however rather few offences in Swedish criminal law with a range of a minimum punishment of four years. Offences with such a severe range of punishment include murder, manslaughter, kidnapping, gross rape and gross arson.

Since the provision does not require a nexus to Sweden, it appears that the Swedish Criminal Code, Chapter 2 Section 3 p. 7 is based on the universality principle, covering as it does severe crimes that are probably criminalized (in one way or another) in most States. However, this is not the case. According to

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48 See e.g. footnote 41 above, which cites the provision and thus the offences covered by its scope.

49 See e.g. Friman, Håkan, "Political and Legal Considerations in Sweden Relating to the Rome Statute for the International Criminal Court" in Lee, Roy S, (ed.), *States' Responses to issues arising from the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law*, Ardsley: Transnational Publishers, 2005, pp. 142–143. For a comparison between how different States have formulated the universality principle in their national legislation, see further Satzger, 2012, pp. 32–38.

50 See Section 3 on authorisation to prosecute.

51 Förordning (1993:1467) med bemyndigande för riksåklagaren att förordna om väckande av åtal i vissa fall (Regulation on delegation to Prosecutor General to authorize prosecution in certain cases).

the *travaux préparatoires* to the Code, the *rationale* for the existence of this provision is that it ensures that no situation occurs where Swedish jurisdiction cannot be exercised in a case where a person (regardless of the citizenship) has committed a severe crime outside Swedish territory. Thus Chapter 2 Section 3 p. 7 ensures that Sweden does not become a safe haven for perpetrators of severe crimes outside Swedish territory.[52]

Although the safe haven concept is the reason for the existence of the Code's Chapter 2 Section 3 p. 7, the scope and application of the provision has been criticized for being too extensive.[53] Therefore it has been suggested that Chapter 2 Section 3 p. 7 should be abolished. A Government inquiry argued that the provision evidently exceeds what is accepted in international law and, thus, it cannot be justified.[54] However, despite this criticism the provision has neither been abolished nor altered.

1.6 Jurisdiction in International Criminal Trials in Sweden

Regarding international criminal trials in Sweden, Swedish courts do not generally reflect much on the issue of the basis for jurisdiction. The main reason is that this issue of course needs to be clear before the prosecutor indicts someone.

In the Swedish international criminal trials reviewed, several trends can be observed. One is that in about half the cases, the courts do not state whether Swedish jurisdiction has been based on the Code's Chapter 2 Sections 2 or 3. Interestingly, in these cases the defendant is not a Swedish citizen.[55] The fact that the defendant is a foreign citizen does not exclude application of Chapter 2. As mentioned above (in Section 1.4 Swedish jurisdiction according to the Swedish Criminal Code, Chapter 2 Section 2), includes non-Swedish citizens. Therefore, it would be preferable if Swedish courts in all future international criminal trials clearly stated the basis of Swedish jurisdiction. Although a transparent statement of the basis for jurisdiction has no implication for the outcome of the case, it would make it easier to understand what provision was applied in an individual case.

However, a situation may occur in which a provision that offers unconditional jurisdiction and a provision that offers conditional jurisdiction simultaneously can be applicable. Considering that either the Government or the Prosecutor

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52 See prop. 1972:98, pp. 98, 101; SOU 2002:98, pp. 102, 148–149.

53 See Nord 1992:17, p. 119.

54 SOU 2002:98, pp. 174–175.

55 See *Åklagaren ./. Milic Martinovic*, Stockholm District Court, Case B 5373-10, judgment 20 January 2012; *Åklagaren ./. Mouhannad Droubi*, Södertörn District Court, Case B 2639-16, judgment 11 May 2016; *Åklagaren ./. Raed Abdulkareem*, Blekinge District Court, Case B 569-16, judgment 6 December 2016; *Åklagaren ./. Omar Sakhanh Haisam*, Stockholm District Court, Case B 3787-16, judgment 16 February 2017; *Åklagaren ./. Mohamad Abdullah*, Södertörn District Court, Case B 11191-17, judgment 25 September 2017; *Åklagaren ./. Kurda Bahaalddin H Saeed H Saeed*, Örebro District Court, Case B 1662-18, judgment 19 February 2019. The reason this footnote only contains references to judgments from district courts is that the matter of jurisdiction – upon appeal – has not been mentioned by the Court of Appeals.

General must grant a request to prosecute someone in these cases, it would be preferable if the courts based it upon the Swedish Criminal Code, Chapter 2 Section 3. This position could be considered controversial, especially since the legitimate use of the universality principle is debated. However, all offences covered by this provision, *inter alia*, genocide and war crimes, are of such character that international law supports a legitimate exercise of the universality principle. Yet again, in practice the application of the Code's Chapter 2 Section 3 p. 6 and p. 7 is limited by the fact that the Swedish Government or the Prosecutor General must grant a request to prosecute on the basis of the universality principle.

