

# SUPREME COURT'S DECISION

delivered in Stockholm on 10 November 2022

Case no.

Ö 1314-22

## **PARTIES**

### **Appellant**

AS

Counsel:

Attorney OK

Attorney JR

Attorney PS

### **Respondent**

The Prosecutor General

Box 5553

114 85 Stockholm

## **THE MATTER**

Dismissal of prosecution

**RULING APPEALED**

Decision of the Svea Court of Appeal of 2022-02-01 in case Ö 574-22

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**THE SUPREME COURT'S RULING**

The Supreme Court rejects the appeal.

**CLAIMS IN THE SUPREME COURT**

AS has claimed that the Supreme Court shall set aside the decision of the court of appeal and remand the case, in the alternative, dismiss the charge. He has also claimed compensation for his costs of litigation.

The Prosecutor General has opposed modification of the decision of the court of appeal.

**REASONS FOR THE DECISION****Background***Introduction*

1. AS has been prosecuted for aiding a crime against the law of nations, gross crimes, in Sudan during the years 2000 to 2003. He is a Swiss citizen and resides in Switzerland. When the prosecution was brought, he was in Switzerland.
2. The prosecution pertains to acts which AS and a co-accused, who is a Swedish citizen, individually or jointly and in concert, allegedly committed in the capacity of representatives of companies within an oil company group with

the Swedish company, Lundin Oil AB, as parent company.<sup>1</sup> In connection with the prosecution, claims were asserted regarding forfeiture and corporate fines against a company within the corporate group.

3. In the description of statement of the criminal act as charged, the following, *inter alia*, is stated. During the period 1997 to 2003, there was a non-international armed conflict in what was then the Republic of the Sudan between, on one side, the Sudanese government and the militia groups allied with the regime and, on the other side, rebel groups. To some extent, the conflict came to be about control of future oil extraction. In southern Sudan, the oil group had commenced in 1997 prospecting in a consortium of companies from other countries. In May 1999, the Sudanese government, through the military and militia groups allied with the regime, commenced, as a part of or in some other manner in conjunction with the armed conflict, offensive military operations for the purpose of securing the operations of the oil group in southern Sudan. This led to disputes which continued, with certain pauses, until the companies left the area in 2003.

4. The prosecutor asserts that the Sudanese government, through the military and militia allied with the regime, waged war in a manner in violation of international humanitarian law and which, according to Swedish law, constituted a crime against the law of nations, gross crime. According to the prosecutor, AS, in his role as representative of companies within the oil group, participated in various ways to see to it that the military attempted to take control of the areas by means of combat. This occurred notwithstanding that it was his intention that the military and militia acted in a manner which was prohibited according to the laws of war.

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<sup>1</sup> The parent company has had different names according to the statement of the criminal act as charged.

5. The prosecution was preceded by a decision regarding authorisation to prosecute from the Swedish Government. In the decision, the Government determined that universal jurisdiction applies to the offence according to Swedish law and that the circumstances were such that there was cause to grant authorisation to prosecute.

*The claim for dismissal*

6. AS claimed that the district court was to dismiss the prosecution due to the fact that there was no Swedish jurisdiction. The district court, which concluded that Swedish courts are competent to examine the acts for which AS is prosecuted, rejected the claim to dismiss. The court of appeal concurred with the determination of the district court and rejected the appeal.

7. In the Supreme Court, AS has, in the main, asserted the following. Swedish courts have jurisdiction to prosecute only in accordance with the provisions regarding universal jurisdiction. However, jurisdiction is limited by Chapter 2, Section 12 (previously Section 7) of the Swedish Criminal Code according to which there must be support in public international law in order for universal jurisdiction to be present. No such support exists in respect of war crimes which have been committed within the framework of a non-international armed conflict. Furthermore, there is no support in public international law for exercising universal jurisdiction over someone who, when the prosecution is brought, is not present in the country. The prosecution, furthermore, is based on a domestic interpretation of the concept of complicity which lacks support in international law. That for which AS has been prosecuted thus does not constitute an international offence in accordance with international law and, accordingly, also on this basis, there is no right for Swedish courts to exercise universal jurisdiction.

