

# THE SWEDISH REPORT ON THE PROSECUTING CORPORATIONS FOR VIOLATIONS OF INTERNATIONAL CRIMINAL LAW

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## **1 General Framework for Prosecuting Cooperations for Violations of International Law**

### *1.1 Legal Framework & Relevant Actors*

#### *1.1.1 Legal Rules governing the prosecution of corporations*

##### *a) Substantive Criminal Law establishing criminal liability*

In Swedish criminal law a business owner can in overall be responsible for an illegal act that has taken place in his company which relates to some specific offences. The criminal responsibility is based on that a person in a certain position, as for instance a board member or the managing director and sometimes even accountants or other persons related to the company, can be prosecuted for criminal offences related to, for example, tax crimes, crimes related to bookkeeping, dishonesty to creditors, market-abuse or crimes against the financial interests of the EU.

If there is a delegation of certain tasks in a corporation and the person who received the task delegated also understand his or her responsibilities and holds an independent position in relation to the management, then this person could be prosecuted for a criminal act.

In Sweden there is in general no explicit criminal liability for a corporation. There is however one exception, corporate fine (the Swedish Penal Code Section 36 Paragraph 7). In this case, the company itself has such a criminal liability if certain conditions are met. A court can impose a corporate fine after a request of a public prosecutor.

##### *b) Procedural Law governing criminal prosecution & Actors (Prosecution and other authorities, victims, NGOs, courts)*

There are no special rules for prosecuting a crime committed within a corporation. In general it is the Swedish Code of Judicial Procedure that stipulates the framework for the investigation and the prosecution and in the end the trial at a district court. There are some special rules regarding the procedure when it comes to criminal acts regarding the workers environment.

The corporation will be presented during the investigation and in the trial by an acting public defense lawyer.

#### *1.1.2 Principles of Jurisdiction /Building the nexus*

The central provisions on criminal jurisdiction in Swedish law are to be found in Chapter 2 of the Swedish Penal Code.

The Swedish legislation is built on the principle that prosecution against serious crimes against international public law always should be possible in Sweden. Swedish jurisdiction over crimes committed abroad is very wide.

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The principle of territoriality is a main principle for jurisdiction in Sweden, however Swedish courts can also exercise active and passive personality jurisdiction, protective jurisdiction as well as universal jurisdiction.

The Swedish Penal Code, Chapter 2, Section 2, Paragraph 1, provides for jurisdiction based on active personality:

Crimes committed outside the Realm shall be adjudged according to Swedish law and by a Swedish court where the crime has been committed:

1. by a Swedish citizen or an alien domiciled in Sweden
2. by an alien not domiciled in Sweden who, after having committed the crime, has become a Swedish citizen or has acquired domicile in the Realm or who is a Danish, Finnish, Icelandic, or Norwegian citizen and is present in the Realm, or
3. by any other alien, who is present in the Realm, and the crime under Swedish Law can result in imprisonment for more than six months.

In general, the exercise of the active personality jurisdiction according to this Section requires double criminality. However the double criminality rule does not apply to a number of sexual crimes when committed against children under the age of 18, including rape, sexual abuse, procuring and use of children to make sexual images.

The Swedish Penal Code provides for universal jurisdiction over a range of specified crimes, such as terrorism, genocide, crimes against humanity, etc. The Penal Code also provides for universal jurisdiction (although not in strict sense based on the principle of universality) for crimes that in the Swedish Penal Code are punished by a minimum of four years or more. There is no requirement for double criminality with regard to the universal jurisdiction.

The Swedish Penal Code provides for a use of the passive personality principle, limited to crimes committed outside the territory of any state. If the crime is committed in another state, jurisdiction must be based on another ground.

One example of the protective jurisdiction can be found in the Penal Code Chapter 2, Section 3, where jurisdiction is at hand if the crime committed was a crime against the Swedish nation, a Swedish municipal authority or other assembly, or against a Swedish public institution.

As can be seen above Swedish law provides for a very wide jurisdiction over crimes committed abroad. In order to prosecute for a crime committed abroad there should however be an adequate Swedish interest. Therefore, as a main rule, the authority of the Government or a person designated by the Government (the Prosecutor General) is needed in order to prosecute for a crime committed outside the Realm.

Sweden does not distinguish between jurisdiction to prescribe and jurisdiction to adjudicate.