The basis for jurisdiction where the defendant is a non-Swedish citizen is sometimes not stated by the courts. This is stated, however, in the decision on authorisation to prosecute. From this decision it follows that in some cases Chapter 2 Section 3 p. 6 is the basis for jurisdiction.[56] In some cases it is noted in the decision to grant the request to prosecute, that Swedish jurisdiction can be based on Chapter 2 Section 3 p. 6 and p. 7.[57]

In the other half of the Swedish international criminal trials reviewed, the courts have clearly stated the basis for jurisdiction. When the court in the written judgment mentions the basis for Swedish jurisdiction, the defendant is a Swedish citizen. Also, in each of these cases, the court notes that Swedish jurisdiction can follow both Chapter 2 Section 2 para. 1 p. 1 and Chapter 2 Section 3 p. 6 and/or p. 7.[58] In such a case a Swedish citizen (Chapter 2 Section 2 para. 1 p. 1) that has allegedly committed a crime of such severity that Sweden can exercise jurisdiction on the universality principle (the Swedish Criminal Code, Chapter 2 Section 3 p. 6 and/or Section 3 p. 7). However, in these cases – where Swedish jurisdiction is either conditional or unconditional – it is impossible to investigate whether the courts have let either basis take precedence. One could argue that it is important that the courts clarify what provision has been applied, particularly when it is a matter of competing grounds for jurisdiction. The reason for this position is that the conditions for applying a provision offering conditional

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[56] See e.g. the Swedish Government's decision of 1 September 2016, reference number JuBC2016/00694/BIRS (*Abdulkareem*); and the Government's decision of 31 August 2017, reference number JuBC2017/00600/BIRS (*Abdullah*).

[57] See e.g. the Swedish Government's decision of 29 January 2015, reference number JuBC2015/63/BIRS (*Droubi*).

[58] See *Åklagaren ./. Jackie Arklöv*, Stockholm District Court, Case B 4084-04, judgment 18 December 2006, p. 12; *åklagaren ./. Ahmet Makitan*, Stockholm District Court, Case B 382-10, judgment 8 April 2011, p. 41; *Åklagaren ./. Mbanenende*, Stockholm District Court, Case B 18271-11, judgment 20 June 2013, p. 12; *Åklagaren ./. Claver Berinkindi*, Stockholm District Court, Case B 12882-14, judgment 16 May 2016, p. 16; *Åklagaren ./. Theodore Tabaro*, Stockholm District Court, Case B 13688-16, judgment 27 June 2018, p. 11. The reason this footnote only contains references to judgments from the district courts is that jurisdiction – upon appeal – has not been mentioned by the Court of Appeals. Although Swedish courts in almost all international criminal trials where the defendant is a Swedish citizen state the basis for jurisdiction (i.e. the Swedish Criminal Code, Chapter 2 Section 2 para. 1 p. 1), there are exceptions, see e.g. *Åklagaren ./. Hassan Al-Mandlawi*, Gothenburg District Court, Case B 9086-15, judgment 14 December 2015, where the Court does not clarify this.

jurisdiction are completely different from those for applying a provision offering unconditional jurisdiction.[59]

However, in cases where the courts conclude that Swedish jurisdiction can be based either on the Code's, Chapter 2 Section 2 para. 1 p. 1 (Swedish citizen) or on Chapter 2 Section 3 p. 6 (universality principle), the actual basis is presented in the decision to grant the request to prosecute. From the review of these cases, it is clear that different provisions have been applied. In some cases, Swedish jurisdiction has been based on Chapter 2 Section 2,[60] and in others on Section 3 p. 6.[61] There are also cases where the decision to grant the request to prosecute has been based on both Section 3 p. 6 and p. 7.[62]

2 Immunities

Immunity may be understood as a bar against jurisdiction. It entails limitations for a State to exercise adjudicative jurisdiction or to take enforcement measures within its own territory. A court can dismiss indictment against a person who enjoys immunity.[63]

Immunity may be discussed under three sub-headings: "State immunity", "diplomatic and consular immunity" and "immunity of international organisations". From State immunity follows immunity for the leaders of foreign States (for example head of State, head of Government and minister of foreign affairs).[64] This part of the article concerns immunity against criminal proceedings for foreign leaders and diplomatic and consular personnel in relation to the jurisdiction of domestic courts of another State (here Sweden), and international courts (henceforth immunity against criminal proceedings). Internal, constitutional rules on immunity of a State's own head of State, Government members, etc. are beyond the scope of this article.[65]

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59 See above Section 1.3.2.

60 See e.g. the Prosecutor General's decision (Swedish Prosecution Authority) of 7 July 2006, reference number ÅM 2006/3012 (*Arklöv*); Prosecutor General's decision (Swedish Prosecution Authority) of 30 September 2015, reference number ÅM 2015/6697 (*Al-Mandlawi*), where – without referring to a provision in the Swedish Criminal Code, Chapter 2 – it is only stated that the defendant is "a Swedish citizen".

61 See e.g. the Swedish government's decision of 10 August 2017, reference number JuBC2017/00565/BIRS (*Tabaro*).

62 See e.g. the Swedish government's decision of 25 June 2015, reference number JuBC2015/00634/BIRS (*Berinkindi*).

63 SOU 2002:98, part A, p. 108.

64 Cameron, 2011, p. 90; Mahmoudi, Said, "Immunitet i svenska domstolar" in Stern, Rebecca & Österdahl, Inger (eds.),*Folkrätten i Svensk rätt*, Malmö: Liber, 2012, 165-187, at p. 165.

