

# Universal Jurisdiction

## Law and Practice in Sweden

April 2020

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## Introduction

This briefing paper was written by the Open Society Justice Initiative in partnership with TRIAL International and White & Case. It provides an overview of the Swedish national legal framework on universal jurisdiction, including statutory and case law, and its application in practice.

The briefing paper intends to contribute to a better understanding of domestic justice systems among legal practitioners who operate in the field of universal jurisdiction, to support the development of litigation strategies. It forms part of a series of briefing papers on selected countries.

The content is based on desk research with the support of pro bono lawyers from the relevant jurisdictions. In addition, interviews with national practitioners were conducted by the authors on the practical application of the law. Respondents are not named in order to protect their identity and affiliation with certain institutions or organizations.

Universal jurisdiction in this briefing paper is understood to encompass investigations and prosecutions of crimes committed on foreign territory by persons who are not nationals of the jurisdiction in question. This briefing paper focuses on the international crimes of genocide, war crimes, crimes against humanity, torture and enforced disappearance.

The authors would like to thank Fiona McKay, Christoffer Nilmén, Valérie Paulet, Björn Torsteinsrud, and Gustaf Wiklund, as well as all experts and practitioners who agreed to be interviewed for their invaluable contribution to this briefing paper.

## Crimes that invoke universal jurisdiction

In 2002, the Rome Statute of the International Criminal Court (Rome Statute) was ratified by Sweden. While some of the crimes included in the Rome Statute were previously covered by the Swedish Criminal Code (SCC)<sup>1</sup> and the Swedish Act on Criminal Responsibility for Genocide,<sup>2</sup> a new law codifying the Rome Statute was incorporated into Swedish law through the Swedish Act on Criminal Responsibility for Genocide, Crimes Against Humanity and War Crimes<sup>3</sup> (Universal Crimes Act or UCA).<sup>4</sup>

The UCA covers genocide,<sup>5</sup> crimes against humanity<sup>6</sup> and war crimes<sup>7</sup>, as well as attempts, preparations and conspiracy to commit such crimes. In addition, the UCA criminalizes superiors' failure to exercise supervision<sup>8</sup> and the failure to report crimes committed by subordinates<sup>9</sup> as separate crimes.

Under the UCA, torture and enforced disappearance as such are only underlying crimes of crimes against humanity and war crimes. Swedish criminal law does not contain any provisions explicitly criminalizing torture or enforced disappearance as stand-alone crimes. Such criminal actions can, however, be prosecuted as other crimes under general criminal law.<sup>10</sup>

For crimes listed in the UCA the SCC allows for universal jurisdiction, i.e. Swedish authorities have jurisdiction even if the crime was committed outside of Sweden by a foreign national (see below under [Universal Jurisdiction Requirements](#)).<sup>11</sup>

Sweden also has universal jurisdiction over any crime with a minimum sentence of four years under a separate provision in the SCC.<sup>12</sup> So, for example, torture could be characterized as the crime of serious assault and enforced disappearance could amount to the crime of kidnapping, which both have minimum sentences of more than four years, and thus could be prosecuted on the basis of universal jurisdiction.<sup>13</sup> However, at the

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<sup>1</sup> The Swedish Criminal Code, SFS 1962:700, 1 January 1965, official English translation as of December 2019 (hereinafter referred to as **SCC**).

<sup>2</sup> *Lag (1964:169) om straff för folkmord* (Unofficial translation: Law (1964:169) on Penalty for Genocide), 20 March 1964.

<sup>3</sup> Act on Criminal Responsibility for Genocide, Crimes Against Humanity and War Crimes, SFW 2014:406, 11 June 2014, official English translation (hereinafter referred to as **UCA**).

<sup>4</sup> *Regeringens proposition 2013/14:146 Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser* (unofficial translation: Government Bill 2013/14:146, Criminal Liability for Genocide, Crimes Against Humanity and War Crimes), 20 February 2014, Sw. Prop. 2013/14:146 (hereinafter referred to as **Prop. 2013/14:146**), p. 1. In Sweden, when laws are adopted, the government has to provide a bill explaining the reason for the law and its provisions. These preparatory documents are a source of law. Swedish courts can use the preparatory documents to interpret the law.

<sup>5</sup> Section 1 UCA.

<sup>6</sup> Section 2 UCA.

<sup>7</sup> Sections 3 to 11 UCA.

<sup>8</sup> Section 14 UCA.

<sup>9</sup> Section 15 UCA.

<sup>10</sup> See Chapter 3 Sections 1, 5, 6 and 7 SCC: Torture can be prosecuted under Chapter 3 Section 6(2) SCC, as a very serious assault. Enforced disappearance can be prosecuted under Chapter 4 Section 1 as a kidnapping, and under Chapter 4 Section 2, as an unlawful deprivation of liberty.

<sup>11</sup> Chapter 2 Section 3(6) SCC.

<sup>12</sup> Chapter 2 Section 3(7) SCC.

<sup>13</sup> Chapter 2 Section 3(7), Chapter 3 Section 6(2) and Chapter 4(1) of the SCC; Interview with a Swedish academic on 18 September 2019; Interview with a prosecutor from the war crimes unit on 25 October 2019.

time of writing this report a proposal to revoke this universal jurisdiction provision for ordinary crimes is pending decision.<sup>14</sup>

## 1. Genocide

Prior to the adoption of the UCA in 2014, the crime of genocide was set out in the Swedish Act on Criminal Responsibility for Genocide of 1964.<sup>15</sup> Through the adoption of the UCA, the definition of genocide has been amended and is now substantially the same as under Article 6 of the Rome Statute.<sup>16</sup>

However, the Swedish wording differs to the extent that it intentionally uses the grammatical singular with regards to the victims (“a member of the group”) against whom the criminal act is directed, whereas Article 6 of the Rome Statute more generally refers to “members of the group”.<sup>17</sup> It is clear that this is intentional: according to the preparatory documents of the UCA, the Swedish provision is explicitly applicable where criminal actions covered by the provision are directed exclusively against any single member of a relevant group.<sup>18</sup>

## 2. Crimes against humanity

The Swedish definition of crimes against humanity is similar but not identical to the definition contained in the Rome Statute.<sup>19</sup> The contextual elements required in Section 2 of the UCA are the same as the Rome Statute: the relevant act must constitute part of a widespread or systematic attack against the civilian population.

There are, however, differences in the definitions of the following underlying crimes:

- **Torture and inhumane treatment:** According to the UCA, torture is committed when someone “causes a person belonging to the population serious pain or harm or subjects that person to severe suffering through torture or other inhumane treatment.”<sup>20</sup> The preparatory documents<sup>21</sup> define “other inhumane treatment” by reference to the Geneva Conventions and the jurisprudence of the International Court for the Former Yugoslavia (ICTY).<sup>22</sup> It includes grave violations of human dignity or exposing a person to grave suffering.<sup>23</sup> The provision follows the Rome Statute definition of torture as set out in Article 7(2)(e), but with additional elements.<sup>24</sup> The Preparatory documents state that torture also includes acts under Article 7(1)(g) of the Rome Statute (enforced sterilization) and under Article 7(1)(k) of the Rome Statute (other inhumane acts

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<sup>14</sup> Interview with a Swedish academic on 18 September 2019.

<sup>15</sup> *Lag (1964:169) om straff för folkmord* (unofficial translation: Law (1964:169) on Penalty for Genocide), 20 March 1964.

<sup>16</sup> Section 1 UCA.

<sup>17</sup> Section 1 UCA and Article 6 Rome Statute.

<sup>18</sup> Prop. 2013/14:146, p. 84.

<sup>19</sup> Section 2 UCA; see also Prop. 20213/14:146, p. 94.

<sup>20</sup> Section 2(2) UCA.

<sup>21</sup> Prop. 2013/14:146, p.102.

<sup>22</sup> Ibid: reference is made to ICTY Trial Judgement, *The Prosecutor v. Goran Jelusic*, 1999, IT-95-10-T, para.52.

<sup>23</sup> Prop. 2013/14:146, p.102.