The wide extraterritorial jurisdiction of Sweden combined with good possibilities of international judicial cooperation, prevent impunity for responsibility.

### *1.1.3 International Law and Human rights framework*

Sweden has ratified relevant conventions on international humanitarian law and human rights. However, the Swedish legal system is dualist and international law is implemented by amendment of national law either through incorporation of customary or conventional international law into national law or through transformation of international law into national law. This means that the Swedish jurisdiction is based on Swedish law and only indirectly on international treaty or customary law.

#### *1.1.4 Framework for Prosecuting a Cross-Border Case*

When there is reason to believe that a crime has been committed usually a criminal case starts with a preliminary investigation initiated by the police. Sometimes, a public prosecutor also initiate an investigation. Once it is established that it is a cross-border case, the preliminary investigation is often taken over by a prosecutor. The procedure for the preliminary investigation is regulated in the Swedish Code of Judicial Procedure. The same rules apply for investigations concerning cases committed against individuals and cases against corporations.

#### *1.1.5 Prominent cases and media coverage*

Yes, prominent cases triggers a public and media debate. Media has an important role in discussing the legitimacy in investigating and prosecuting crimes committed within corporations. Those cases usually concerns corruption and sometimes various crimes against international law. Generally you could say that these cases are openly discussed in the media and that the public does not question the need for such investigations.

#### *1.1.6 Statistics*

There is no such statistics available as there is no criminal liability for corporations.

#### *1.1.7 Public debate on Corporate Social Responsibility?*

Due to the recent debate on the accountability of corporations and possibly also due to the evaluation of Sweden of international organizations, the Government has appointed a committee to evaluate the system on corporate fine. The Committee shall report to the Government in the end of October 2016. Amongst other things the Committee shall evaluate the maximum fine that can be imposed.

In 2012 the offence "Negligent financing of a bribe" was introduced in the Swedish Penal Code. This offence, which is applicable to both international and domestic cases, can be seen as an example of the efforts to make representatives of corporations responsible for their actions. The introduction of the offence was done shortly after a high profile Swedish case on bribe.

## **2 Holding Corporations Accountable – The Jurisdictional issue**

### **2.1 General Aspects of Jurisdiction**

#### *2.1.1 General*

As was mentioned under 1.1.2 the central provisions on criminal jurisdiction in Swedish law are to be found in Chapter 2 of the Swedish Penal Code. The framework for jurisdiction is therefore set by the legislation. Under Swedish law there is a mandatory prosecution meaning that Swedish prosecutors are required to pursue all cases where there is jurisdiction and sufficient evidence. Due to the wide jurisdiction over crimes committed abroad, there is a principal rule requiring the leave of the Government or the Prosecutor General in order to prosecute for crimes committed abroad. It is not regulated in law what factors should be taken into account when deciding on leave to prosecute. However factors that can be taken into account may be, the seriousness of the crime, the connection to Sweden, the interest of the state in which the crime was committed and international principles on jurisdiction. Prosecution for crimes committed by representatives of corporations will be handled in accordance with these principles.

#### *2.1.2 Territorial Jurisdiction*

Territoriality has for a long time been a standard parameter for establishing jurisdiction in Sweden.

## *Legal Framework*

The statutory rule defining territorial jurisdiction can be found in Chapter 2, Section 1 of the Swedish Penal Code.

Crimes committed in this Realm shall be adjudged in accordance with Swedish law and by a Swedish court. The same applies when it is uncertain where the crime was committed but grounds exist for assuming that it was committed within the Realm.

Sweden apply the principle of ubiquity and the effects doctrine.

Chapter 2, Section 4 of the Penal Code states;

A crime is deemed to have been committed where the criminal act was perpetrated and also where the crime was completed or, in the case of an attempt, where the intended crime would have been completed.

## *Practice*

Swedish courts have dealt with the issue in several judgements. The doctrine states that as long as some part of the offence has taken place or occurred in Sweden, the offence as a whole is considered to have taken place in Sweden (not only the actual part of the offence that was committed in Sweden). In this sense both the conduct doctrine and the effects doctrine is emphasizes. The same goes for the concepts of objective territoriality and the subjective territoriality.

### *2.1.3 Extraterritorial Jurisdiction*

Swedish legislation recognizes active and passive personality jurisdiction, protective jurisdiction as well as universal jurisdiction as a basis for extraterritorial jurisdiction. For more information see under 1.1.2.