65 The constitution was amended in 2010 to clarify that Sweden's head of State (the King) did not enjoy immunities in the unlikely event of prosecution being sought at the International Criminal Court, see Chapter 10, Section 14 of the Instrument of Government which provides that Chapter 5, Section 8 does "not prevent Sweden from fulfilling its commitments under the Rome Statute for the International Criminal Court or in relation to other international criminal courts."

2.1 Immunity against Criminal Proceedings pursuant to Swedish Law

Swedish law provides for immunity in the Act on Immunities and Privileges (1976:661) in certain cases. The Act provides, *inter alia*, for the immunity of diplomats and consular officers.[66] In relation to immunity from criminal proceedings the Swedish Criminal Code, Chapter 2 Section 7 provides that

> With respect to the applicability of Swedish law and the jurisdiction of Swedish courts, the limitations that follow from generally recognised fundamental principles of public international law or, as specifically prescribed, from agreements with foreign powers are observed in addition to the provisions of this chapter.

From this follows that persons who enjoy immunity pursuant to a treaty or customary international law shall be protected against indictment and other enforcement measures.

2.2 Immunity against Criminal Proceedings pursuant to International Law

Immunity for diplomats and consular personnel follows from treaties,[67] while immunity for the leader of a foreign country follows from customary international law.

The military forces of a State which are on the territory of another State with the consent of that State may enjoy certain immunities. However, there are different views on the scope of such immunity. Thus, in many cases such immunity is regulated by agreement,[68] for example through a SOFA (Status of Forces Agreement).

The Convention on Special Missions (1969) may protect State representatives who would otherwise not be protected by immunity when in another State to carry out a limited mission with the consent of the State concerned.[69] The convention has 39 States Parties, Sweden is not of one of them.

The ICJ found in the case of the *DRC v. Belgium* (also known as the *Yerodia* case) that Belgium had violated the rules on immunity that follow from customary international law when it issued a warrant of arrest for the DRC minister of foreign affairs. In an *obiter dictum* the ICJ elaborated upon exceptions from immunity. While none of these exceptions were relevant to the case, the ICJ's discussion captures the main points of contention. The ICJ lists four exceptions where the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution: 1) such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law; 2) they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or

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66 Lag (1976:661) om immunitet och privilegier i vissa fall (Act on Immunities and Privilegies in Certain Cases), Sections 2 and 3.

67 Vienna Convention on Diplomatic Relations, 18 April 1961, Article 31; Vienna Convention on Consular Relations, 24 April 1963.

68 SOU 2002:98, part A, p. 109.

69 Convention on Special Missions, 8 December 1969.

have represented decides to waive that immunity; 3) after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity; 4) an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.[70] This view appears largely to represent the law as applied in other domestic and international cases. However, in the third exception it is debatable whether State acts are exempt from prosecution. In scholarship and in some court cases it is held that international crimes are not covered by functional immunity.[71]

The rules on immunity in criminal proceedings before domestic authorities and courts may be summarized as follows. Certain representatives of a State have functional immunity (*immunity ratione materiae*) as well as personal immunity (*immunity ratione personae*). Functional immunity offers protection against domestic criminal proceedings in other States in relation to acts of State but not in relation to private acts. Functional immunity persists for acts of State even after the representative's period of office has ceased. However this does not apply to international crimes. Personal immunity offers protection against criminal proceedings in other States in relation to States' acts as well as private acts, but that protection ceases when that representative's period of office ends. The rules on immunity do not offer protection against proceedings before an international criminal tribunal or international criminal court.[72]

2.3 Case Law in Sweden

One of the few cases before a Swedish court when immunity became relevant was the *von Herder* case. This concerned a German citizen who served in the German military forces and spied against Sweden from German-occupied Norway during the Second World War. Discussion about immunity appeared first and foremost in an expert statement by Professor Bergendal submitted by the prosecutor before the district court (*Häradsrätt*). Bergendahl held that immunities were only afforded to diplomats and military personnel acting on the

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70 Arrest Warrant Case, Judgment of 14 February 2002, para. 61.

71 *Prosecutor v. Blaškić*, (Case No. IT-95-14-A), ICTY A. Ch., Judgment on the Request of the Republic of Croatia for Review of the Decision of the Trial Chamber II of 18 July 1997, 29 October 1997, paras. 38 and 41: "functional immunity … is a well-established rule of customary international law[with] few exceptions. These exceptions arise from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity."; see also Bring, Klamberg, Mahmoudi and Wrange, 2020, pp. 127-128; Cryer, Robert, Friman, Håkan, Robinson, Darryl & Wilmshurst, Elizabeth, *An Introduction to International Criminal Law and Procedure*, Cambridge: Cambridge University Press, Third Edition, 2014, pp. 548-549, 550-551.