<sup>24</sup> Interview with a Swedish academic on 18 September 2019.

of a similar character intentionally causing great suffering, or serious injury to body or to mental of physical health), even though these are not explicitly listed in the UCA.<sup>25</sup> The preparatory documents of the UCA state that enforced sterilization, regardless of whether or not it includes sexual abuse, must be deemed to cause serious harm and suffering, and thus warrant being covered under the provision on torture and other inhumane treatment.<sup>26</sup>

- **Crimes of sexual violence:** Although it is based on Article 7(1)(g) of the Rome Statute, the provision on crimes of sexual violence in Section 2(3) of the UCA differs slightly from the wording set out in the Rome Statute. Under the UCA, the crime is committed when someone “subjects a person belonging to the population to grave sexual abuse through rape, enforced prostitution or any other comparably serious act”,<sup>27</sup> whereas the Rome Statute also lists sexual slavery, forced pregnancy, enforced sterilization and any other form of sexual violence of comparable gravity. The UCA groups sexual slavery with the crime of forced labour rather than with crimes of sexual violence.<sup>28</sup> As mentioned above, enforced sterilization is covered by the provision on torture and other inhumane treatment. The reasons for not including forced pregnancy under this crime, as explained in the preparatory documents of the UCA, are partly the same as described above in relation to enforced sterilization, i.e. such an act does not necessarily have to include any sexual abuse, but should nevertheless be considered a criminal act. An additional reason given is that enforced pregnancies are typically carried out primarily in order to interfere with the ethnic composition of the population, rather than to sexually abuse a person. Therefore, the crime of enforced pregnancy has been separated from the provision on crimes of sexual violence and instead given its own provision in Section 2(4) of the UCA, which has the same definition as the Rome Statute crime (Article 7(1)(g)).<sup>29</sup>
- **Persecution:** The crime against humanity of persecution under the UCA is broader than the same crime under the Rome Statute as it does not require that persecution is connected to another crime against humanity, genocide or a war crime.<sup>30</sup>
- **Apartheid:** This crime listed under Article 7(1)(j) of the Rome Statute is not included in the UCA because the legislators considered that it was already covered by the crime of persecution.<sup>31</sup> The preparatory documents did acknowledge that apartheid requires more constitutive elements, and is more difficult to prosecute, than persecution.<sup>32</sup> On the other hand, recognizing that

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<sup>25</sup> Prop 2013/14:146, p 103.

<sup>26</sup> Prop 2013/14:146, p 103.

<sup>27</sup> Section 2(3) UCA.

<sup>28</sup> Section 2(5) UCA.

<sup>29</sup> Prop 2013/14:146, p. 107-108; see also Prop 2013/14:146, p. 247-248.

<sup>30</sup> Section 2(8) UCA and Article 7(1)(h) Rome Statute which requires the connection to crimes against humanity or any other crimes within the jurisdiction of the International Criminal Court.

<sup>31</sup> Interview with a Swedish academic on 18 September 2019.

<sup>32</sup> Section 2(8) UCA; Prop 2013/14:146, p115-117 and p. 252-254.

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the crime of apartheid has a symbolic value, it was considered that elements related to apartheid can be used as aggravated circumstances for sentencing. The accused can be convicted for persecution, and if elements of apartheid can be proven, they will be used as aggravated circumstances for sentencing.<sup>33</sup>

- **Enslavement:** The Swedish legislators used the wording “forced labour or other such state of coercion” in Section 2(5) of the UCA to cover the Rome Statute crime of enslavement rather than listing it explicitly.<sup>34</sup> The Rome Statute definition of enslavement encompasses trafficking in persons (Article 7(2)(c)). According to the preparatory documents, the inclusion of human trafficking was considered too wide as human trafficking is regulated as a separate crime under the SCC and, therefore, the language in Section 2(5) of the UCA differs from the Rome Statute.<sup>35</sup>

Due to the recent adoption of the law on crimes against humanity, at the time of writing this report, there is no jurisprudence yet on its application.<sup>36</sup>

### 3. War Crimes

In Sections 3 to 11, the UCA sets out a list of crimes similar but not identical to the Rome Statute war crimes that is intended to be exhaustive: it is not possible to prosecute someone for a war crime that is not on the list. However, customary international law can be invoked before Swedish Courts, which might open the way for other war crimes to be prosecuted.<sup>37</sup>

In the UCA, war crimes are sub-divided into ten separate Sections, without substantially deviating from the definitions in the Rome Statute. However, one important difference is that the structural differentiation between war crimes committed in international armed conflicts and those committed in non-international armed conflicts is, with two exceptions, abolished. Crimes listed in Section 5<sup>38</sup> and 7<sup>39</sup> are the only ones that require an international armed conflict.

The UCA divides war crimes into six categories:

- war crimes against persons;<sup>40</sup>
- war crimes against property;<sup>41</sup>
- war crimes through the abolition of the right of access to a court;<sup>42</sup>
- war crimes concerning specially protected missions or emblems;<sup>43</sup>

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<sup>33</sup> Interview with a Swedish academic on 18 September 2019.

<sup>34</sup> Prop. 2013/14:146, p. 109-112.

<sup>35</sup> Prop. 2013/14:146, p. 111-112.

<sup>36</sup> Interview with a Swedish academic on 18 September 2019.

<sup>37</sup> Stockholm District Court, Arklov case, B 4084-04, 18 December 2006.

<sup>38</sup> Section 5 UCA contains the war crimes of transfer of civilian population to occupied territories (1); forced participation in the armed conflict (2); illegal deprivation of liberty (3).

<sup>39</sup> Section 7 UCA contains the war crime of abolishing the rights of a national of the adversary State to have access to a court hearing regarding civil or other civic rights.

<sup>40</sup> Sections 4 and 5 UCA.

<sup>41</sup> Section 6 UCA.

<sup>42</sup> Section 7 UCA.

<sup>43</sup> Section 8 UCA.



- war crimes through the use of prohibited methods of warfare;<sup>44</sup>
- war crimes through the use of prohibited weapons.<sup>45</sup>

The crimes listed in these categories are defined in identical terms to the Rome Statute, except for **physical mutilations** which, in contrast to the Rome Statute,<sup>46</sup> are not specifically listed as a war crime under the UCA.<sup>47</sup>

Another difference is that Section 11 of the UCA provides that a war crime can be considered a “gross” war crime if it was committed as part of a plan or policy or as part of extensive crimes or if the act has caused death, severe pain or injury or severe suffering, extensive damage to property or particularly serious damage to the natural environment.<sup>48</sup> If an accused is convicted of such a “gross” war crime, they can be sentenced to at least four years of imprisonment, whereas war crimes that are not considered “gross” do not attract such a minimum sentence. The Rome Statute does not foresee this form of aggravated war crime.

## 4. Responsibility of commanders / superiors

According to the UCA, a violation of the duty of supervision (Section 14 of the UCA) or an omission to report crimes of subordinates (Section 15 of the UCA) are separate crimes.<sup>49</sup> Section 13 of the UCA on the other hand establishes a separate mode of liability for military or civilian superiors (see below under [Command Responsibility](#)). In contrast to Article 28 of the Rome Statute, where command / superior responsibility is only a mode of liability, the UCA thus contains additional crimes against the commanders/superiors.

Section 14 of the UCA provides that “a military or civilian superior who deliberately or by gross negligence fails to exercise particular supervision of a subordinate answerable to him or her and under his or her effective control shall be sentenced to imprisonment for at most four years for failure to exercise control, if the subordinate has committed genocide, a crime against humanity or a war crime that the superior should have foreseen and could have prevented”.<sup>50</sup>

Section 15 provides that “a military or civilian superior who, when it is possible without risk of the superior revealing crimes of his or her own, fails to report, for investigation and prosecution, a reasonable suspicion that a subordinate answerable to him or her and under his or her effective control has committed genocide, a crime against humanity or a war crime shall be sentenced to imprisonment for at most four years for failure to report a crime”.<sup>51</sup>

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<sup>44</sup> Section 9 UCA.

<sup>45</sup> Section 10 UCA.

<sup>46</sup> Article 8(2)(x) Rome Statute.

<sup>47</sup> Section 4(3) UCA.

<sup>48</sup> Section 11 UCA.

<sup>49</sup> Interview with an academic on 18 October 2019.

<sup>50</sup> Section 14 UCA.

<sup>51</sup> Section 15 UCA.