#### *Active Personality and Nationality Principle*

##### *- Generals*

The Swedish Penal Code, Chapter 2, Section 2, Paragraph 1, provides for jurisdiction based on active personality:

Crimes committed outside the Realm shall be adjudged according to Swedish law and by a Swedish court where the crime has been committed:

1. by a Swedish citizen or an alien domiciled in Sweden
2. by an alien not domiciled in Sweden who, after having committed the crime, has become a Swedish citizen or has acquired domicile in the Realm or who is a Danish, Finnish, Icelandic, or Norwegian citizen and is present in the Realm, or
3. by any other alien, who is present in the Realm, and the crime under Swedish Law can result in imprisonment for more than six months.

Paragraph 1 does however not apply if the act is not subject to criminal responsibility under the law of the place where it was committed or if it was committed within an area not belonging to any state and, under Swedish law, the punishment for the act cannot be more severe than a fine.

A sanction may not be imposed which is more severe than the severest punishment provided for the crime under the law in the place where it was committed.

The double criminality rule does however not apply to a number of sexual crimes when committed against children under the age of 18, including rape, sexual abuse, procuring and use of children to make sexual images.

- Corporations and the Active Personality Principle

Jurisdiction over crimes committed *within* a corporation may be based on the active personality principle. Not for the corporation itself but with regard to the responsible natural persons. See also the answer under 1.1.1 a).

A corporation, partnership, cooperative, association or similar society, foundation or similar institution is considered to reside at the place where the board has its seat or, if the board has no permanent seat or there is no board, at the place from which the administration is carried out. This rule also applies to municipalities or similar public authority.

If there is a branch office in Sweden, this can under certain circumstances found national jurisdiction here.

#### *Passive Personality Principle*

- Generals

The Swedish Penal Code provides for a use of the passive personality principle, limited to crimes committed outside the territory of any state. Chapter 2, Section 3, Paragraph 5 of the Penal Code:

*5. if the crime was committed in an area not belonging to any state and was directed against a Swedish citizen, a Swedish association or private institution, or against an alien domiciled in Sweden,*

If the crime is committed in another state jurisdiction must be based on another ground.

- Corporations and the passive personality principle

Jurisdiction over crimes committed *within* a corporation may be based on the passive personality principle. Not for the corporation itself but with regard to the responsible natural persons. See also the answer under B.I.1.a.

#### *Protective Principle*

- Generals

Chapter 2, Section 3, Paragraph 4 provides for jurisdiction if the crime committed was a crime against the Swedish nation, a Swedish municipal authority or other assembly, or against a Swedish public institution. This is an expression of the protection principle. The jurisdiction is as such not limited to certain crimes.

Also jurisdiction on the basis of the passive personality principle could be seen as an expression of the protection principle.

- Corporations and the Passive Protective Principle

According to Section 9 of the Swedish Act (1996:95) on certain International Sanctions, Sweden has jurisdiction over crimes committed abroad by a Swedish citizen that acts in contravention to international sanctions that has been implemented in Sweden. In addition to the individual responsibility a corporate fine could be applied.

### *Jurisdiction over Military Personnel*

Yes, according to Chapter 2, Section 3, Paragraphs 2 and 3 of the Swedish Penal Code, Sweden has jurisdiction over persons acting abroad under its military order. Whether Paragraph two would be applicable to other outsourced services staff is unclear (this Paragraph would mainly be applied in times of war). Paragraph 3 is only applied with regard to persons employed by the Swedish Armed Forces.

### *Vicarious Jurisdiction – Stellvertretende Strafrechtspflege*

Sweden has ratified a number of international conventions regulating the principle of *aut dedere aut iudicare*. There is no explicit statute in the Swedish legislation concerning this issue. However, taking into account treaty obligations, the wide extraterritorial jurisdiction and the mandatory prosecution, explicit regulation has not been necessary. The principle of *aut dedere aut iudicare* is in most cases triggered by a treaty obligation or a request from the State requesting extradition.

#### *2.1.4 Universal Jurisdiction*

The Swedish Penal Code provides for universal jurisdiction over a range of specified crimes, such as terrorism, genocide, crimes against humanity, etc. The Penal Code also provides for universal jurisdiction (although not in strict sense based on the principle of universality) for crimes that in the Swedish Penal Code are punished by a minimum of four years or more. There is no requirement for double criminality with regard to the universal jurisdiction.