72 Bring, Klamberg, Mahmoudi and Wrange, 2020, pp. 127-132.

territory where the claim of immunity was made. Since von Herder was operating from Norwegian territory, immunity would provide no protection. Von Herder referred in the Svea Court of Appeal to an expert statement by Professor Wetter, who conceded that immunity did not protect against prosecution, but instead questioned whether the alleged act was criminal since von Herder had engaged in activities that were lawful under international law. The Supreme Court acquitted von Herder, taking into account that he had served the military forces of his country. The Supreme Court gave the following reasons:

> Pursuant to tenets of public international law, which should be applied in Swedish law, the acts that are attributed [von Herder] are not such that should lead to criminal responsibility.[73]

Thus, the matter was dealt with in terms of criminal responsibility, not of immunity.[74]

During the Swedish-Russian military exercise "Snöflingan" – the Snowflake – in Sweden in 2006 the question arose as to whether prosecution of a Russian lieutenant-general for alleged war crimes in Chechnya was permissible. The Swedish Helsinki Committee (now Civil Rights Defenders) filed a complaint which referred to evidence that seven Chechen civilians had been detained, tortured and killed that could be attributed to the lieutenant-general. The prosecutor decided not to start an investigation, by giving the following reasons:

> My opinion is that there are solid reasons that the Russian officer enjoys immunity from criminal proceedings during the time he is in Sweden as a participant in the joint exercise "Snöflingan". He has come to Sweden on the basis of the mentioned decision by the Swedish Government. Immunity is based on recognized tenets of public international law. Immunity entails a bar against commencing an investigating and using coercive measures. … Regardless of his potential immunity against criminal proceedings, one must assess the likelihood that the Government will authorize a prosecution. … At present there is no possibility of getting an advance ruling whether an authorisation to prosecute is to be expected. Admittedly an authorisation to prosecute relates only to the question of issuing an indictment and not to the decision to commence an investigation or decisions during an investigation. However, this question is of outmost importance whether an investigation should be commenced or not since there must the conditions to prosecute must be present. My understanding is that it is unlikely that an authorisation to prosecute will be granted.[75]

The prosecutor's assessment in relation to the Russian lieutenant-general may be questioned since the latter did not belong to the narrow category of persons who enjoy personal immunity. Bring explained in relation to this incident that the lieutenant-general did not have immunity and criticised the prosecutor's decision because it meant Sweden did not meet its obligations under

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73 The Swedish Supreme Court, NJA 1946 s. 65.

74 Bring, Klamberg, Mahmoudi and Wrange, 2020, p. 119.

75 International prosecution office in Uppsala, decision, 26 January 2006, reference number (dnr) C1-19-06. See also office of the Prosecutor General, legal section, international legal cooperation, letter, 25 January 2006, reference number (dnr) 2006/0395.

international law to prosecute war crimes.[76] The lieutenant-general's presence in Sweden could have been characterised as a "special mission"; however Sweden is not a party to the relevant treaty. The reasons given by the prosecutor are interesting since they – arguably in a correct manner – show that not only the Government has to consider immunities; the prosecutor must also do so at an even earlier stage.

Questions relating to immunity have not arisen in later cases adjudicated before Swedish courts.

2.4 Analysis

Questions relating to immunity may have arisen in other incidents in Sweden but information about these events has not become public. Thus one might envisage a situation where a leader of a foreign State – for example a former politician – has contemplated travelling to Sweden, but abstained for fear that rules relating to immunity would not protect him or her. Thus, there may be practice where concerned parties and decision makers may have acted in consideration of the relevant law without this being observable by an external observer.

3 Authorisation to Prosecute

As explained in the previous sections, the rules on Swedish jurisdiction in the Swedish Criminal Code, Chapter 2 grant wide opportunities for prosecution in Sweden. The general rule in the Code's Chapter 2 Section 5 provides that prosecution based on extraterritorial jurisdiction may only be initiated with authorisation by the Government or a State agency designated by the Government. This requirement for an authorisation to prosecute (*åtalsförordnande*) indicates that the intent was never that prosecutions should be pressed home to the extent that the jurisdictional rules suggest. However, no statutory rule clarifies what should be considered when deciding whether to authorise a prosecution.[77] The *travaux préparatoires* state that

> the question whether a prosecution should be authorised is determined by balancing the circumstances in the specific case, *inter alia*, the gravity of the alleged criminal act and the Swedish interest to prosecute the act. Moreover, the Government may in its determination of the matter consider matters relating to international law and foreign policy.[78]

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[76] Sveriges Radio, Ingen rättslig prövning av rysk militär, 26 January 2006; SvD, Rysk general slipper svenskt åtal, 26 January 2006; Pax, Samövning med misstänkta krigsförbrytare kritiseras, 2007, nr 5-6.

[77] SOU 2002:98, p. 189; Prop. 2013/14:146, pp. 55-56.

[78] Proposition 2013/14:146, p. 56. Cf Justitiedepartementet, Ds 2014:13, p. 27, which provides that "the determination shall be based on balance of interests where different circumstances relating to the case at hand shall be considered, for example the gravity of the crime, the link to Sweden and, when crime are committed outside of Sweden, the interest of the State - where the crime was committed - to prosecute the case."