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## Modes of liability

In Sweden, there is one main statutory regulation on the different modes of liability: Chapter 23 Section 4 of the SCC.<sup>52</sup> This provision of the SCC also applies to the crimes under the UCA.<sup>53</sup>

In addition, the UCA contains a separate mode of liability of command responsibility that only applies to crimes in the UCA.<sup>54</sup> Furthermore, Section 16 of the UCA criminalizes attempt, preparation and conspiracy to commit genocide, crimes against humanity and war crimes as well as omission to reveal or prevent such crimes.

### 1. Direct perpetration

There is no statutory definition of perpetration as such.<sup>55</sup> A direct perpetrator is a person who committed<sup>56</sup> or attempted<sup>57</sup> to commit the crime.

If the offence is committed jointly by more than one person, each of them is liable as a principal.<sup>58</sup> The requirements of co-perpetration under Swedish law closely resemble those under Article 25(3)(d) of the Rome Statute and encompass joint perpetration under Article 25(3)(a) of the Rome Statute. Under Swedish law, a contribution in the preparatory stages of the crime may also be sufficient.<sup>59</sup>

Swedish Courts frequently apply the principle of co-perpetration.<sup>60</sup> For instance, they applied co-perpetration in a case where nine persons shot and killed 7 captive soldiers. The accused himself shot one victim, but it was found that he, together with all the others, had committed the entire crime, as perpetrators.<sup>61</sup>

### 2. Aiding and abetting

Under Swedish law, any person who intentionally assists another in the commission of an unlawful act shall be convicted and sentenced as an aider.<sup>62</sup> The requirements of Swedish law are substantially the same as those set out for aiding and abetting in Article 25(3)(c) of the Rome Statute.

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<sup>52</sup> Interview with a prosecutor from the war crimes unit on 25 October 2019; interview with an academic on 30 October 2019.

<sup>52</sup> Interview with an academic on 30 October 2019.

<sup>53</sup> Chapter 23 Section 4 SCC.

<sup>54</sup> Section 13 UCA.

<sup>55</sup> Interview with an academic on 24 October 2019.

<sup>56</sup> Sections 1 to 12 and 14 to 15 UCA refer to the direct perpetrator; see also section 16 UCA.

<sup>57</sup> Chapter 23 Section 1 SCC.

<sup>58</sup> Chapter 23 Section 4 SCC.

<sup>59</sup> Chapter 23 Section 1 and 4 SCC.

<sup>60</sup> Interview with an academic on 30 October 2019.

<sup>61</sup> Stockholm District Court, Prosecutor v. Omar Haisam Sakhanh, B 3787-16, Judgement of 16 February 2017. The judgement was upheld by the Svea Court of Appeals in Prosecutor v. Omar Haisam Sakhanh, B 2259-17, Judgement of 31 May 2017.

<sup>62</sup> Chapter 23 Section 4 SCC.

Chapter 23 section 4 of the SCC provides that: “A person who is considered a perpetrator is, if they induced another person to commit the offence, guilty of instigating the offence and otherwise of aiding the offence.”

### **3. Indirect commission**

Any person who commits an offence through another person is also liable as a principal actor.<sup>63</sup> The requirements of indirect commission under Swedish law are similar to those set out in Article 25(3)(a) of the Rome Statute.

### **4. Ordering and inducing**

Under Swedish law, any person who intentionally orders or induces another person to intentionally commit an unlawful act can be sentenced as if this person were the principal actor.<sup>64</sup> The requirements for liability for ordering or inducing a crime under Swedish law are substantially the same as those applying to anyone who orders, solicits or induces the commission of such a crime as in Article 25(3)(b) of the Rome Statute.

### **5. Command responsibility**

Under Section 13 of the UCA, a military or civilian superior can be sentenced as a perpetrator.<sup>65</sup> This provision creates a separate mode of liability for UCA crimes: this is not a mode of liability otherwise recognized in Swedish law for other crimes.<sup>66</sup>

According to Section 13, if a military or civilian superior “fails to take measures that he or she could possibly have taken and that were necessary and reasonable to prevent a subordinate to the superior and under the superior’s effective control from committing genocide, a crime against humanity or a war crime, he or she shall be regarded as a perpetrator of the crime.” In other words, a situation where the superior is intentionally passive.<sup>67</sup> This article corresponds to Article 28 of the Rome Statute.<sup>68</sup>

### **6. Preparation and conspiracy**

The UCA also provides for criminal liability over preparation or conspiracy to commit, or failure to reveal, an act of genocide, a crime against humanity or a war crime.<sup>69</sup>

The preparation of a crime is defined by the SCC as occurring where a person who, with the intention of committing or promoting a crime, receives or pays money for a crime or handles in any way anything that is “particularly liable to be used as an instrumentality of an offence”.<sup>70</sup>

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<sup>63</sup> Chapter 23 Section 4 SCC.

<sup>64</sup> Chapter 23 Section 4 SCC.

<sup>65</sup> Section 13 UCA.

<sup>66</sup> Interview with a prosecutor from the war crimes unit on 25 October 2019; interview with an academic on 30 October 2019.

<sup>67</sup> Interview with an academic on 30 October 2019.

<sup>68</sup> Interview with an academic on 30 October 2019.

<sup>69</sup> Section 16 UCA.

<sup>70</sup> Chapter 23 Section 2 paragraph 1 SCC.

Conspiracy requires that someone “decides on the act in concert with another person or that a person tries to instigate another person to commit it, or undertake or offers to commit it”.<sup>71</sup>

## Temporal jurisdiction over crimes

### 1. Beginning of temporal application

Chapter 2 Article 10 of The Instrument of Government which forms part of the Constitution of Sweden stipulates that no one may be sentenced to a penalty or penal sanction for an act that was not subject to a penal sanction at the time it was committed.<sup>72</sup> Retroactive application of criminal law is therefore forbidden under Swedish law.

The UCA was introduced on July 1, 2014. For crimes committed before this date, the laws in force at the relevant time apply.<sup>73</sup>

#### 1.1. Genocide

The crime of genocide was codified on January 1, 1965 in the Swedish Act relating to the punishment of genocide.<sup>74</sup> However, the crime did not invoke universal jurisdiction until July 1, 1973 through an amendment of Chapter 2 Section 3 of the SCC. Universal jurisdiction is therefore applicable since 1973.<sup>75</sup>

The crime of genocide was transferred in 2014 to Section 1 of the UCA with substantially the same wording. Since then, Chapter 2 Section 3 of the SCC explicitly provides that crimes included in the UCA are subject to universal jurisdiction. The transfer to the SCC has had no other effect on the universal jurisdiction in relation to the crime. The UCA is not applicable to crimes committed before 2014 but relevant criminal acts may nonetheless be prosecuted under the former Swedish Act relating to the punishment of genocide. Acts of genocide committed after 1972 can therefore be prosecuted on the basis of universal jurisdiction.<sup>76</sup>

#### 1.2. War crimes

Crimes against international law were formerly codified on January 1, 1965 in Chapter 22 Section 6 of the SCC (now repealed). Universal jurisdiction was made applicable to those crimes pursuant to Chapter 2 Section 3(6) of the SCC.<sup>77</sup> In 2014, these crimes were transferred to the UCA, and in the process, were renamed and are now referred to as war crimes.

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<sup>71</sup> Chapter 23 Section 2 paragraph 2 SCC.

<sup>72</sup> *Sveriges Riksdag* (unofficial translation: Swedish Parliament), The Constitution of Sweden – The Fundamental Laws and the Riksdag Act, 2016, available at: <https://www.riksdagen.se/globalassets/07.-dokument--lagar/the-constitution-of-sweden-160628.pdf>.

<sup>73</sup> Interview with an academic on 18 October 2018.

<sup>74</sup> *Lag (1964:169) om straff för folkmord* (Unofficial translation: Law (1964:169) on Penalty for Genocide), 20 March 1964.

<sup>75</sup> Prop. 2013/14:146, p. 72 f., also see the Swedish government’s report on *Internationella brott och svensk jurisdiction* (unofficial translation: International crimes and Swedish jurisdiction), Sw. SOU 2002:98, 2002.

<sup>76</sup> Prop. 2013/14:146, p. 231 f.