The universal jurisdiction could, depending on the circumstances in the case, be taken into account when initiating and conducting a preliminary investigation against a person not present in Sweden. When the case is brought to court, however, the suspect must be present.

This ground for jurisdiction is used on a regular basis by Swedish courts.

#### *2.1.5 Other Sources of Jurisdiction*

Considering the wide extraterritorial jurisdiction of Sweden, no “creativity” has been needed.

With regards to the effects doctrine the Swedish jurisdiction makes it possible to prosecute if any of the deed is committed, planned or designed in Sweden, even if these acts are done via email or telephone.

#### *2.1.6 Transitional Justice Mechanisms*

No.

### **2.2 Jurisdiction for Prosecuting Corporations under International Law (UN Law, multi-lateral treaties)**

#### *2.2.1 General*

The Swedish legal system is dualist, where international law is implemented by amendment of national law either through incorporation of customary or conventional international law into national law or through transformation of international law into national law. This means that the Swedish jurisdiction is based on Swedish law and only indirectly on international treaty or customary law.

#### *2.2.2. Jurisdictions Prescribed by International Humanitarian Law (Core Crimes)*

When implementing an international treaty, the legislator in Sweden always makes sure that the jurisdictional requirements are fulfilled. Necessary changes in Swedish legislation are decided upon by the Parliament. One example is the creation of universal jurisdiction for specific offences in Chapter 2, Section 3, Paragraph 6 of the Penal Code.

### **Section 3**

Even in cases other than those listed in Section 2, crimes committed outside the Realm shall be adjudged according to Swedish law and by a Swedish court:

...

6. if the crime is hijacking, maritime or aircraft sabotage, airport sabotage, counterfeiting currency, an attempt to commit such crimes, unlawful dealings with chemical weapons, unlawful dealings with mines, false or careless statement before an international court, terrorism or an attempt to commit such crimes, genocide, crimes against humanity, war crimes, incitement to commit genocide or incitement to commit a crime against the administration of justice of the International Criminal Court.

#### *2.2.3 Jurisdiction Based on Customary International Law*

The Swedish legal system is dualist, where international law is implemented by amendment of national law either through incorporation of customary or conventional international law into national law or through transformation of international law into national law. This means that the Swedish jurisdiction is based on Swedish law and only indirectly on international treaty or customary law.

## **3 Overlapping Domestic Legal Frameworks and the Prosecution of Corporations**

### *3.1 Conflicts of Jurisdiction*

Swedish legislation contains wide possibilities to prosecute for cross-border crime. Having said this, it does not mean that the judicial authorities are dominant in claiming jurisdiction in these cases, but rather one could say that moderation prevails. When it occurs a case regarding cross-border crime with limited connection to Sweden, the situation is often that the evidence and interested parties are in other countries. Also, to process in such cases is often complicated and costly.

It is more usual to have overlapping jurisdictions. It is however rarely that the overlapping jurisdictions creates conflicts. If there are two or more possible jurisdictions the conflict of jurisdictions is solved by communication.

### *3.2 Overlapping Domestic Jurisdictions*

Generally if it turns out that Swedish companies have committed some atrocities in another country, they can certainly be liable for damages, prosecuted and fined if they are registered and have some management control here. What is principally when it concerns both civil and criminal cases is that judicial proceedings are best suited where the evidence is available. This tends to usually be where the offense is committed, in some cases abroad. But if the other country is not able or willing to prosecute, there is nothing preventing Swedish authorities to take action against those individuals that are legal representatives of the company to be prosecuted or regarding the corporation itself to be fined by a Swedish court. As mentioned, Sweden has a wide jurisdiction, but it still requires that a certain activity can be traced to the management in Sweden, which usually do not tend to be difficult to prove.

### *3.3 Conflicting International jurisdictions*

No.

## **4 Proposals for Reform of the Legal Framework of Jurisdiction**

There is in Sweden a discussion on the responsibility for Sweden as a member of the world community. However, when it comes to jurisdiction most of the discussion is based on the notion that there should be a link to Sweden, an actual interest for Sweden in investigating and prosecuting a specific crime.

## **5 Conclusion**

In recent years there has been an increasing number of cases concerning persons responsible for acts committed as representatives of corporations (for example for corruption, war crimes and violations of humanitarian law). These issues are also put on the agenda by the Government through the evaluation of existing legislation and proposals for new and updated legislation. As mentioned the Government has appointed a Committee to evaluate the legislation on corporate fine.