This may also involve questions relating to immunity.[79] The issuance of an authorisation to prosecute is a precondition for the proceedings but is not part of the trial.[80]

Through regulation (1993:1467) the Government delegated to the Prosecutor-General (head of the Swedish Prosecution Authority) the power to authorise prosecution in certain cases. These include crimes committed outside Sweden by a Swedish citizen. The delegation of power also includes prosecution for crimes committed by a Swedish citizen or a foreign citizen with residence in Sweden if responsibility for that act has been adjudicated (with a judgment) in a foreign State. Section 3 of the 1993 regulation provides that the Prosecutor-General may transfer a case to the Government if there are reasons for doing so.[81]

The exercise of extraterritorial jurisdiction may relate to political aspects; hence it may be reasonable that the authorisation to prosecute is determined by the Government. However, this triggers questions relating to arbitrariness: it may raise doubt about the independence and impartiality of the legal proceedings.[82] In a 2014 memo from the Ministry Publications Series (*departementsskrivelse*) the inquiry suggests that the responsibility to determine authorisations to prosecute (i.e. the review authority) is moved from the Government in the cases where the Government has the power to delegate such authority. In these cases the Prosecutor-General should – as the most senior prosecutor - have the primary responsibility to decide on authorisation to prosecute with some power to delegate it further to other parts of the Swedish Prosecution Authority.[83] The inquiry also suggested specified grounds to be used when determining whether to authorise prosecution, namely: 1) if prosecution in Sweden would comply with Sweden's obligations under international law; 2) to what extent the alleged criminality of the suspect has a link to Sweden; 3) whether investigatory measures or prosecution has commenced or are about to commence in another State; and 4) the actual ability to investigate the crime in Sweden (i.e. by the Swedish police). If there are reasons that the determination has particular relevance for Sweden's foreign and security policy, the Prosecutor-General shall transfer the matter to the Government for determination. The question whether to change the rules on authorisation of prosecution were subject to consultations and subsequently made a part of the Inquiry on the Crime of Aggression.[84] The Inquiry on the Crime of Aggression suggests amendments on the rules of

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79 Swedish Criminal Code, Chapter 2 Section 7.

80 Ingeson, Miriam & Kather, Alexandra Lily, *The Road Less Traveled: How Corporate Directors Could be Held Individually Liable in Sweden for Corporate Atrocity Crimes Abroad*, EJIL Talk, https://www.ejiltalk.org/the-road-less-traveled-how-corporate-directors-could-be-held-individually-liable-in-sweden-for-corporate-atrocity-crimes-abroad/, published 13 November 2018. Accessed 1 May 2020.

81 Förordning (1993:1467) med bemyndigande för riksåklagaren att förordna om väckande av åtal i vissa fall (Regulation on delegation to Prosecutor General to authorize prosecution in certain cases).

82 Ingeson and Kather, 2018.

83 Ds 2014:13, p. 58.

84 Kommittédirektiv, *Aggressionsbrottet i Romstadgan för Internationella brottmålsdomstolen* (dir. 2017:105)

criminal jurisdiction, primarily how the Swedish Criminal Code, Chapter 2 is structured; however it does not suggest any fundamental changes regarding applicable jurisdictional principles.[85] The Inquiry suggests (similarly to the 2014 memo mentioned above) that in the majority of cases the Prosecutor-General should be responsible for determining authorisation to prosecute and sets up four assessment criteria for the determination. If there is reason to assume that the examination is of particular importance for Sweden's foreign or security policy, the case should always be transferred to the Government for decision.[86] The proposal should be seen as an attempt to reduce the Government's role and strengthen the independence of criminal proceedings.

3.1 Public International Law Considerations on the Requirement of an Authorisation to Prosecute

As indicated above, a system requiring an authorisation to prosecute which is controlled by the Government opens up for political considerations. What are the relevant public international law considerations? The obligation of States either to prosecute international crimes or to surrender them to a State capable of investigating and prosecuting such crimes (*aut dedere aut judicare*) would favour a system where prosecutors have an absolute duty to prosecute without the need for prior authorisation. The *aut dedere aut judicare* principle is applicable for grave breaches of international humanitarian law,[87] torture[88] and genocide.[89]

Obligations relating to immunity for a foreign head of State, head of Government, minister of foreign affairs and other State representatives suggest that prior Government authorisation to prosecute should be required. It is also possible that several States may claim jurisdiction over the same alleged criminal act. Relevant considerations in such situations may be the citizenship and residence of the suspect, the existence of other criminal proceedings, and the possibility to investigate, prosecute and enforce sentences. It is of mutual interest to avoid jurisdictional conflicts as far as possible, i.e. where several States assert jurisdiction in relation to the same act. In such cases where it may be necessary to consult with other States, the Government may possess resources to carry out such consultations which an individual prosecutor may not have at his/her

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85 SOU 2018:87, pp. 208-210. Summary in English, p. 36.

86 SOU 2018:87, p. 46 with proposal to amend the criminal Code, Chapter 2 Section 8. See also comment on pp. 241-245.

87 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, Article 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, Article 50; Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, Article 129; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, Article 146.

88 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted 10 December 1984, 1465 UNTS 85, Article 7.