<sup>77</sup> See preparatory documents in *Kungl.Maj:t Proposition 1962:10 med förslag til brottsbalki* (unofficial translation: The Royal Majesty’s Proposition 1962:10 with suggestions for the Criminal Code), Prop. 1962:10, p. 57 f.

Chapter 2 Section 3(6) of the SCC, as noted above, already explicitly provided that war crimes (then described as crimes against international law) are subject to universal jurisdiction. Thus, the transfer to the UCA has had no effect on the application of universal jurisdiction in relation to these crimes, but the definition of war crimes under the UCA is more detailed than the previous definitions of crimes against international law.

As mentioned above, the UCA does not apply to crimes committed before 2014, but such criminal acts may be prosecuted under the previous Chapter 22 Section 11 of the SCC. Therefore, war crimes committed after January 1, 1962 can be prosecuted on the basis of universal jurisdiction.<sup>78</sup>

### 1.3. Crimes against humanity

Crimes against humanity were criminalized on July 1, 2014 in the UCA. Those committed before this date cannot be prosecuted.<sup>79</sup>

## 2. Statute of limitations

Pursuant to Chapter 35 Section 2 of the SCC, the statute of limitations does not apply to genocide or to crimes against humanity.

The statute of limitations for regular (as opposed to “gross”) war crimes is 10 years.<sup>80</sup>

Before the July 1, 2010, “gross” war crimes were subject to a limitation period of 25 years.<sup>81</sup> Since then, by virtue of an amendment to the law on statutes of limitations, “gross” war crimes are no longer subject to limitations on the time within which they must be prosecuted.<sup>82</sup> However, this amendment of the law only applies to crimes in relation to which the limitation period had not yet expired when the new law came into force on July 1, 2010.<sup>83</sup> As an exception to this, if the perpetrator was under the age of 21, the statute of limitations of 25 years will apply.<sup>84</sup>

## Universal jurisdiction requirements

### 1. Presence / residence of suspects

The presence or residence of a suspect in Sweden is not necessary to establish the jurisdiction of the Swedish courts over international crimes, nor for the investigation of such crimes.<sup>85</sup>

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<sup>78</sup> Prop. 2013/14:146, p. 128 f.

<sup>79</sup> Interview with an academic on 18 September 2019.

<sup>80</sup> Chapter 35 Section 1(3) SCC; interview with an academic on 18 October 2019.

<sup>81</sup> Chapter 35 Section 1(5) SCC; interview with an academic on 18 October 2019.

<sup>82</sup> *Sw. Prop. 2009/10:50 om avskaffande av preskription för vissa allvarliga brott* (unofficial translation: The Swedish Government’s proposition on the elimination of the statute of limitations for certain serious crimes (hereinafter referred to as **Prop. 2009/10:50**)).

<sup>83</sup> Interview with an academic on 18 October 2019.

<sup>84</sup> Chapter 35 Section 1(5) SCC.

<sup>85</sup> Prop. 2013/14:146, p. 2, see Chapter 2 Section 3(6) SCC.

However in practice, an investigation will not be initiated if the absence of the suspect prevents the crime from being effectively investigated (see below under [Prosecutorial Discretion](#)). If there is no reasonable chance of apprehending the suspect in Sweden, prosecutors will not start a case.<sup>86</sup> The accused must be presented before the court during the trial.

Swedish authorities have opened a so-called “structured criminal investigation” in relation to Syria and Iraq in 2015.<sup>87</sup> This is the first time such an investigation is opened in Sweden. This investigation relates to the context and the on-going armed conflict in those countries, and not to any specific crime or suspect. The aims are to secure evidence, cooperate with other countries that are investigating similar crimes, and to lead to individual investigations.<sup>88</sup>

## 2. Prosecutorial discretion

Swedish law states that prosecutors have a duty to open an investigation “due to a report or for other reason there is cause to believe that an offence subject to public prosecution has been committed”.<sup>89</sup> The term “cause to believe” means that it must be possible to show some concrete circumstances, for instance a statement from a witness, and that vague rumors not are sufficient. It is, however, not a requirement that there is a suspected perpetrator at this stage of the process.<sup>90</sup> When a complaint has been filed, the prosecutor has a duty to investigate.<sup>91</sup>

Practically, however, the prosecutor has considerable discretion. A prosecutor may decide not to open an investigation, even if concrete circumstances can be shown, if he or she deems that it is “manifest that it is not possible to investigate the offence”.<sup>92</sup> This principle applies to all crimes.

In addition, a prosecutor may refrain from initiating an investigation or may discontinue an investigation (for any crimes) in the following circumstances:<sup>93</sup>

- “1. if continued inquiry would incur costs not in reasonable proportion to the importance of the matter and the offence, if prosecuted, would not lead to a penalty more severe than a fine or
2. if it can be assumed that prosecution will not be instituted pursuant to the provision on waiver of prosecution contained in Chapter 20, or on special examination of prosecution and if no substantial public or private interests would be ignored by the discontinuance of the preliminary investigation.”<sup>94</sup>

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<sup>86</sup> Interview with a prosecutor from the war crimes unit on 25 October 2019.

<sup>87</sup> Interview with an academic on 27 March 2020.

<sup>88</sup> Interview with an academic on 18 October 2019.

<sup>89</sup> Chapter 23 Section 1(1) of the Swedish Code of Judicial Procedure, SFS 1998:605, 1 January 1999 (hereinafter referred to as the **Procedural Code**).

<sup>90</sup> *Sw. Prop. 1994/95:23 Ett effektivare brottmålsförfarande* (unofficial translation: The Swedish Government's proposition on a more effective criminal procedure), 1994 (hereinafter referred to as **Prop. 1994/95:23**), p. 8.

<sup>91</sup> Interview with a prosecutor from the war crimes unit on 25 October 2019.

<sup>92</sup> Chapter 23 Section 1(2) Procedural Code.

<sup>93</sup> Chapter 23 Section 4a(2) Procedural Code.

<sup>94</sup> Chapter 23 Section 4a(1) Procedural Code.

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According to the SCC, the purpose of any investigation is to investigate who can be reasonably suspected of a crime, whether there are sufficient grounds for prosecution and whether the evidence will be capable of being presented at the main hearing coherently.<sup>95</sup> If the prosecutor deems that the evidence produced by the investigation is insufficient, he or she may either continue the investigation with the aim of gathering further evidence, or issue a decision not to prosecute (to close the investigation).<sup>96</sup>

If the prosecutor on the other hand deems the evidence gathered to be sufficient for a prosecution, he or she is obliged to prosecute the crime. Therefore, Swedish law does not only prescribe a duty to investigate crimes, it also prescribes a duty to prosecute.<sup>97</sup> This means that the prosecutor is obliged to prosecute a crime if he or she deems that sufficient evidence has been gathered to prove that a crime has been committed and that it can be shown who the perpetrator of the crime is.<sup>98</sup> Furthermore, the prosecutor must prosecute the crime regardless of the wishes of the parties involved.<sup>99</sup> In other words, it is not possible for a victim of a crime to elect not to press charges under Swedish law.

### 3. Governmental approval

Under the SCC, prosecutors need the approval of the “Government or the public authority designated by the Government” before filing an indictment regarding crimes committed in a foreign country.<sup>100</sup> No criteria are mentioned in the law, which gives wide discretionary powers to the government.<sup>101</sup> This could potentially be a major obstacle to prosecution of foreigners, especially high ranking ones, and there is no recourse available to challenge the government’s exercise of decision.<sup>102</sup> An inquiry has been conducted as to whether or not to introduce criteria to limit this power and to reduce the margin of discretion afforded to the Government.<sup>103</sup> On 21 February 2019, the Government has initiated the next stage of the legislative process, namely consultations with expert state agencies, larger district courts, appeal courts, universities and concerned NGOs.<sup>104</sup> At the time of writing this report, prosecutors have never been denied a request for permission to prosecute universal jurisdiction cases.<sup>105</sup>

### 4. Double criminality

Jurisdiction over the crimes set out in the UCA do not require that the same crimes are criminalized in the country where they were committed (double criminality).

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<sup>95</sup> Chapter 23 Section 2 Procedural Code.