**What is at issue in the case**

8. The Supreme Court must consider whether Swedish courts are competent to prosecute a crime against the law of nations committed abroad within the context of a non-international armed conflict when the accused is neither a citizen nor present in Sweden. The case pertains to, *inter alia*, the question of whether public international law precludes such jurisdiction.

**The Swedish regime***The jurisdiction of Swedish courts to adjudicate offences which have been committed outside Sweden*

9. The provisions regarding the jurisdiction of Swedish courts to adjudicate a particular offence are found in Chapter 2 of the Swedish Criminal Code. A procedural condition is that a Swedish court has jurisdiction. If the court in which the prosecution is brought concludes that jurisdiction is lacking, the prosecution is to be dismissed. It is the assertion made by the prosecutor in the summons application which constitutes the basis for the Court's examination of the issue of jurisdiction.

10. Chapter 2, Section 3 regulates the jurisdiction of Swedish courts to adjudicate offences which have been committed outside Sweden. Sub-section (6) enumerates certain international offences over which a Swedish court has jurisdiction irrespective of where, by whom, or against whom the offence has been committed (universal jurisdiction).

11. The provision covers, *inter alia*, most offences in accordance with the Swedish Criminal Responsibility for Genocide, Crimes Against Humanity and War Crimes Act (2014:406). Section 4 of that act governs liability for war crimes committed against a person. The act replaced, *inter alia*, the provision regarding crimes against the law of nations in Chapter 22, Section 6 of the Swedish Criminal Code which applied at the time that the deeds to which the

prosecution pertains were committed. According to the previous reading of Chapter 2, Section 3, that offence is also covered by universal jurisdiction.

*Adjudication in accordance with Chapter 2, Section 12 of the Swedish Criminal Code*

12. According to Chapter 2, Section 12 (formerly Section 7) of the Swedish Criminal Code, the limitations to the jurisdiction of Swedish courts and applicability of Swedish law that follows from public international law or from any international agreement that is binding on Sweden must be observed.

13. The provision expresses the obligation of Sweden to observe the limitations which may follow from international law (*cf.* Government Bill 2020/21:204, p. 158 f.). Firstly, the provision has in view the restrictions on the jurisdiction of Swedish courts as a consequence of international law rules regarding immunity, but other international law norms are also to be observed.

14. When the court concludes that jurisdiction exists in accordance with Chapter 2, Section 3 of the Swedish Criminal Code, it shall, furthermore, verify that there are no international law impediments. Such an impediment exists only where there is a norm established within international law which limits the jurisdiction of the court in the individual case. Thus, no positive support in international law for the exercise of jurisdiction in accordance with the Swedish provisions is necessary.

15. In international courts, certain principles have developed in respect of when culpability may be established for international offences, e.g. as regards the perpetrator's degree of participation and knowledge (see, for example, International Criminal Tribunal for the Former Yugoslavia [ICTY], Trial Chamber, Judgement, *The Prosecutor v. Dusko Tadic*, IT-94-1-AR72, 7 May 1997, paras. 673–692). Whether these principles are to be applied even when national courts adjudicate prosecutions for an international offence and

the significance to be ascribed to them in such case are a part of the substantive assessment of the prosecution. The question lacks relevance for the examination of the court's jurisdiction in accordance with Chapter 2, Section 12.

*Requirement of authorisation to prosecute*

16. For offences which have been committed outside Sweden, a special authorisation is necessary in certain cases before prosecution may be brought (see Chapter 2, Section 7 of the Swedish Criminal Code). Such a requirement of authorisation to bring prosecution is normally issued by the Prosecutor General or the Government (see Chapter 2, Section 8).