89 Convention on the Prevention and Punishment of the Crime of Genocide, Article VI.

immediate disposal.[90] On the other hand, a system where prosecutors' decisions and measures need approval by a judge may have sufficient institutional strength to balance different interests and increase respect for rules relating to immunities.

For comparison it may be noted that Denmark lacks a system which requires prior governmental authorisation to prosecute. Whether to prosecute a crime committed outside of Denmark is normally determined within the regular public prosecution service by the prosecutor in charge of the case. The Ministry of Justice may decide in cases where matters relating to security or foreign policy arise. In Finland there are rules on authorisation to prosecute in Chapter 1, Sections 12 and 13 of the Finnish Criminal Law. The default rule is that the Prosecutor General decides on whether to prosecute when an authorisation to prosecute is needed. Pursuant to Icelandic Criminal Law prior governmental authorisation is required to prosecute in certain specified cases. This is granted by the Minister of Justice. Pursuant to Section 13 of the Norwegian Criminal Law there was until 2014 a requirement that prosecution could only be initiated with the permission of the King (i.e. the Government). This was applicable for certain specified crimes, for example murder, assault and rape, committed by foreign citizens outside Norwegian territory. This was amended in 2015 in relation to cases previously decided by the Government, now prosecution is decided upon by the Director of Public Prosecutions (*Riksadvokaten*).[91]

3.2 Swedish Case Law Relating to Authorisation to Prosecute

3.2.1 Review authority and the substance of the review

The Prosecutor General authorised prosecution in early cases such as *Arklöv* and *Makitan*.[92] The Prosecutor General also authorised the prosecution in *Mbanenande,* which was accepted by the district court. The Svea Court of Appeal queried whether authorisation should have been issued by the Government for crimes committed outside Sweden (Swedish Criminal Code, Chapter 2 Section 5) and in cases where a final judgment by a court in another country relates to the same act committed by the defendant (Swedish Criminal Code, Chapter 2 Section 5 a).[93] The Prosecutor General stated in a motion that regulation (1993:1467) may be subject to several interpretations of who is to authorise prosecution when the defendant has acquired Swedish citizenship after the crime/act. As a consequence of the Appeal Court's query, the Prosecutor General referred the matter to the Government.[94] The Government later issued an authorisation to prosecute, stating, *inter alia*, that since the defendant was

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90 Ds 2014:13, pp. 48-49, 66.

91 ibid, pp. 51-55, 60.

92 *Åklagaren ./. Jackie Arklöv*, Prosecutor-General, reference number ÅM 2006/3012, Authorisation to prosecute, 7 July 2006.

93 *Åklagaren ./. Mbanenande*, Svea Court of Appeal, Mål B 6659-13, letter 10 January 2014, file no. 199.

94 *Åklagaren ./. Mbanenande*, Prosecutor-General, reference number ÅM 2014/0303, letter 15 January 2014.

previously convicted in another country Government authorisation was necessary pursuant to the Swedish Criminal Code, Chapter 2 Section 5 a, para. 3.[95] In subsequent cases – *Droubi*, *Abdulkareem*, *Abdullah* and *Tabaro* – it has been the Government that has authorised the prosecutions, even when there has been no prior judgment in another country.[96] Common to these cases was that the defendant had acquired citizenship of or residence in Sweden after the alleged criminal act had been committed. The Prosecutor-General authorised prosecution in *Al-Mandlawi and Sultan*;[97] however the two defendants were residents in Sweden prior to going to Syria where the crimes were committed.

The account relates to cases where indictments have been served and trials have been completed. At present no indictment has been served in the *Lundin* case, yet the matter raises interesting questions relating to authorisation of prosecution. Lundin Petroleum is a Swedish oil and gas exploration and production company allegedly complicit in the commission of war crimes and crimes against humanity whilst operating in South Sudan (then Sudan). The Prosecutor-General noted that chairman of the board I.L. was a Swedish citizen while the CEO A.S. was not, hence the case in its entirety was transferred to the Government for determination.[98] The legal counsel for the suspect A.S. requested that the Government should dismiss the application for authorisation by the prosecutor on the grounds that were not in conformity with customary international law. A.S. argued that the prosecutor was not meeting this requirement because the prosecutor was relying upon for the prosecution more favourable Swedish rules on aiding and abetting. This would violate the principle of *in dubio pro reo*. Moreover A.S. argued that since his prosecution could be based only on universal jurisdiction, the stricter standards in customary international law should be deemed applicable.[99] I.L.'s counsel presented partly different grounds for dismissing the prosecutor's application, among others that I.L. criticized the sources underlying the prosecutor's investigation; that investigation and prosecution would circumvent international rules using an extensive interpretation and application of Swedish law on participation; no argument had been made (by the prosecutor) that I.L. had personally done wrong; the company had conducted legitimate business operations; representatives of the Sudanese Government were accused of committing

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95 *Åklagaren ./. Mbanenande*, Ministry of Justice, reference number JuBC2014/211/BIRS, Government decision 30 January 2014; *Mbanenande*, Svea Court of Appeal, 19 June 2014, p. 4.