<sup>96</sup> See Chapter 23 Section 20 Procedural Code.

<sup>97</sup> Chapter 20 Section 6 Procedural Code.

<sup>98</sup> Interview with a prosecutor from the war crimes unit on 25 October 2019.

<sup>99</sup> *Sw. Prop. 1984/85:3 om åtalsunderåtelse* (unofficial translation: The Swedish Government’s proposition 1984/85:3 on abstention from prosecution), p. 17.

<sup>100</sup> Chapter 2 Section 5 SCC.

<sup>101</sup> Interview with an academic on 18 September 2019.

<sup>102</sup> Interview with an academic on 18 September 2019.

<sup>103</sup> Interview with an academic on 18 September 2019; Report SOU 2018:87.

<sup>104</sup> Interview with an academic on 18 September 2019.

<sup>105</sup> Interview with a prosecutor from the war crimes unit on 25 October 2019.

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## 5. Subsidiarity

The Swedish law enforcement authorities and courts have the competence to investigate and adjudicate crimes under the UCA and have no legal duty to step aside in favor of other jurisdictions. Neither is it an obstacle to proceed with an investigation or prosecution if the ICC is investigating or prosecuting the same person.<sup>106</sup>

## Key stages in criminal proceedings

As of October 2019, the Swedish authorities were working on 12 cases on the basis of universal jurisdiction. Most of these relate to crimes that were committed before July 1, 2014, and thus fall under the previously applicable law on international crimes.<sup>107</sup> Only two out of the on-going 12 cases fall under the UCA, including the *Saeed* case against an Iraqi national who posted photos of himself with dead bodies on social media.<sup>108</sup>

## 1. Investigation Stage

### 1.1. Initiation of investigations

An investigation, which in Sweden is termed “preliminary investigation”, shall be initiated if “due to a report or for other reasons there is cause to believe that an offence subject to public prosecution has been committed”.<sup>109</sup> (On the evidentiary standard see below [Evidence Necessary to Open an Investigation](#).) Anybody – including victims and non-governmental organisations (NGOs) – can report an offence orally or in writing to any public prosecution office, to the police, or to local courts.<sup>110</sup>

The War Crimes Unit within the Swedish police is in charge of investigating the international crimes discussed in this report.<sup>111</sup> In universal jurisdiction cases, due to the complexity of such cases, the prosecutor rather than the police is always in charge of the investigation and makes the decision to initiate it.<sup>112</sup> Within the prosecuting authorities, a specialized group of prosecutors deals with these crimes.<sup>113</sup> As soon as a complaint has been filed to the police, prosecutors will take charge of the case.<sup>114</sup>

In practice, victims’ lawyers collaborate with the prosecuting authorities during the investigation, in particular regarding investigations to be conducted abroad (see below under [Victim Rights and Participation at Investigations Stage](#)). Typically, victims’ lawyers are able to suggest victims and witnesses to be interviewed.<sup>115</sup>

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<sup>106</sup> Interview with an academic on 18 September 2019.

<sup>107</sup> Interview with an academic on 18 October 2019.

<sup>108</sup> Örebro District Court, B 1662-18, 19 February 2019.

<sup>109</sup> Chapter 23 Section 1 Procedural Code.

<sup>110</sup> See Chapter 20 Section 5 Procedural Code.

<sup>111</sup> Police of Sweden, War Crimes – Swedish Police efforts, <https://polisen.se/en/victims-of-crime/war-crime---swedish-police-efforts/>, last accessed on 15 January 2020.

<sup>112</sup> Interview with a prosecutor from the war crimes unit on 25 October 2019.

<sup>113</sup> Police of Sweden, War Crimes – Swedish Police efforts, <https://polisen.se/en/victims-of-crime/war-crime---swedish-police-efforts/>, last accessed on 15 January 2020.

<sup>114</sup> Interview with a prosecutor from the war crimes unit on 25 October 2019.

<sup>115</sup> Interview with a lawyer on 29 October 2019.



## 1.2. Length of the investigations

Swedish criminal law provides that an investigation shall be conducted as expeditiously as possible.<sup>116</sup> Since genocide, crimes against humanity and gross war crimes are not subject to any statute of limitations (see above under [Statute of Limitations](#)), such crimes could generally be prosecuted at any given time. However, the fair trial principle set forth in Article 6 of the European Convention on Human Rights, which applies in Sweden,<sup>117</sup> might be invoked to limit the length of an on-going investigation. Therefore, subject to the complexity of the individual case at hand, any investigation must be completed within a reasonable time.

## 1.3. Completion of investigations

### 1.3.1. Possible outcomes

The prosecutor must conduct his or her investigation based on the principle of objectivity (*Objektivitetsprincipen*), which means that the prosecutor must take into account circumstances that speak both for and against the guilt of the suspect.<sup>118</sup> Based on the results of the investigation, the prosecutor must decide whether or not an indictment should be filed.<sup>119</sup> The prosecutor is obliged to prosecute a crime if he or she deems that sufficient evidence has been gathered to prove that a crime has been committed and that it can be shown who the perpetrator of the crime is.<sup>120</sup> In cases of crimes committed abroad, however, the prosecutor needs to seek authorisation from the Government before filing an indictment (see above under [Governmental Approval](#)).<sup>121</sup>

### 1.3.2. Possible challenges by victims

If the prosecutor decides to close the investigation and/or not to prosecute the crime, it is possible to apply for a review of the decision.<sup>122</sup> This right only applies to persons who have a legitimate interest, which includes persons who have been exposed to the crime.<sup>123</sup> NGO's do not have standing to apply for a review because they are not a primary victim of the crimes.<sup>124</sup>

A request for review should be sent the prosecutor who made the decision. If the prosecutor decides not to change their decision, he or she must send the request to their

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<sup>116</sup> Chapter 23 Section 4(2) Procedural Code.

<sup>117</sup> Chapter 2 Section 19 of the Swedish Constitution (*Sw. Regeringsformen (1974:152)*) states that no law or other regulation may be announced in violation of the European Convention on Human Rights.

<sup>118</sup> Chapter 23 Section 4(1) Procedural Code; interview with a prosecutor from the war crimes unit on 25 October 2019.

<sup>119</sup> Chapter 23 Section 20 Procedural Code; interview with a prosecutor from the war crimes unit on 25 October 2019.

<sup>120</sup> Interview with a prosecutor from the war crimes unit on 25 October 2019.

<sup>121</sup> Chapter 2 Section 5 SCC.

<sup>122</sup> Riksåklagarens riktlinjer, Överprövning och annan prövningsverksamhet (unofficial translation: The Prosecutor's Guidelines, Review and other review activities), RaR 2013:1, 29 September 2014 (hereinafter referred to as **Prosecutor's Guidelines on Review**), Chapter 1.4.1: The right to apply for a review of a decision is not explicitly stated in law, but is derived from Chapter 7 Section 2 and 5 Procedural Code.

<sup>123</sup> Website of Swedish Prosecution on review: <https://www.aklagare.se/en/the-legal-process/the-role-of-the-prosecutor/decision-to-prosecute/review/>, last accessed on 2 January 2020; see also Prosecutor's Guidelines on Review, Chapter 2.5.1.

<sup>124</sup> See Prosecutor's Guidelines on Review, Chapter 2.5.1.

superior who will decide on the request.<sup>125</sup> The request shall be made in writing, including through e-mail, since an oral request for review is not normally accepted.<sup>126</sup>

The decision will be reviewed by a more senior prosecutor, which may lead to a new decision.<sup>127</sup> There are no time limitations for applying for a review of the decision.<sup>128</sup> However, if a long time has passed between the request for review and the decision in question, the case may not be examined in substance.<sup>129</sup>

#### 1.4. Victims' rights and participation at the investigation stage

Swedish law refers to victims as “aggrieved persons”.<sup>130</sup> An aggrieved person is “the person against whom the offence was committed or who was affronted or harmed by it”,<sup>131</sup> whatever his or her nationality and place of residence.<sup>132</sup> When a criminal act has resulted in the death of a person, the deceased's surviving spouse, direct heir, father, mother or sibling succeeds to the right of the aggrieved person to report the offence or prosecute the offence (see below under [Private Prosecution](#)).<sup>133</sup> A legal entity can also be an aggrieved person.<sup>134</sup> Chapter 20 Section 8(4) of the Procedural Code does not limit the term “aggrieved person” to natural persons.