17. The regime is intended, *inter alia*, to avoid situations in which prosecutions are brought in violation of principles of international law and Sweden's international agreements. Accordingly, Chapter 2, Section 8, second paragraph (1) states that whether a prosecution in this country is compatible with Sweden's obligations under public international law shall be considered in particular. In conjunction with the adjudication, a broader assessment shall be carried out which takes into account, *inter alia*, the extent to which the offences or the suspect are linked to Sweden and what actual possibilities there are to investigate the offence and bring legal proceedings against the suspect here (see Chapter 2, Section 8, second paragraph (2) and (4)).

**International law limitations for the exercise of criminal jurisdiction**

18. The starting point is that each state shall itself determine the scope of its jurisdiction. However, the ultimate limit is established by international law.

19. The development of international law takes place through an interaction between public international law (customary law) and convention-based international law. There is no international convention which generally regulates criminal jurisdiction. On the other hand, there are several treaties which contain jurisdiction provisions relative to specific offences.

20. A starting point is that a state has jurisdiction over all offences committed within its own territory (the principle of territoriality). This jurisdiction may be traced to the international law principle of state sovereignty. Under certain circumstances, the state has, in addition, jurisdiction to try offences which have been committed beyond its own territory (extra-territorial jurisdiction).

21. The various grounds for extra-territorial jurisdiction which have been developed within international law are primarily the flag-state principle (offences against ships or aircraft registered in the state), the active personality principle (offences committed by the state's own citizens), the passive personality principle (offences against an individual interest in the state), the protective principle (offences against the state) and the principle which is raised in this case, the universality principle.

### **The universality principle**

#### *The purport of the universality principle*

22. According to the universality principle, jurisdiction is based on the character of the offence. The principle builds on the notion that there are certain protected interests which are so fundamental that every state has a right and, sometimes, an obligation to protect them. Common to the offences covered by universal jurisdiction is that they are of concern to the international community as a whole and, thus, there is an overall international interest in punishing them.

23. The universality principle entails as a starting point that all states have jurisdiction irrespective of who has committed the offence, against whom the offence has been committed or where the offence is committed. The specific purport of the principle, however, is debated and has been applied variously in different countries. For example, the extent to which the exercise of



jurisdiction based on the principle requires some additional connection to the prosecuting state, over and above the character of the offence itself, varies. (*Cf.*, *inter alia*, the annual UN report, The scope and application of the principle of universal jurisdiction, Report of the Secretary-General. Regarding 2022, see UN. Doc. A/77/186.)

*The universality principle in Swedish law*

24. The provision in Chapter 2, Section 3 of the Swedish Criminal Code gives the impression that Swedish law contains unlimited universal jurisdiction for international offences. However, it is apparent from the preparatory works that the intention of the legislature has been that extra-territorial jurisdiction shall be exercised only where there is a tangible and legitimate interest that legal proceedings take place in Sweden (see, for example, Government Bill 2020/21:204, p. 126).

25. This is in line with the often-expressed position in the international law literature that some form of legitimate interest is necessary in order for a state to be able to exercise jurisdiction for offences which have been committed outside its own territory. It has been asserted that the connection between a state and that over which the state wishes to exercise jurisdiction may not be too diffuse (See, for example, James Crawford, *Brownlie's Principles of Public International Law*, 9th ed., 2019, p. 440 f.; Dan Helenius, *Straffrättslig jurisdiktion*, 2014, p. 222 ff.; and Cedric Ryngaert, *Jurisdiction in International Law*, 2nd ed., 2015, p. 29 f.)

26. In the Swedish system, it is presupposed that the examination of whether an interest subsists in order to pursue legal proceedings against an international offence which was committed abroad shall primarily take place within the context of the Prosecutor General or Government's position on whether authorisation to prosecute will be issued (*cf.* paras. 16 and 17). Since the examination ultimately deals with whether a prosecution in a Swedish

court is authorised, there must also, however, be certain room for the court, within the context of its jurisdictional examination, to determine whether the connection to Sweden is sufficient in order for it to be the case. It would be incompatible with the fundamental principles of the administration of justice if the court was compelled to adjudicate a prosecution in the absence of a legitimate interest in such an examination.