96 *Åklagaren ./. Droubi*, Ministry of Justice, reference number JuBC2015/63/BIRS, Government authorisation to prosecute, 29 January 2015; *Åklagaren ./. Abdulkareem*, Ministry of Justice, reference number JuBC2016/00694/BIRS, Government authorisation to prosecute, 1 September 2016; *Åklagaren ./. Abdullah*, Ministry of Justice, reference number JuBC2017/00600/BIRS, Government authorisation to prosecute, 31 August 2017; *Åklagaren ./. Tabaro*, Ministry of Justice, reference number JuBC2017/00565/BIRS, Government authorisation to prosecute, 10 August 2017.

97 *Åklagaren ./. Al-Mandlawi and Sultan*, Prosecutor-General, reference number ÅM 2015/6697, Authorisation to prosecute, 30 September 2015.

98 *Åklagaren ./. I.L. and A.S.*, Ministry of Justice, reference number JuBC2018/00462/BIRS, Government decision 18 October 2018.

99 *Åklagaren ./. I.L. and A.S.*, motion from A.S. to the Ministry of Justice, reference number JuBC2018/00136/BIRS, 9 February. 2017.

serious crimes with no possibility of defending themselves, and this could harm Sweden's relations with Sudan; lastly the prosecutor was unable to investigate what had actually happened in Sudan.[100] The Government authorised prosecution without explaining how it assessed A.S. and I.L's arguments.[101] The case and the decision so far may be understood as an attempt by the suspects to induce the Government to partly examine and decide on substantial matters, which the Government has abstained from doing. I.L. is also trying vainly to have the Government take account of foreign-policy considerations when adducing the possible harm to Sweden's relations to Sudan. The Swedish Government remains unpersuaded.

3.2.2 Question on legal standing (*locus standi*)

In the context of the Government's determination in the *Lundin* case, I.L. and A.S. applied to be parties to the matter when subject to the Government's review and determination. Their purpose was to acquire the rights that follow from such standing, *locus standi*, for example access to documents and the right to submit views on the matter, The Government denied I.L. and A.S. this standing. The decision was contested and in the request to the Supreme Administrative Court for judicial review (*Högsta förvaltningsdomstolen - HFD*), they argued, *inter alia*, that they should have legal standing in the review and determination on authorisation to prosecute. The HFD noted that the rules on authorisation to prosecute do not provide for a right to be a party to the matter and receive the related rights to such a status. Nevertheless, the HFD still considered whether the Government's review involved a determination of the appellant's civil rights or obligations in the sense intended in Article 6.1 of the European Convention on Human Rights. Were the question to be answered in the affirmative the HFD explained that the subsequent question would be whether the Government had violated any legal rule, for example a procedural requirement.[102] The HFD explained that "if a right or obligation is explicitly excluded from domestic law, an individual cannot successfully claim that such a right exists". In previous decisions it has stated that "a rule that gives the Government a discretionary power to rule on a certain matter means that it cannot be considered as a right".[103] The HFD ruled that the provision in question did not entail a right or obligation on the person who was subject to deliberations on authorisation to prosecute. Hence, the HFD denied the appellants' status as parties to the proceedings and dismissed the application for judicial review.[104]

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[100] *Åklagaren ./. I.L. and A.S.*, motion from I.L. to Ministry of Justice, reference number JuBC2018/00654-3/BIRS, 24 September 2018.

[101] *Åklagaren ./. I.L. and A.S.*, Government decision 18 October 2018.

[102] *I.L. and A.S.*, Supreme Administrative Court, Case 6179-18, decision, 25 February 2019, paras. 25 and 34.

[103] ibid, para. 29.

[104] ibid, paras. 35 and 36.

3.3 Analysis

A main reason for having a requirement on authorisation to prosecute is to ensure that the exercise of criminal jurisdiction complies with public international law and Sweden's international obligations.[105] International law contains no imposition, prohibition or other guidance on requirement for prior authorisation to prosecute or guidance on what State organ should determine such matters. As indicated above, the Prosecutors General in Finland and Norway are responsible for authorising prosecution. In Denmark it is the prosecutor in charge of the case who makes the determination, with a possibility for the Ministry of Justice to determine in certain cases.[106] There are also proposals in Sweden to adopt a similar approach, as manifested in Government memo Ds 2014:13 and SOU 2018:87.

The HFD decision in *Lundin* where the petitioners were denied legal standing illustrates the function of the system of prior authorisation to prosecute. One way of understanding the mentioned decision – and the authorisation system – is its discretionary nature, where the Government or the Prosecutor General assigns suspects of crimes committed outside Sweden the same standing as if the crime was committed on Swedish territory. An individual's civil rights or obligations, including criminal responsibility, must be reviewed and determined in the same manner, i.e. in a trial before a court of first instance (in criminal cases a district court) regardless of whether the crime has been committed on or outside of Swedish territory.

[105] Ds 2014:13, pp. 64-65.

[106] ibid, p. 60.