After a prosecution has been initiated, aggrieved persons can become parties to the case (see below [Victim Rights at Trial Stage](#)).

At the investigation stage, aggrieved persons have the following rights:

- **Right to information**, in particular about the possibility to request compensation for damages (see below under [Reparation](#)),<sup>135</sup> the right to have a legal counsel or a support person, and decisions to open or discontinue an investigation.<sup>136</sup>
- **Right to free legal representation** through counsel as soon as the investigation is opened:<sup>137</sup> the aggrieved person's counsel is entitled to be

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<sup>125</sup> Interview with a prosecutor from the war crimes unit on 25 October 2019; interview with a lawyer on 29 October 2019.

<sup>126</sup> Prosecutor's Guidelines on Review, Chapter 2.1.

<sup>127</sup> Website of Swedish Prosecution on review: <https://www.aklagare.se/en/the-legal-process/the-role-of-the-prosecutor/decision-to-prosecute/review/>, last accessed on 2 January 2020; see also Prosecutor's Guidelines on Review, Chapter 1.4.1.

<sup>128</sup> Website of Swedish Prosecution on review: <https://www.aklagare.se/en/the-legal-process/the-role-of-the-prosecutor/decision-to-prosecute/review/>, last accessed on 2 January 2020.

<sup>129</sup> Ibid.

<sup>130</sup> In this report the terms victim and aggrieved person are used interchangeably.

<sup>131</sup> Chapter 20 Section 8(4) Procedural Code.

<sup>132</sup> Interview with a lawyer on 29 October 2019.

<sup>133</sup> Chapter 20 Section 13(1) Procedural Code.

<sup>134</sup> Interview with a prosecutor from the war crimes unit on 25 October 2019; interview with a lawyer on 29 October 2019.

<sup>135</sup> See Chapter 20 Section 2(2) Procedural Code.

<sup>136</sup> Swedish Crime Victim Compensation and Support Authority, Report to Police, <https://www.brottsoffermyndigheten.se/eng/help-for-victims/report-to-the-police>, last accessed 3 January 2020.

<sup>137</sup> *Sw. lag (1988:609) om målsägandebiträde* (unofficial translation: The Swedish Law (1988:609) on Aggrieved Person's Counsel), 1988, Article 1; see also Chapter 23 Section 5 Procedural Code.

present during questioning of the victim in the course of the investigation;<sup>138</sup> and the counsel may pose questions during such questioning.<sup>139</sup>

- **Right to interpretation and translation**<sup>140</sup>
- **Right to reimbursement of costs**<sup>141</sup>
- **Right to request a review** of the decision not to investigate or not to prosecute (see above [Possible Challenges by Victims](#)).

The victim's lawyer is expected to inform the victim of his or her rights, and about the proceedings.<sup>142</sup>

## 2. Arrest and detention orders

### 2.1. Arrest order

If there are grounds for detaining a person (see below), the person may be placed under arrest while awaiting the court's determination on detention.<sup>143</sup> Decisions concerning arrests are made by the prosecutor and must state the suspected offence and the grounds for arrest.<sup>144</sup>

### 2.2. Detention order

If a person is apprehended based on a prosecutor's arrest order, the prosecutor must file an application to the court to for a detention order by the third day of the arrest.<sup>145</sup> Upon application by the prosecutor, the district court will decide during the detention hearing whether or not a person suspected of having committed a crime will be detained, based on the grounds for detention described below.<sup>146</sup>

### 2.3. Grounds for an arrest or detention order

Above mentioned arrest or detention can be ordered against the suspect based on four different rules:

#### 2.3.1. General rule

Any person suspected on "probable cause" of having committed an offence may be placed in detention.<sup>147</sup>

In addition, it is required that there is a risk, in the individual case, that the suspect will either:

- flee or otherwise evade prosecution (risk of flight), or

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<sup>138</sup> Chapter 23 Section 10(2) Procedural Code.

<sup>139</sup> Chapter 23 Section 11 Procedural Code.

<sup>140</sup> Swedish Crime Victim Compensation and Support Authority, Support and Help, <https://www.brottsoffermyndigheten.se/eng/help-for-victims/support-and-help>, last accessed on 3 January 2020.

<sup>141</sup> Ibid.

<sup>142</sup> Interview with a lawyer on 15 November 2019.

<sup>143</sup> Chapter 24 Section 6(1) Procedural Code.

<sup>144</sup> Chapter 24 Section 6(3) Procedural Code.

<sup>145</sup> Chapter 24 Section 12 Procedural Code.

<sup>146</sup> Chapter 24 Section 5 Procedural Code.

<sup>147</sup> Chapter 24 Section 1(1) Procedural Code.

- complicate or hamper the investigation by removing or tampering with evidence or by interfering in some other way (risk of tampering with evidence), or
- continues to commit crimes (risk of continued criminal activity);<sup>148</sup> and
- the reason for detention outweighs the intrusion or other detriment to the suspect.<sup>149</sup>

An order for arrest or detention must be issued if the sentence for the alleged crime is more than two years, unless it is clear that detention or arrest is unwarranted.<sup>150</sup> In such cases, there is a presumption in favor of detention, which can be rebutted if there are no grounds for detention.<sup>151</sup>

Regardless of the severity of the crime, an arrest warrant may be ordered if:<sup>152</sup>

- the suspect is unknown and refuses to state his or her name and domicile or if the information provided by the suspect can be assumed to be incorrect; or
- the suspect is not a resident of Sweden and there is a risk that he or she will leave the country.

### **2.3.2. Arrest for further investigation**

Where there is not considered to be “probable cause” as defined above, but only a “reasonable suspicion” (intended to denote a lower level of certainty), that a person committed an offence, arrest or detention can also be ordered.<sup>153</sup> Reasonable suspicion requires that the commission of the offense is more probable than not, whereas probable cause requires an even higher probability.<sup>154</sup> Arrest or detention for reasonable suspicion requires, in addition to the grounds listed above, that the detention is important pending further investigations.<sup>155</sup> The preparatory documents on arrest and detention state that there must be a well-founded basis for assuming that the criminal investigation will soon lead to increased clarity regarding the degree of suspicion.<sup>156</sup>

If the court decides to issue an arrest warrant under this rule, the suspect can only be detained for one week.<sup>157</sup> After this deadline, a new detention hearing must be held, at which it must be shown that the evidence against the suspect reaches the threshold of probable cause.

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<sup>148</sup> Chapter 24 Section 1(1) Procedural Code.

<sup>149</sup> Chapter 24 Section 2(3) Procedural Code.

<sup>150</sup> Chapter 24 Section 1(2) Procedural Code.

<sup>151</sup> *Regeringens proposition 1986/87:112 om anhållande och häktning* (unofficial translation: Government Bill 1986/87:112 on arrest and detention), 12 March 1987 (hereinafter referred to as **Prop. 1986/87:112**), p. 34.

<sup>152</sup> Chapter 24 Section 2 Procedural Code.

<sup>153</sup> Chapter 24 Section 3 Procedural Code.

<sup>154</sup> Interview with a Swedish academic on 18 October 2018.

<sup>155</sup> Chapter 24 Section 3 Procedural Code.

<sup>156</sup> Prop. 1986/87:112, p. 104.

<sup>157</sup> Chapter 24 Section 19 Procedural Code.

## 3. Trial stage

### 3.1. Possible outcomes

The only possible outcomes of trials regarding crimes under universal jurisdiction are verdicts (of either guilty or not guilty). This differs from the options available in trials involving less serious crimes, where an additional alternative is that the court may issue an order of summary punishment.<sup>158</sup>

### 3.2. Possible challenges by victims

The court's verdict may be appealed by the victim,<sup>159</sup> the prosecutor and the person convicted of a crime.

### 3.3. Victims' rights and participation at the trial stage

Once a prosecution has been initiated via an indictment, aggrieved persons can become parties to the case by filing a claim for damages (see below under [Reparation](#)) or by supporting the prosecution according to Chapter 20 Section 8(2) of the Swedish Code of Judicial Procedure (Procedural Code).<sup>160</sup> An aggrieved person enjoys additional rights if she or he becomes a party to the case.