27. In the event a prosecution for an international offence which has been committed abroad by a foreign citizen is brought in a Swedish court by adducing the universality principle, the court must thus examine whether the connection to Sweden is sufficient to form the basis of a legitimate Swedish interest in the administration of justice and whether there is any impediment in international law (see paras. 12–14).

*Can universal jurisdiction be exercised for war crimes which have been committed within the context of a non-international armed conflict?*

28. The possibility to exercise jurisdiction pursuant to the universality principle is limited primarily to certain specifically serious offences which, in international law, are regarded as international offences. Such international offences include, in any case, genocide, crimes against humanity and war crimes.

29. By virtue of the 1949 Geneva Conventions, all states party were obliged to pursue the necessary legislative measures in order to establish functioning criminal sanctions for persons who committed or commanded grave violations of the Conventions' rules and regulations. In addition, the states were obliged, irrespective of nationality, to bring such persons before their own courts of law or to extradite them to another state party to be tried there provided that the state had an interest in prosecuting the offence and presented sufficient cause for prosecution. Since the Geneva Conventions (with certain exceptions) are applicable only in international armed conflicts, this treaty-based

obligation to exercise universal jurisdiction for war crimes which have been committed within the framework of non-international armed conflicts does not apply. The question regarding the room available to exercise jurisdiction pursuant to the universality principle for such war crimes must, instead, be determined by interpretation of customary law.

30. The trend has been towards equating international and non-international armed conflict in the application of the humanitarian law regime. It has long been assumed that it follows from customary law that grave offences against humanitarian law in non-international conflicts may constitute war crimes. The need for protection and the importance of respect for the regime has been deemed to be the same irrespective of the type of conflict (*cf.* Government Bill 2013/14:146, p. 125 ff.). In this regard, it is also not always clear where the boundary lies between an international and a non-international conflict (*Cf.* the International Criminal Tribunal for the Former Yugoslavia [ICTY], Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber I, *The Prosecutor v. Dusko Tadic*, IT-94-1-AR72, 2 October 1995; the Rome Statute of the International Criminal Court, 1998, Article 8 (2) (c) - (f); and Antonio Cassese, *Cassese's International Criminal Law*, 3rd ed., 2013, p. 65 f.)

31. One of the more extensive studies relating to which customary law rules are applicable in international and non-international armed conflict was published by the Committee for the International Red Cross in 2005. The study was conducted together with experts in humanitarian law from various parts of the world and in consultation with governments and international organisations. It was observed in the study that several of the important principles in the Geneva Conventions are to be regarded as customary law and apply in both international and non-international armed conflicts. According to Rule 157 of the study, states have the right, within the scope of their international legislation, to apply universal jurisdiction to war crimes, both in

international and non-international armed conflicts (see Jean-Marie Henckaerts and Louise Doswald-Beck [ed.], ICRC, Customary International Humanitarian Law, Volume I: Rules, 2005, pp. 604–607).

32. As far as Sweden is concerned, the customary law study has been analysed in the report, *Folkrätt i väpnad konflikt – svensk tolkning och tillämpning* (Government Official Reports 2010:72). The considerations in the report have formed the basis of the conclusion reached by the Swedish legislature that a distinction should be made in the regime between international and non-international armed conflicts only in those cases where international humanitarian customary law does not otherwise allow (see Government Bill 2013/14:146, p. 125 ff.). A right to exercise universal jurisdiction in respect of war crimes has been deemed to follow from public international law irrespective of the character of the armed conflict (see, *inter alia*, *ibid.*, Government Bill, p. 51 and p. 216 f.).

33. Against this background, the conclusion is that there is no impediment to a Swedish court exercising universal jurisdiction for war crimes which have been committed within the framework of a non-international armed conflict.