Literature

Asp, Petter, *Från tanke till gärning. Del II. Förberedelse och stämpling till brott*, Uppsala: Iustus, 2007

Asp, Petter, *Internationell straffrätt*, Second edition, Iustus: Uppsala, 2014

Asp, Petter, "Materiellt och processuellt – och frågan om 'kriminalisering av sexköp utomlands" in Samuelsson Kääntä, Jenny, Almkvist, Gustaf, Svensson, Erik & Skarhed, Anna (eds.), *Vänbok till Lena Holmqvist*, Uppsala: Iustus, 2019, 85-105

Asp, Petter & Samuelsson, Jörgen, "De svenska jurisdiktionsreglerna" in Asp, Petter & Jareborg, Nils, (eds.), *Svensk internationell straffprocess*, Uppsala: Iustus, 1995, 21–112

Asp, Petter et al., *Brottsbalken. En kommentar. Kapitel 1–12*, Stockholm: Karnov Group, 2018

Asp, Petter, Ulväng, Magnus & Jareborg, Nils, *Kriminalrättens grunder*, Second edition, Uppsala: Iustus, 2013.

Bassiouni, Cherif M, *Universal Jurisdiction for International Crimes: Historical Practice and Contemporary Practice*, Virginia Journal of International Law 2001–2002, vol. 42, no. 1, 81–162

Bring, Ove, Klamberg, Mark, Mahmoudi, Said & Wrange, Pål, *Sverige och folkrätten*, Stockholm: Norstedts Juridik AB, Sixth edition, 2020

Butler, Hays A, *The Doctrine of Universal Jurisdiction: A Review of the Literature*, Criminal Law Forum 2000, vol. 11, no. 3, 353–373

Bäcklund, Agneta, et al., *Brottsbalken (Zeteo)*

Cameron Iain, "Jurisdiction" in Cameron, Iain, Thunberg Schunke, Malin, Påle-Bartes, Karin, Wong, Christoffer & Asp, Petter, *International Criminal Law from a Swedish Perspective*, Cambridge-Antwerp-Portland: Intersentia, 2011, 53-100

Cameron, Iain, Thunberg Schunke, Malin, Påle-Bartes, Karin, Wong, Christoffer & Asp, Petter, *International Criminal Law from a Swedish Perspective*, Cambridge-Antwerp-Portland: Intersentia, 2011

Cornils, Karin, "Sweden" in Elholm, Thomas & Feldtmann, Birgit, (eds.), *Criminal Jurisdiction. A Nordic Perspective*, Copenhagen: Djøf Publishing, 2014, 125–148

Crawford, James, *Brownlie's Principles of Public International Law*, Ninth edition, Oxford: Oxford University Press, 2019

Cryer, Robert, Robinson, Darryl & Vasiliev, Sergey, *An Introduction to International Criminal Law and Procedure*, Fourth edition, Cambridge: Cambridge University Press, 2019

Cryer, Robert, Friman, Håkan, Robinson, Darryl & Wilmshurst, Elizabeth, *An Introduction to International Criminal Law and Procedure*, Cambridge: Cambridge University Press, Third edition, 2014

Currie, Robert & Rikhof, Joseph, *International and Transnational Criminal Law*, Second edition, Toronto: Irwin Law, 2013

Falk, Per, *Straffrätt och territorium*, Stockholm: Norstedts, 1976

Friman, Håkan, "Political and Legal Considerations in Sweden Relating to the Rome Statute for the International Criminal Court" in Lee, Roy S, (ed.), *States' Responses to*

issues arising from the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law, Ardsley: Transnational Publishers, 2005, 121-145

Helenius, Dan, *Straffrättslig jurisdiktion*, Helsinki: Soumalainen Lakimiesyhdistys, 2014

Ingeson, Miriam & Kather, Alexandra Lily, *The Road Less Traveled: How Corporate Directors Could be Held Individually Liable in Sweden for Corporate Atrocity Crimes Abroad*, EJIL Talk, https://www.ejiltalk.org/the-road-less-traveled-how-corporate-directors-could-be-held-individually-liable-in-sweden-for-corporate-atrocity-crimes-abroad/, published 13 November 2018. Accessed 1 May 2020

Kmak, Magdalena, *The Scope and Application of the Principle of Universal Jurisdiction*, Helsinki: Erik Castrén Institute of International law and Human Rights, 2011.

Mahmoudi, Said, "Immunitet i svenska domstolar" in Stern, Rebecca & Österdahl, Inger (eds.), *Folkrätten i Svensk rätt*, Malmö: Liber, 2012, 165-187

Orakhelashvili, Alexander, *Akehurst's Modern Introduction to International Law*, Eighth edition, Milton Park: Routledge, 2019

Reydams, Luc, *Universal Jurisdiction – International and Municipal Legal Perspectives*, Oxford: Oxford University Press, 2004

Satzger, Helmut, *International and European Criminal Law*, Munich: Beck, 2012

Shaw, Malcolm Nathan, *International Law*, Eighth edition, Cambridge: Cambridge University Press, 2017

Strahl, Ivar, *Allmän straffrätt i vad angår brotten*, Stockholm: Norstedt, 1976

Träskman, Per Ole, *Straffrättsliga åtgärder med främmande inslag I. En granskning av den finska straffrättens tillämpningsområde*, Helsinki: Juridiska föreningen i Finland, 1977

Wong, Christoffer, *Criminal Act, Criminal Jurisdiction and Criminal Justice*, Cracow: Polpress, 2004

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