Any aggrieved person has the following rights:

- **Right to be notified** of the date and time of the trial, but only if they requested so during the investigation;<sup>161</sup>
- **Right to support the prosecution** (and thereby become a party to the case);<sup>162</sup>
- **Right to claim damages** (and thereby become a party to the case, see below under [Reparation](#));<sup>163</sup>
- **Right to present a statement** at the beginning of the main trial hearing;<sup>164</sup>
- **Right to legal representation** through counsel and possibly to legal aid;<sup>165</sup>
- **Right to a support person** when testifying;<sup>166</sup>
- **Right to request detention** of the accused<sup>167</sup> or that a travel prohibition be imposed on the accused;<sup>168</sup>

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<sup>158</sup> Chapter 48 Section 4 Procedural Code.

<sup>159</sup> Chapter 20 Section 8(2) Procedural Code.

<sup>160</sup> European Justice, Sweden - Reporting a crime and my rights during investigation or trial, [https://e-justice.europa.eu/content\\_rights\\_of\\_victims\\_of\\_crime\\_in\\_criminal\\_proceedings-171-SE-maximizeMS-en.do?clang=en&idSubpage=6&member=1](https://e-justice.europa.eu/content_rights_of_victims_of_crime_in_criminal_proceedings-171-SE-maximizeMS-en.do?clang=en&idSubpage=6&member=1), last accessed on 3 January 2020; Swedish Crime Victim Compensation and Support Authority, Glossary - Party, <https://www.brottsoffermyndigheten.se/eng/help-for-victims/glossary>, last accessed on 3 January 2020.

<sup>161</sup> European Justice, Sweden - Reporting a crime and my rights during investigation or trial, [https://e-justice.europa.eu/content\\_rights\\_of\\_victims\\_of\\_crime\\_in\\_criminal\\_proceedings-171-SE-maximizeMS-en.do?clang=en&idSubpage=6&member=1](https://e-justice.europa.eu/content_rights_of_victims_of_crime_in_criminal_proceedings-171-SE-maximizeMS-en.do?clang=en&idSubpage=6&member=1), last accessed on 3 January 2020.

<sup>162</sup> See Chapter 20 Section 8(2) Procedural Code.

<sup>163</sup> Chapter 22 Section 2 Procedural Code.

<sup>164</sup> Chapter 46 Section 6(1) Procedural Code.

<sup>165</sup> Chapter 20 Section 15(2) Procedural Code and *Sw. lag (1988:609) om målsägandebiträde* (unofficial translation: The Swedish Law (1988:609) on Aggrieved Person's Counsel), 1988, Article 4 and Article 6.

<sup>166</sup> Chapter 20 Section 15(1) Procedural Code.

<sup>167</sup> Chapter 24 Section 17(1) Procedural Code.

<sup>168</sup> Chapter 25 Section 3(2) Procedural Code.

- **Right to request provisional measures** to secure assets for the purpose of executing potential compensation claims;<sup>169</sup>
- **Right to request seizure** of an object<sup>170</sup> or search of premises;<sup>171</sup>
- **Right to appeal the judgement**, regardless of whether or not the prosecutor decides to appeal the judgment.<sup>172</sup>

If the aggrieved person becomes a party to the case, they have the following additional rights:

- **Right to access documents** (upon request) relating to the case or other materials<sup>173</sup>
- **Right to comment** on materials relating to the case<sup>174</sup>
- **Right to question** the accused, witnesses and experts<sup>175</sup>
- **Right to be present** throughout the trial even if the proceedings are not public<sup>176</sup>
- **Right to give evidence** during the trial<sup>177</sup>

Third party interventions are not possible in criminal cases in Sweden.<sup>178</sup>

## 4. Private prosecution

An aggrieved person may only initiate a prosecution themselves if the prosecutor has declined to investigate his or her complaint (private prosecution).<sup>179</sup> Even in cases of private prosecution, the provision noted above requiring the authorization of the Government before filing an indictment regarding crimes committed in a foreign country would apply to private prosecutions of international crimes on the basis of universal jurisdiction.<sup>180</sup>

Private prosecutions are initiated by filing with the court a written and signed application for summons against the person to be charged.<sup>181</sup> Such an application needs to contain information concerning the defendant, details of the criminal act, claim for damages, evidence invoked, why the court has jurisdiction, and proof of the prosecutor's decision not to prosecute.<sup>182</sup>

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<sup>169</sup> Chapter 26 Section 2(2) Procedural Code.

<sup>170</sup> Chapter 27 Section 5(2) Procedural Code.

<sup>171</sup> Chapter 27 Section 4(2) Procedural Code.

<sup>172</sup> Chapter 20 Section 8(2) Procedural Code; interview with a prosecutor from the war crime unit on 25 October 2019.

<sup>173</sup> European Justice, Sweden - Reporting a crime and my rights during investigation or trial, [https://e-justice.europa.eu/content\\_rights\\_of\\_victims\\_of\\_crime\\_in\\_criminal\\_proceedings-171-SE-maximizeMS-en.do?clang=en&idSubpage=6&member=1](https://e-justice.europa.eu/content_rights_of_victims_of_crime_in_criminal_proceedings-171-SE-maximizeMS-en.do?clang=en&idSubpage=6&member=1), last accessed on 3 January 2020.

<sup>174</sup> Ibid.

<sup>175</sup> Ibid.

<sup>176</sup> Ibid.

<sup>177</sup> Ibid.

<sup>178</sup> Third party interventions are only possible in civil cases, see Chapter 14 Section 9 Procedural Code.

<sup>179</sup> Chapter 20 Section 8(1) Procedural Code.

<sup>180</sup> Chapter 2 Section 5 SCC.

<sup>181</sup> Chapter 47 Section 1(1) Procedural Code.

<sup>182</sup> Chapter 47 Section 2(1) Procedural Code.

Upon receipt of the application, the court may dismiss the case immediately if it considers the prosecution to be groundless.<sup>183</sup> Otherwise the court can summon and hear the accused, and eventually proceed to trial hearings following the same rules as for trials initiated by the public prosecutor.<sup>184</sup>

## Rules of evidence

### 1. At the investigation stage

#### 1.1. Necessary information for a report of an offence

A report of an offence should describe the criminal events in as much detail as possible.<sup>185</sup> The statement should be as comprehensive and complete as possible, in order to support the investigation. Any available evidence should be presented and if there are other potential witnesses they should be named.<sup>186</sup> The report of an offence can provide evidence, such as witness list, victims' testimonies, or reports from NGOs.<sup>187</sup>

Any statements contained in the report of an offence, such as those provided by a witness or other person, must be truthful, as false accusations and untruthful incrimination constitute crimes under Chapter 15 Section 6 and 7 of the SCC.

There are no requirements as to the form of the report of an offence. It can be done either orally or in writing. Sworn statements are not necessary.

#### 1.2. Evidence necessary to open an investigation

The opening of an investigation does not require any specific type of evidence.<sup>188</sup> The threshold to open investigations is low. The evidentiary threshold contained in Chapter 23 Section 1 of the Procedural Code requires "cause to believe" that an offence has been committed. The initial suspicion must be based on concrete facts. Such facts can be based on a single concrete relationship or on a number of more or less concrete pieces of information that together provide a sufficient basis for assuming that crimes have been committed.<sup>189</sup>

#### 1.3. Evidence necessary for an indictment

When an investigation has been completed, the competent public prosecutor will decide whether the evidence gathered is sufficient for a conviction.<sup>190</sup> The prosecutor is obliged to prosecute a crime if he or she deems that sufficient evidence has been gathered to

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<sup>183</sup> Chapter 47 Section 5(1) Procedural Code.

<sup>184</sup> Chapter 47 Section 22(1) and 24 Procedural Code.

<sup>185</sup> Interview with a lawyer on 29 October 2019.

<sup>186</sup> Interview with a lawyer on 29 October 2019.

<sup>187</sup> Interview with a lawyer on 29 October 2019.

<sup>188</sup> See Chapter 23 Section 1 Procedural Code.

<sup>189</sup> Prop. 1994/95:23, p. 76.