*Can universal jurisdiction be exercised even when the suspect is not located in the country in which the prosecution is brought?*

34. Swedish law requires, in order to bring prosecution for international offences, some form of connection between the prosecution and Sweden in order for Swedish courts to have jurisdiction (see para. 24). In conjunction with the assessment of the connection – which is primarily conducted in conjunction with the decision regarding authorisation to prosecute (see Chapter 2, Section 8, second paragraph (2) of the Swedish Criminal Code) – it may be relevant whether the suspect is present in Sweden or not. The lack of such a connection, however, in conjunction with an overall assessment, may be weighed against other connection factors. This applies also in the

assessment which the court, within the context of the examination of its jurisdiction, is to carry out as to whether there is a sufficient connection to Sweden in order for a legitimate Swedish interest in the administration of justice to subsist (see para. 26).

35. Thus, Swedish law does not impose any general requirement that the suspect is to be present in the country in order for the Swedish court to be able to exercise jurisdiction for offences covered by the universality principle. The question is then whether any such requirement follows from international law.

36. As regards international law, a state's jurisdiction to prosecute the offence is derived directly from the nature of the offence. The effect of the offence is deemed not to be limited to the country in which the offence has been committed but, rather, the offence is of concern to the international community as a whole (*cf.* preamble to the Rome Statute of the International Criminal Court). With this view, the exercise of universal jurisdiction for such offences without additional requirements for connection to the country does not contravene the international law principle of non-intervention, i.e. the prohibition against states becoming involved in the internal affairs of other states. (*Cf.* Cedric Ryngaert, *ibid.*, p. 127 f. and Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, 4th ed., 2020, p. 95 f.)

37. However, many states require, in conjunction with universal jurisdiction, also some type of connection between the offence or the suspect and the state which intends to exercise jurisdiction (*cf.* para. 23). A general connection requirement applies in several legal systems according to which prosecution may be brought only where the suspect is present within the territory of the country when the prosecution is brought. However, there are other states which do not impose any such requirement. No uniform state practice exists (*cf.* the commentary to Rule 157 in the customary law study conducted by the Committee of the International Red Cross). Nor may it be taken for granted that the countries which have imposed such a requirement

have done so due to the understanding that it follows from international law. The requirement may instead have been justified by practical or political reasons.

38. Thus, there is no support for the notion that, within international law, there has been established some norm requiring that the suspect must be present in the state which intends to exercise jurisdiction by application of the universality principle.

39. Accordingly, the conclusion is that international law also does not constitute any impediment to a Swedish court exercising universal jurisdiction in relation to a suspect who is not located in Sweden when the prosecution is brought.

#### **The assessment in this case**

40. AS is charged for aiding an offence against the law of nations, gross crimes, according to Chapter 22, Section 6 of the Swedish Criminal Code as worded prior to 1 July 2009 and Chapter 23, Section 4 of the Swedish Criminal Code. It is a matter of an offence covered by the provision regarding universal jurisdiction in Chapter 2, Section 3.

41. The prosecution pertains to acts which AS has allegedly committed in his role as a representative of a company in a Swedish corporate group, individually or jointly and in concert with a Swedish citizen. The connection to Sweden may be deemed to be sufficient in order for there to exist a legitimate Swedish interest in the administration of justice.

42. Accordingly, Swedish courts are competent to prosecute in accordance with Chapter 2, Section 3 of the Swedish Criminal Code. The question is then whether, pursuant to Section 12, there is any impediment in public international law to Swedish jurisdiction.

43. That for which AS has been prosecuted constitutes such an international offence which, according to international law, is covered by universal jurisdiction. The fact that the alleged acts were committed in a non-international armed conflict leads to no other assessment. What AS has stated according to which the prosecution is built on principles of responsibility for complicity which are incompatible with international law does not affect the assessment of the jurisdiction question.

44. The fact that AS is not present in Sweden does not constitute any impediment to Swedish jurisdiction.

45. Nor is there any other impediment in public international law against Swedish jurisdiction.

46. Thus, Swedish courts have jurisdiction to try the prosecution. AS's appeal shall therefore be rejected.

Justices of the Supreme Court Anders Eka, Agneta Bäcklund, Sten Andersson, Stefan Johansson and Johan Danelius (reporting Justice) participated in the ruling.

Judge referee: Hanna Hallonsten