<sup>190</sup> Chapter 23 Sections 2 and 20 Procedural Code; interview with a prosecutor from the war crime unit on 25 October 2019.

prove that a crime has been committed and that it can be shown who the perpetrator of the crime is.<sup>191</sup>

## 2. At the trial stage

### 2.1. General principles

In accordance with the principle of freedom of evidence (*Principen om fri bevisföring*), the parties to a trial may generally obtain and use all forms of evidence.<sup>192</sup> However, the court must reject evidence that is without importance to the case, unnecessary, evidently of no effect, or that can be presented in a less costly or troublesome way.<sup>193</sup>

The principle of immediate evidence (*omedelbarhetsprincipen*) requires that the judgment in a case must be determined on the basis of the facts and materials presented during the trial.<sup>194</sup> Written statements of persons instead of oral testimony are only allowed in exceptional circumstances.<sup>195</sup>

New evidence may be introduced by a party during the trial.<sup>196</sup>

### 2.2. Unlawfully obtained materials

As a matter of principle, unlawfully obtained evidence is admissible.<sup>197</sup> The court will assess the weight of the (admissible) evidence according to the principle of free evaluation of evidence, taking into consideration the rights of the accused and the reliability and importance of the evidence.<sup>198</sup> However, the use of evidence obtained through torture would render the entire trial unfair and is therefore prohibited.<sup>199</sup>

When authorities obtain evidence unlawfully, law enforcement officers could be found criminally liable for malpractice if they breach the law in the process of gathering that evidence. So, for example, there could be a finding of criminal responsibility for entering a house without a search warrant, even if the evidence thereby obtained is admissible.<sup>200</sup>

### 2.3. Open source materials

In accordance with the principle of freedom of evidence, open source materials, i.e. publicly available information, including social media content, are admissible at trial without specific requirements.

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<sup>191</sup> Interview with a prosecutor from the war crime unit on 25 October 2019.

<sup>192</sup> Interview with an academic 18 October 2019.

<sup>193</sup> Chapter 35 Section 7 Procedural Code.

<sup>194</sup> Chapter 17 Section 2 and Chapter 30 Section 2 Procedural Code.

<sup>195</sup> Chapter 35 Section 14 Procedural Code.

<sup>196</sup> Chapter 45 Section 17 Procedural Code.

<sup>197</sup> See e.g. Supreme Court, Case No. B2150-11, 20 October 2011, NJA 2011 p. 638, para. 18.

<sup>198</sup> *Ibid*, para. 21.

<sup>199</sup> Supreme Court, Case No. B2150-11, 20 October 2011, NJA 2011 p. 638, para. 21.

<sup>200</sup> Interview with a prosecutor from the war crimes unit on 25 October 2019.

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# Witness and victim protection

## 1. In-court protection

The court may order that a party or the public are excluded from attending the courtroom when a witness gives his or her testimony if it believes their presence may interfere with or influence the testimony.<sup>201</sup>

Aggrieved persons have the right to be accompanied by a support person if the witness experiences the trial as difficult and/or unpleasant.<sup>202</sup>

## 2. Witness protection program

In Sweden, there is no witness protection program as such, but there are measures that can be invoked to protect witnesses and victims under threat.<sup>203</sup> Protection measures may be decided upon and implemented by the police in specific cases pursuant to the Swedish Regulation on Special Personal Security Work.<sup>204</sup> They can include any measures that are possible and necessary.<sup>205</sup>

Individuals who are eligible for such protection measures include, among others, people who filed a report of an offence and witnesses who are involved or have been involved in an investigation or trial concerning gross or organized crime, individuals who continuously provide (or have provided) the police authorities with information regarding gross or organized crime, and people affiliated with them.<sup>206</sup> Other individuals may also qualify for protection measures, provided that there are specific reasons (not listed in the law) supporting it.<sup>207</sup>

There must be a considerable risk that a serious crime is directed at the life, health, freedom or peace of eligible persons.<sup>208</sup> In addition,

- (1) The information provided by an eligible person must be of importance for the preliminary investigation or the trial;
- (2) there must be a connection between the risk of crime and the information provided by the eligible person;
- (3) the person must consent to co-operate with the safety measures taken and be deemed able to follow potential orders;
- (4) the person must have attained, or is expected to attain, the right to permanently reside in Sweden; and
- (5) other safety measures have been deemed insufficient.<sup>209</sup>

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<sup>201</sup> Chapter 36 Section 18 Procedural Code.

<sup>202</sup> Chapter 20 Section 15(1) Procedural Code.

<sup>203</sup> Interview with a lawyer on 15 November 2019.

<sup>204</sup> *Sw. Förordning (2006:519) om särskilt personsäkerhetsarbete m.m.*, (unofficial translation: Swedish Regulation (2006:519) on Special Personal Security Work), 2006 (hereinafter referred to as **Personal Security Regulation**).

<sup>205</sup> Section 1 Personal Security Regulation.

<sup>206</sup> Section 2 Personal Security Regulation.

<sup>207</sup> *Ibid.*

<sup>208</sup> Section 3 Personal Security Regulation.

<sup>209</sup> Section 4 Personal Security Regulation.

## Reparation for victims in criminal proceedings

Under Swedish law it is possible for aggrieved persons to claim compensation as a form of reparation as part of the criminal proceeding.<sup>210</sup> The aggrieved person must notify the prosecutor about the claim and state the circumstances on which it is based.<sup>211</sup>

The prosecutor is obliged to prepare and present the claim for compensation to the court, provided it is based on the crime(s) that is/are being prosecuted, can be done without major inconvenience and is not manifestly unfounded.<sup>212</sup> The court may order that the claim be disposed of as a separate civil action, if joining it with the criminal proceedings causes major inconvenience.<sup>213</sup>

The Swedish courts apply the general rule that liability for compensation must be assessed in accordance with the law of the country in which the injurious act occurred.<sup>214</sup> In the *Theodore Tabaro* case, the conviction was based on Swedish law, but the Court applied Rwandan law when assessing the compensation to be awarded to the victims.<sup>215</sup>

If the offender is unable to pay the compensation awarded, victims can apply for compensation from the state. Such compensation is known as criminal injuries compensation (*brottskadeersättning*) under the Law on Compensation for Criminal Injuries.<sup>216</sup> This only applies if the crime was committed in Sweden or if the victim was resident in Sweden when the crime was committed outside Sweden.<sup>217</sup>

## Immunities

As a general principle, immunities are regulated by international law, including customary international law.<sup>218</sup>

The Swedish Act on Immunity and Special Privileges regulates immunity of, *inter alia*, members of NATO and other military missions to Sweden.<sup>219</sup> At the time of writing this report, there have been no cases under this law in cases based on universal jurisdiction.

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<sup>210</sup> Chapter 22 Section 1 Procedural Code.

<sup>211</sup> Chapter 22 Section 2(1) Procedural Code.

<sup>212</sup> Chapter 22 Section 2(1) Procedural Code.

<sup>213</sup> Chapter 22 Section 5 Procedural Code.

<sup>214</sup> Interview with a lawyer on 29 October 2019.

<sup>215</sup> Stockholm District Court, Case No. B 13688-16, 27 June 2018; interview with a lawyer on 29 October 2019.

<sup>216</sup> *Brottskadelag* (2014:322) (unofficial translation: Law on Compensation for Criminal Injuries (2014:322), 2014 (hereinafter referred to as **Compensation Law**).

<sup>217</sup> Section 2 Compensation Law.

<sup>218</sup> Prop. 2013/14:146, p. 22.

<sup>219</sup> *Sw. lag* (1976:661) *om immunitet och privilegier i vissa fall* (unofficial translation: The Swedish Act (1976:661) on Immunity and Special Privileges, Section 8.

The **Open Society Justice Initiative**, part of the Open Society Foundations, uses strategic litigation and other kinds of legal advocacy to defend and promote the rule of law, and to advance human rights. We pursue accountability for international crimes, support criminal justice reforms, strengthen human rights institutions, combat discrimination and statelessness, challenge abuses related to national security and counterterrorism, defend civic space, foster freedom of information and expression, confront corruption and promote economic justice. In this work, we collaborate with a community of dedicated and skillful human rights advocates across the globe, and form part of a dynamic and progressive justice movement that reflects the diversity of the world.

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